

BILL ANALYSIS

C.S.H.B. 4862
By: Longoria
Judiciary & Civil Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

The Business Organizations Code provides the statutory framework for establishing corporations, partnerships, limited liability companies, and all other forms of business organization in Texas. It governs all aspects of formation, ownership, operation, and winding down of such entities. The bill author has informed the committee that the code provides a highly innovative and efficient set of business organizations laws that serve as a cornerstone in attracting businesses to Texas. Nevertheless, due to the complexity and dynamics of corporate law, the code requires ongoing substantive and technical updates so that Texas business organizations remain competitive with other states. The bill author has further informed the committee that updates to the code have been enacted every legislative session since the code's initial adoption in 2003 and that this package of updates presented to the committee is derived from working meetings conducted by the Business Organizations Code Drafting Committee of the State Bar of Texas Business Law Section, in consultation with the Texas Secretary of State. C.S.H.B. 4862 seeks to continue the biennial process of making the code responsive to the current needs of Texas' business organizations.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 4862 amends the Business Organizations Code to revise provisions governing business organization generally, for-profit corporations, nonprofit corporations, limited liability companies, limited partnerships, and associations.

Business Organization Generally

Code Construction

C.S.H.B. 4862 establishes that a reference or grant of jurisdiction in the Business Organizations Code, including a grant of exclusive jurisdiction, to a district court constitutes a reference or grant of concurrent jurisdiction to a business court established under applicable Government Code provisions if the business court has authority and jurisdiction under those provisions to adjudicate the action or claim. That provision expressly does not expand the authority of such a business court.

C.S.H.B. 4862 establishes that the plain meaning of the text of the Business Organizations Code may not be supplanted, contravened, or modified by the laws or judicial decisions of any other state. However, the bill authorizes the managerial officials of a domestic entity, in exercising their powers with respect to the domestic entity, to consider the laws and judicial decisions of other states and the practices observed by entities formed in those other states. The bill establishes that the failure or refusal of a managerial official to consider, or to conform the exercise of the managerial official's powers to, the laws, judicial decisions, or practices of another state does not constitute or imply a breach of the Business Organizations Code or of any duty existing under the laws of Texas.

Purposes and Power of a Domestic Entity

Choice of Forum Provision

C.S.H.B. 4862 authorizes the governing documents of a domestic entity, consistent with applicable state and federal jurisdictional requirements, to require that one or more courts in Texas having jurisdiction must serve as the exclusive forum and venue for any or all internal entity claims.

Formation and Governance

Formation, Existence, and Certificate of Formation

C.S.H.B. 4862 replaces references to a "person" with references to an "individual" for purposes of Business Organizations Code provisions governing the following:

- supplemental provisions required in a certificate of formation for a for-profit or a professional corporation;
- supplemental provisions required in a certificate of formation for a professional association;
- supplemental provisions for a restated certificate of formation for a for-profit corporation or a professional corporation;
- supplemental provisions for a restated certificate of formation for a nonprofit corporation; and
- supplemental provisions for a restated certificate of formation for a real estate investment trust.

C.S.H.B. 4862 authorizes a restated certificate of formation for a for-profit corporation or professional corporation to omit any provisions that were necessary to effect a change, exchange, reclassification, subdivision, combination, or cancellation of shares if the change, exchange, reclassification, subdivision, combination, or cancellation has become effective. The bill establishes that any omission or insertion in such a restated certificate provided under applicable supplemental provisions or an omission in a restated certificate of formation provided generally under state law is not considered an amendment that requires shareholder approval.

C.S.H.B. 4862 establishes that any omission or insertion in a restated certificate of formation for a nonprofit organization or a limited liability company provided under applicable supplemental provisions or an omission in a restated certificate of formation provided generally under state law is not considered an amendment that requires member approval. The bill establishes that any update in a restated certificate of formation for a real estate investment trust provided under applicable supplemental provisions or an omission in a restated certificate of formation provided generally under state law is not considered an amendment that requires shareholder approval.

Governing Persons and Officers

C.S.H.B. 4862 authorizes the approval of any document by a governing authority in final form or in substantially final form if the Business Organizations Code expressly requires the governing authority to approve or take other action with respect to the document. If a governing authority has acted to approve or take other action with respect to a document that is required by the Business Organizations Code to be filed with the secretary of state or referenced in any certificate to be filed with the secretary of state, the governing authority may act to ratify the document at any time after acting to approve or taking that other action and before the effectiveness of the filing with the secretary of state. The bill establishes that ratification is considered, as follows:

- to be effective as of the time of the original act to approve or the original taking of other action by the governing authority; and
- to satisfy any requirement under this code that the governing authority approve or take other action with respect to the document in a specific manner or sequence.

Filings and Filing Fees

C.S.H.B. 4862 removes the option for a filing instrument to be delivered to the secretary of state by facsimile or any other form of delivery comparable to in person, by mail, courier, or electronic transmission and includes among the options of delivery any other method approved by the secretary of state. The bill includes the filing fees for a similar instrument by or for a for-profit corporation as an alternative filing fee that may be imposed by the secretary of state for a filing by or for a registered series of a domestic limited liability company when no other fee has been provided.

C.S.H.B. 4862 applies only to a filing instrument delivered to the secretary of state on or after the bill's effective date. A filing instrument delivered to the secretary of state before that date is governed by the law in effect on the date the filing instrument was delivered to the secretary of state, and the former law is continued in effect for that purpose.

Meetings and Voting for Domestic Entities

Notice of Meetings

C.S.H.B. 4862 clarifies that when a notice is required or permitted by the Business Organizations Code or the governing documents of a domestic entity to be given to an owner, member, or governing person of the domestic entity, a document enclosed with, or annexed or appended to, the notice is considered part of the notice for the purpose of determining whether notice was properly given under the Business Organizations Code and the governing documents.

Action by Written Consent

C.S.H.B. 4862 revises the requirement for a domestic or foreign entity to promptly notify each owner or member of an action that was taken by less than unanimous consent, which the owner or member did not sign, as follows:

- specifies that the notice must be provided to each person who is an owner or member as of the record date for the action, as determined under applicable state law, who did not sign such a consent;
- requires the notice, in addition to other information required by applicable law, to contain a reasonable description of the action that is the subject of the consent; and
- authorizes the notice, instead of containing the complete notice, to include information directing the owner or member to a publicly available electronic resource at which a reasonable description of the action that is the subject of the consent and any other information required by applicable law may be accessed by the owner or member without subscription or cost.

Limitation of Liability of a Managerial Official

C.S.H.B. 4862 replaces references to a "governing person" with references to a "managerial official" for purposes of provisions relating to the limitation of liability of a managerial official of a domestic entity other than a partnership or limited liability company, another organization incorporated or organized under another law of Texas, and to the extent permitted by federal law, a federally chartered bank, savings and loan association, or credit union. The bill authorizes the liability of a managerial official to be limited or eliminated in a limited liability company by its certificate of formation or company agreement to the additional extent permitted under Business Organizations Code provisions governing the company agreement of a limited liability company.

Mergers, Interest Exchanges, Conversions, and Sales of Assets

Mergers

C.S.H.B. 4862 clarifies that, unless otherwise expressly provided by a plan of merger, a disclosure letter, disclosure schedules, or similar documents or instruments delivered in connection with the plan of merger are not considered part of the plan of merger for purposes of Business Organizations Code provisions relating to mergers, interest exchanges, conversions, and sales of assets but that those documents or instruments have the effects provided in the plan of merger.

C.S.H.B. 4862 includes among the permissive provisions that may be included in a plan of merger provisions for the appointment, at or after the time at which the plan is adopted by the owners or members of a party to the merger, of one or more persons, which may include an organization surviving or resulting from the merger or any managerial official, representative, or agent of a party to the merger or of a surviving or resulting organization, as representative of the owners or members of a party to the merger, including those whose ownership interests or membership interests are cancelled, converted, or exchanged in the merger. The bill authorizes such provisions for the appointment of a representative to do the following:

- delegate to the representative the sole and exclusive authority to take action on behalf of the owners or members under the plan of merger, including the authority to take any action the representative determines to enforce or settle the rights of the owners or members under the plan of merger, subject to the terms and conditions prescribed by the plan of merger;
- prescribe the irrevocable nature and binding effect of the appointment as to all owners or members to be bound by the appointment from and after the approval of the plan of merger by those owners or members in accordance with provisions governing mergers; and
- provide that any of the provisions may not be amended after the merger has become effective or may be amended only with the consent or approval of persons specified in the plan of merger.

C.S.H.B. 4862 makes provisions authorizing permissive provisions in a plan of merger applicable to a merger in which the parent organization will survive the merger and is approved by a resolution adopted by the governing authority of the parent organization, except that the resolution approving the merger should be considered the plan of merger for those purposes.

Exchanges of Interests

C.S.H.B. 4862 clarifies that, unless otherwise expressly provided by a plan of exchange, a disclosure letter, disclosure schedules, or similar documents or instruments delivered in connection with the plan of exchange are not considered part of the plan for purposes of Business Organizations Code provisions relating to mergers, interest exchanges, conversions, and sales of assets, but the documents or instruments have the effect provided in the plan of exchange.

C.S.H.B. 4862 includes among the permissive provisions that may be included in a plan of exchange provisions for the appointment, at or after the time at which the plan is adopted by the owners or members whose ownership or membership interests are being acquired in the interest exchange, of one or more persons, which may include an organization that is a party to the interest exchange or any managerial official, representative, or agent of a party to the interest exchange, as representative of those owners or members. The bill authorizes such provisions relating to the appointment of a representative to do the following:

- delegate to the representative the sole and exclusive authority to take action on behalf of the owners or members under the plan of exchange, including the authority to take actions the representative determines to enforce or settle the rights of the owners or members under the plan of exchange, subject to the terms and conditions as prescribed by the plan of exchange;
- prescribe the irrevocable nature and binding effect of the appointment as to all owners or members to be bound by the appointment from and after the approval of the plan of exchange by those owners or members in accordance with provisions governing exchanges of interests; and
- provide that any of the provisions meet either of the following criteria:
 - may not be amended after the interest exchange has become effective; or
 - may be amended only with the consent or approval of persons specified in the plan of exchange.

Conversions

C.S.H.B. 4862 provides the following with respect to an action to be taken by a converted entity in connection with the conversion of the converting entity that is provided by the plan of conversion adopted in the manner required under provisions governing conversions of domestic entities or organizations other than a domestic entity, as applicable, and that is within the power of the converted entity under the law of its jurisdiction of formation:

- such an action is considered authorized, adopted, and approved, as applicable, by the converted entity and the governing authority and owners or members of the converted entity, as applicable; and
- expressly does not require any further action of the governing authority, owners, or members of the converted entity for purposes of the Business Organizations Code.

For-Profit Corporations

Formation and Governing Documents

C.S.H.B. 4862 includes the following among the purposes for which the board of directors of a corporation that has outstanding shares may, without shareholder approval, adopt an amendment to the corporation's certificate of formation:

- omitting any provision that specifies the name and address of each organizer or director;
- omitting any provisions that were necessary to effect a change, exchange, reclassification, subdivision, combination, or cancellation of shares, if the change, exchange, reclassification, subdivision, combination, or cancellation has become effective; and
- if the corporation has only one class of outstanding stock that is not divided into series and in which no change is made in any par value of shares of that class:
 - reclassifying by subdividing the issued shares of the class into a greater number of issued shares of the class; and
 - if the reclassification is primarily for the purpose of maintaining the listing eligibility of the class on any applicable national securities exchange, reclassifying by combining the issued shares of the class into a lesser number of issued shares of the class.

The bill authorizes such an amendment to reclassify issued shares into a greater number of issued shares to also increase the number of authorized shares of the class up to an amount determined

by multiplying the existing number of authorized shares of the class by the same multiple by which the issued shares of the class are subdivided in the reclassification and rounding up any resulting fractional number of shares to a whole number of shares. The bill authorizes such an amendment to reclassify issued shares into a lesser number of issued shares to also decrease the number of authorized shares of the class to an amount determined by dividing the existing number of authorized shares of the class by the same multiple by which the issued shares of the class are combined in the reclassification and rounding up any resulting fractional number of shares to a whole number of shares.

With respect to the reclassification of issued shares into a greater number of issued shares under an amendment to a corporation's certificate of formation, the bill requires the following:

- if the reclassification is of issued shares with par value, a transfer to stated capital of an amount of surplus designated by the board of directors that is not less than the aggregate par value of the shares issued as a result of the reclassification; and
- if the reclassification is of issued shares without par value, a transfer to stated capital of an amount of surplus equal to an aggregate value with respect to the shares issued as a result of the reclassification, as set by the board of directors when the reclassification is authorized.

If the surplus of the corporation is less than the amount required under the bill to be transferred to stated capital at the time the reclassification becomes effective, as applicable, such a reclassification of issued shares is prohibited.

Shares and Shareholder Rights

C.S.H.B. 4862, for purposes of a corporation's disposition of treasury shares for consideration that may be determined by its board of directors, establishes the consideration may meet the following conditions:

- have a value greater or less than, or equal to, the par value, if any, of the shares; and
- consist of the types of consideration for which shares with or without par value may be issued by a for-profit corporation.

C.S.H.B. 4862 revises the authorization for a person or persons to enter into a transaction to issue rights or options, as delegated by a board of directors of a for-profit corporation, as follows:

- specifies that those rights or options may be issued under the other terms on which shares may be issued on the exercise of those rights and options, subject to the authorization of the board of directors satisfying certain conditions;
- removes the condition that the authorization of the board of directors state the maximum number of rights or options that may be issued under the authorization; and
- specifies that the authorization of the board of directors must state the period of time during which the shares issuable on exercise of those rights or options may be issued.

Board of Directors

C.S.H.B. 4862 replaces the individuals whose names and addresses must be stated in the certificate of formation of a for-profit corporation, if the corporation is to be managed by a board of directors, from the persons constituting the initial board of directors of the corporation to each individual who will serve as director until the first annual meeting of shareholders and until a successor is elected and qualified.

Derivative Proceedings

C.S.H.B. 4862, for purposes of a court order on the termination of a derivative proceeding for a for-profit corporation to pay expenses the plaintiff incurred in the proceeding if the court finds the proceeding has resulted in a substantial benefit to the corporation, establishes that substantial benefit to the corporation does not include additional or amended disclosures made to the shareholders, regardless of materiality.

C.S.H.B. 4862 clarifies that, for purposes of the exception that Business Organizations Code provisions relating to a stay of proceeding, discontinuance or settlement, and payment of expenses are procedural provisions and do not relate to the internal affairs of a foreign for-profit corporation, that exception applies with respect to foreign for-profit corporations.

These provisions apply only to a derivative proceeding for a for-profit corporation instituted on or after the bill's effective date. A derivative proceeding instituted before that date is governed by the law in effect on the date the proceeding was instituted, and the former law is continued in effect for those purposes.

Exception to Derivative Proceedings

C.S.H.B. 4862 revises the exception to the application of provisions governing derivative proceedings for a claim or derivative proceeding by a shareholder of a closely held for-profit corporation against a director, officer, or shareholder of the corporation by specifying that the exception applies to a derivative proceeding by such a shareholder against a present or former director, officer, or shareholder of the corporation.

Defective Corporate Acts or Shares; Proceedings

C.S.H.B. 4862 expands the definition of "defective corporate act" to include any act or transaction purportedly taken by or on behalf of a for-profit corporation that is, and at the time the act or transaction was purportedly taken would have been, within the power of a corporation to take under the corporate statute, without regard to the failure of authorization identified in a resolution for purposes of ratifying the defective corporate act under applicable state law, but is ineffective due to a failure of authorization and is ineffective, void, or voidable due to a failure to file with the filing officer a filing instrument that was required under the corporate statute to complete the effectiveness of that act or transaction as such a failure of authorization. Accordingly, the bill does the following:

- establishes that a defective corporate act or putative shares are not ineffective if the act or shares are ratified in accordance with applicable state law or validated by the district court in a proceeding regarding validity of defective corporate acts; and
- makes the statute of limitations for an action claiming that a defective corporate act or putative shares are void or voidable due to a failure of authorization identified in a resolution applicable to an action claiming that a defective corporate act or putative shares are ineffective due to such a failure of authorization.

C.S.H.B. 4862 prohibits a for-profit corporation from ratifying with retroactive effect in accordance with provisions governing ratification of defective corporate acts or shares a defective corporate act resulting from a failure of authorization that is attributable to the failure to file with the filing officer any of the following filing instruments under the Business Organizations Code:

- a statement of change of registered agent or a statement of change of registered office;
- a certificate of amendment or restated certificate of formation that amends the registered agent or registered office;
- a certificate of formation;
- a certificate of termination;
- a certificate of merger or certificate of conversion; or
- an initial report filed with the comptroller of public accounts by an entity subject to the franchise tax.

C.S.H.B. 4862 revises the requirement for a for-profit corporation to file a certificate of validation with respect to a defective corporate act in accordance with the Business Organizations Code, as follows:

- removes the condition making the requirement applicable regardless of whether a filing instrument or other document was previously filed with respect to the defective corporate act; and
- includes among the requisite conditions, that either:
 - a filing instrument or other document was previously filed with the filing officer but requires any change to give effect to the defective corporate act in accordance with provisions governing ratification of defective corporate acts or shares, including a change to the date and time of the effectiveness of the filed filing instrument or other document; or
 - a filing instrument or other document was not previously filed with the filing officer under any other provision of the corporate statute with respect to the defective corporate act.

Accordingly, C.S.H.B. 4862 revises the required contents of such a certificate of validation, as follows:

- includes a statement that the corporation has ratified one or more defective corporate acts that would have required the filing of a filing instrument or other document with the filing officer under any provision of the corporate statute;
- removes each defective corporate act that is a subject of the certificate of validation, including the following:
 - for a defective corporate act involving the issuance of putative shares, the number and type of putative shares issued and the date or dates on which the putative shares were purported to have been issued;
 - the date of the defective corporate act; and
 - the nature of the failure of authorization with respect to the defective corporate act;
- with respect to the statement that each defective corporate act has been ratified, removes the following:
 - the date on which the board of directors ratified each defective corporate act; and
 - the date, if any, on which the shareholders approved the ratification of each defective corporate act; and
- removes information relating to and the requisite statement with respect to a filing instrument that was previously filed but no change was required to give effect to a defective corporate act.

Nonprofit Corporations

C.S.H.B. 4862 specifies that the term "board of directors," for purposes of provisions governing nonprofit corporations, does not include the member or members of the corporation if the certificate of formation of the corporation vests the management of the affairs of the corporation in the members. The bill also replaces references to a "person" with references to an "individual" in that definition and the definition of "director" for those purposes, and in provisions relating to the constitution of the officers of such a corporation.

C.S.H.B. 4862 revises the authorization for the board of directors of a corporation, by resolution adopted by the majority of the directors in office, if authorized by the certificate of formation or bylaws of the corporation, to designate one or more committees to have and exercise the authority of the board in the management corporation to the extent provided by the resolution, the certificate of formation, or the bylaws as follows:

- specifies that the authority that may be delegated is all or a specified portion of the authority of the board of directors; and
- removes language specifying that authority may be delegated to the extent provided by the resolution adopted by the board of directors.

The bill also authorizes the certificate of formation or bylaws of a nonprofit corporation to designate one or more committees to have and exercise all, or a specified portion, of the authority of the board of directors of the corporation in the management of the corporation.

Defective Corporate Acts or Transactions

C.S.H.B. 4862 expands the definition of "defective corporate act" to include any act or transaction purportedly taken by or on behalf of a nonprofit corporation that is, and at the time the act or transaction was purportedly taken would have been, within the power of a corporation to take under the corporate statute, but is ineffective due to a failure of authorization or is ineffective, void, or voidable due to a failure to file with the filing officer a filing instrument that was required under the corporate statute to complete the effectiveness of that act or transaction as such a failure of authorization. Accordingly, the bill does the following:

- establishes that a defective corporate act that is not ineffective solely as a result of a failure of authorization if the act is ratified in accordance with applicable state law or validated by the district court in a proceeding regarding validity of defective corporate acts; and
- makes the statute of limitations for an action claiming that a defective corporate act is void or voidable due to a failure of authorization identified in a resolution applicable to an action claiming that a defective corporate act is ineffective due to such a failure of authorization.

C.S.H.B. 4862 prohibits a nonprofit corporation from ratifying with retroactive effect in accordance with provisions governing ratification of defective corporate acts a defective corporate act resulting from a failure of authorization that is attributable to the failure to file with the filing officer any of the following filing instruments under the Business Organizations Code:

- a statement of change of registered agent or a statement of change of registered office;
- a certificate of amendment or restated certificate of formation that amends the registered agent or registered office;
- a certificate of formation;
- a certificate of termination;
- a certificate of merger or certificate of conversion;
- an initial report filed with the comptroller by an entity subject to the franchise tax; and
- a report filed by a domestic or foreign corporation.

C.S.H.B. 4862 revises the requirement for a nonprofit corporation to file a certificate of validation with respect to a defective corporate act in accordance with the Business Organizations Code as follows:

- removes the condition making the requirement applicable regardless of whether a filing instrument or other document was previously filed with respect to the defective corporate act; and
- includes among the requisite conditions that either:
 - a filing instrument or other document was previously filed with the filing officer but requires any change to give effect to the defective corporate act in accordance with provisions governing ratification of defective corporate acts or shares, including a change to the date and time of the effectiveness of the filed filing instrument or other document; or
 - a filing instrument or other document was not previously filed with the filing officer under any other provision of the corporate statute with respect to the defective corporate act.

Accordingly, C.S.H.B. 4862 revises the required contents of such a certificate of validation, as follows:

- includes a statement that the corporation has ratified one or more defective corporate acts that would have required the filing of a filing instrument or other document with the filing officer under any provision of the corporate statute;

- removes each defective corporate act that is a subject of the certificate of validation, including the date of the defective corporate act and the nature of the failure of authorization with respect to the defective corporate act;
- with respect to the statement that each defective corporate act has been ratified in accordance with provisions governing ratification of defective corporate acts or shares, removes the following:
 - the date on which the board of directors ratified each defective corporate act; and
 - if the corporation has members with voting rights, the date, if any, on which the members approved the ratification of each defective corporate act or, if the management of the affairs of the corporation is vested in its members under applicable state law, the date on which the members ratified each defective corporate act; and
- removes information relating to and the requisite statement with respect to a filing instrument that was previously filed but no change was required to give effect to a defective corporate act.

Limited Liability Companies

C.S.H.B. 4862 establishes that a subscription to purchase a membership interest in a limited liability company in the process of being formed is irrevocable to the extent provided by the terms of the subscription if the following conditions are met:

- the subscription is in writing and signed by the subscriber; and
- the subscription states that it is irrevocable.

The bill establishes that a written subscription entered into after the limited liability company is formed is a contract between the subscriber and the company.

C.S.H.B. 4862 removes provisions entitling a person who is assigned a membership interest in a limited liability company to the following:

- to require, for any purpose, reasonable information or a reasonable account of the transactions of the company; and
- to make, for any proper purpose, reasonable inspections of the books and records of the company.

However, the bill establishes that such a person is entitled to the rights provided by statutory provisions relating to the right of a member of a limited liability company or assignee of a membership interest in a limited liability company to examine records.

C.S.H.B. 4862 revises the exception to the application of provisions governing derivative proceeding for a claim or derivative proceeding by a member of a closely held limited liability company against a governing person, member, or officer of the company by specifying that the exception applies to a derivative proceeding by such a member against a present or former governing person, member, or officer of the company.

Limited Partnerships

C.S.H.B. 4862 establishes that a subscription to purchase a partnership interest in a limited partnership in the process of being formed is irrevocable to the extent provided by the terms of the subscription if the following conditions are met:

- the subscription is in writing and signed by the subscriber; and
- the subscription states that it is irrevocable.

The bill establishes that a written subscription entered into after the limited partnership is formed is a contract between the subscriber and the partnership.

C.S.H.B. 4862 revises the exception to the application of provisions governing a derivative proceeding for a claim or a derivative proceeding by a limited partner of a closely held limited partnership against a general partner, limited partner, or officer of the partnership by specifying

that the exception applies instead to a derivative proceeding by such a limited partner against a present or former general partner, limited partner, or officer of the partnership.

C.S.H.B. 4862 specifies that a restated certificate of formation that must be signed by at least one general partner and by each other general partner designated in the restated certificate of formation as a new general partner, unless signed and filed by a person under provisions governing a discretionary amendment to a certificate of formation, is a restated certificate of formation containing amendments.

C.S.H.B. 4862 revises the conditions under which a certificate of merger, conversion, or exchange filed on behalf of a domestic limited partnership must be executed, as follows:

- replaces the signature of the certificate of merger as provided generally under the Business Organizations Code with a signature by at least one general partner and by each other general partner designated as a new general partner by any amendment to the certificate of formation of the limited partnership being made by the certificate, with the provision that the certificate need not be signed by a withdrawing general partner; and
- replaces the signature of the certificate of conversion or exchange as provided generally under the Business Organizations Code with a signature by at least one general partner.

Associations

Cooperative Associations

C.S.H.B. 4862 includes the following among the required contents of the annual written report of a cooperative association submitted to its members at the annual meeting of the association:

- the name, address, occupation, and date of expiration of the term of office of each officer and director; and
- any compensation paid by the association to each officer or director of the association.

Unincorporated Nonprofit Associations

C.S.H.B. 4862 makes Business Organizations Code provisions governing the purposes and power of a domestic entity and the winding up and termination of a domestic entity applicable to a nonprofit association.

Repealed Provisions

C.S.H.B. 4862 repeals the provision excepting a limited partnership from the requirement to send a written notice of winding up to each known claimant against the partnership.

C.S.H.B. 4862 repeals provisions requiring a cooperative association that has at least 100 members or at least \$20,000 in annual business to file in the association's registered office an annual report of the association's financial condition, requiring a cooperative association that has at least 3,000 members or at least \$750,000 in annual business to file a copy of the report with the secretary of state, including certain actions to compel the filing of the copy with the secretary of state, and creating a misdemeanor offense for a materially false statement in such a report.

C.S.H.B. 4862 repeals the following provisions of the Business Organizations Code:

- Section 153.502(c);
- Section 251.353; and
- Section 251.354.

EFFECTIVE DATE

September 1, 2025.

COMPARISON OF INTRODUCED AND SUBSTITUTE

While C.S.H.B. 4862 may differ from the introduced in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

Whereas the introduced established that the plain meaning of the laws enacted by the legislature in the Business Organizations Code must not be supplanted, contravened, or modified by the laws or judicial decisions of any other state, the substitute clarifies that provision to establish instead that the plain meaning of the text of the Business Organizations Code may not be supplanted, contravened, or modified by the laws or judicial decisions of any other state.

The substitute removes the option for a filing instrument to be delivered to the secretary of state by facsimile or any other form of delivery comparable to delivery in person, by mail, courier, or electronic transmission and includes among the options of delivery any other method approved by the secretary of state, neither of which the introduced did.

The introduced and substitute both include a clarification that, when certain notice is required or permitted by the Business Organizations Code or the governing documents of a domestic entity, a document enclosed with or annexed or appended to the notice is considered part of the notice for the purpose of determining whether notice was given. However, the substitute includes a specification absent from the introduced that the notice is considered part of a notice for the purpose of determining whether notice was properly given.

While the introduced and substitute both revise the requirement for a domestic or foreign entity to promptly notify each owner or member of an action that was taken by less than unanimous consent that the owner or member did not sign, the substitute does not include the specification in the introduced that the notice be written notice.

The substitute includes an authorization absent from the introduced for the liability of a managerial official to be limited or eliminated in a limited liability company by its certificate of formation or company agreement to the additional extent permitted under Business Organizations Code provisions governing the company agreement of a limited liability company.

While the introduced and substitute both include provisions for the appointment of a representative among the permissive provisions in a plan of merger or plan of exchange, the versions differ as follows:

- the substitute replaces the reference to an "entity surviving or resulting from the merger," as in the introduced, with a reference to an "organization surviving or resulting from the merger"; and
- the substitute replaces the reference to an "entity that is a party to the interest exchange," as in the introduced, with a reference to an "organization that is a party to the interest exchange."

The introduced and substitute both authorize such provisions to delegate authority to the representative to take any action the representative determines to enforce or settle the rights of the owners of members under the applicable plan. However, the introduced included a further condition that the representative determine that the action is necessary or appropriate for purposes of enforcing or settling those rights, whereas the substitute does not.

Whereas the introduced explicitly prohibited an action by a converted entity in connection with the conversion of the converting entity and that is within the power of the converted entity under the law of its jurisdiction of formation from requiring any further action of the governing authority, owners, or members of the converted entity for purposes of the Business Organizations Code, the substitute instead establishes that such an action does not require any

further action of the governing authority, owners, or members of the converted entity for those purposes.

Whereas the introduced included the requirement for a transfer to stated capital of an amount of surplus equal to an aggregate value with respect to shares issued as a result of a reclassification of shares into a lesser number of shares with par value, the substitute does not. However, the substitute includes a requirement for a transfer to stated capital of an amount of surplus equal to an aggregate value with respect to shares issued as a result of a reclassification of shares into a greater number of shares without par value, which was absent from the introduced.

The substitute does not include the following provisions from the introduced:

- provisions establishing that, if a for-profit corporation reasonably determines that a written demand to examine and copy records from a shareholder is in connection with certain pending derivative proceedings or civil lawsuits, the demand is not a proper purpose for which an applicable shareholder is entitled to examine and copy the corporation's records, and establishing that the provision expressly does not impair the rights of certain entities;
- the authorization for the board of directors of a for-profit corporation to adopt resolutions authorizing formation of a committee of independent and disinterested directors to review and approve transactions, whether or not contemplated at the time of the committee's formation or the filing of a petition under the introduced version's provisions that involves the corporation or any of its subsidiaries and the persons described in the resolutions;
- the related authorization for the corporation to petition an applicable court to hold an evidentiary hearing to determine whether the directors appointed to such a committee are independent and disinterested with respect to any transactions involving the corporation or any of its subsidiaries and the persons described in the resolution;
- requirements for a court to hold a preliminary hearing to determine the appropriate legal counsel to represent the corporation and its shareholders and to hold an evidentiary hearing and make a determination as to whether the directors are independent and disinterested; and
- provisions establishing that the court's determination that the directors are independent and disinterested is presumptively dispositive and binding in any subsequent lawsuit or legal proceeding and procedures for a person to overcome that presumption.

The introduced expanded the definition of "shareholder" for purposes of derivative proceedings involving a for-profit corporation to include two or more persons that are a shareholder or a beneficial owner whose shares are held in a voting trust or by a nominee on the beneficial owner's behalf acting together, under any agreement, arrangement, or understanding, except for a corporation that has fewer than 35 shareholders, whereas the substitute does not include a provision changing that definition.

The introduced included a provision specifying that, for purposes of a determination of how to proceed on allegations made in a demand or petition relating to a derivative proceeding involving a for-profit corporation, a panel of independent and disinterested individuals appointed by a court on motion of the corporation for purposes of making that determination by majority vote may be composed of directors, whereas the substitute does not include a provision changing the statute regarding such determinations. The substitute also does not include the following provisions contained in the introduced:

- the authorization for a for-profit corporation, before the corporation's determination on how to proceed on those allegations, to petition an applicable court to request a determination as to whether the directors identified or appointed for purposes of making the determination of how to proceed by majority vote, other than the panel, are independent and disinterested with respect to the allegations made in the demand;
- the requirement for such a corporation to promptly deliver a copy of the petition to the shareholder making the demand and a provision establishing that the shareholder will

have the right, if promptly exercised, to challenge the petition before the court's determination;

- the provision establishing that the court will make its determination after hearing and reviewing the evidence; and
- provisions establishing that the court's determination that the directors or individuals are independent and disinterested is presumptively dispositive and binding in any subsequent lawsuit or legal proceeding and procedures for a person to overcome that presumption.