

BILL ANALYSIS

C.S.S.B. 29
By: Hughes
Judiciary & Civil Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

According to the Fordham Journal of Corporate & Financial Law, the Harvard Law School Forum on Corporate Governance, and the Delaware Department of State, historically, the state of Delaware has been heralded as a legal home for business entities, as it was believed its extensive case law and business-focused Court of Chancery provided certainty for business decision-making. However, the bill sponsor has informed the committee that in recent years, anti-business sentiment and rulings have negated this perception and eroded trust in Delaware, causing entities to look to organize or move to states with business-friendly climates, such as Texas. C.S.S.B. 29 seeks to make Texas an attractive legal home for businesses by reforming statutory provisions governing certain business entities and enhancing the predictability and efficiency of Texas entity law and governance while maintaining strong protections for entity owners and transparency.

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.S.B. 29 amends the Business Organizations Code to revise statutory provisions relating to business activities of domestic entities, certain for-profit corporations, certain limited liability companies, and certain limited partnerships.

General Provisions

C.S.S.B. 29 expands the definition of "national securities exchange," as applicable to the code in its entirety, to include a stock exchange that has its principal office in Texas and has received approval by the securities commissioner under The Securities Act. Furthermore, the bill sets out a general provision regarding the laws governing the formation, internal affairs, and governance of an organization formed under the code or the internal affairs of which are governed by the code that does the following with regard to such a domestic entity:

- authorizes the managerial officials of such a domestic entity, in exercising their powers with respect to that entity, to consider the laws and judicial decisions of other states and the practices observed by entities formed in those states; and
- provides 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 code or of any duty existing under state laws.

Powers of Domestic Entities

Choice of Forum Provisions

C.S.S.B. 29, in the choice of forum provision authorizing the governing documents of a domestic entity to require that any internal entity claims must be brought only in a court in Texas, expands that authorization to provide that the documents may also require, consistent with applicable state and federal jurisdictional requirements, that one or more courts in Texas having jurisdiction must serve as the exclusive forum and venue for any internal entity claims.

Waiver of Trial by Jury

C.S.S.B. 29 establishes that a domestic entity's governing documents may contain a waiver of the right to a jury trial concerning any internal entity claim. The bill establishes that, in a lawsuit asserting such a claim, a waiver of the right to a jury trial contained in the governing documents of a domestic entity is enforceable, regardless of whether the applicable governing document is signed by the members, owners, officers, or governing persons. A person asserting an internal entity claim is considered to have been informed of the waiver of the right to a jury trial contained in the governing documents and to have knowingly waived the right in the action if the person, as follows:

- voted for or affirmatively ratified the governing document containing the waiver; or
- acquired an equity security of the domestic entity or any predecessor to the entity at, or continued to hold an equity security of a domestic entity that has one or more classes of equity securities listed on a national securities exchange after, a time at which the waiver was included in the governing documents.

The bill establishes that nothing in these provisions prevents an entity from showing that a person asserting an internal entity claim knowingly and informedly waived the right to a jury trial by any evidence satisfactory to the court having jurisdiction, including by the person's consent or acquiescence to the waiver contained in the governing documents. The bill defines "internal entity claim" by reference to the meaning assigned to that term by the choice of forum provisions applicable to a domestic entity.

For-Profit Corporations

Shareholder Rights and Restrictions: Examination of Records

C.S.S.B. 29, with respect to the right of certain shareholders of a for-profit corporation to examine and copy, on written demand, applicable records of that corporation for a proper purpose, prohibits the inclusion in those applicable records of emails, text messages or similar electronic communications, or information from social media accounts unless such communication or information effectuates an action by the corporation. In addition, the bill sets out a provision that is applicable only to a corporation that has a class or series of voting shares listed on a national securities exchange or that has made an affirmative election to be governed by subsequently described provisions of the bill establishing specific presumptions for directors and officers of certain corporations who take or decline to take certain actions on any matters of a corporation's business. Accordingly, with respect to such an applicable corporation, the bill establishes that for purposes of an applicable shareholder's entitlement to examine and copy the applicable corporation's records for a proper purpose, a written demand is not for a proper purpose if the applicable corporation reasonably determines that the demand is in connection with one of the following:

- an active or pending derivative proceeding in the right of the corporation under statutory provisions relating to those derivative proceedings that is or is expected to be instituted or maintained by the applicable shareholder or the shareholder's affiliate; or

- an active or pending civil lawsuit to which the corporation, or its affiliate, and the applicable shareholder, or the shareholder's affiliate, are or are expected to be adversarial named parties.

Furthermore, the bill establishes that the provision as set out by the bill expressly does not impair the following rights:

- any rights of the applicable shareholder or the shareholder's affiliate to obtain discovery of records from the applicable corporation in an active or pending civil lawsuit described by the provision as set out by the bill or in the derivative proceeding subject to the applicable Business Organizations Code provision limiting discovery in a derivative proceeding; or
- any rights of the applicable shareholder to obtain a court order to compel production of records of the applicable corporation for examination by the holder as provided by the applicable Business Organizations Code provision relating to the power of the court to compel the production of applicable records of a corporation for examination, regardless of the period during which the shareholder was a beneficial shareholder or record holder and regardless of the number of shares held by the person.

Shareholder Voting

Vote Required to Approve Fundamental Action

C.S.S.B. 29 creates an exception to the statutory provision establishing that separate voting by a class or series of shares of a corporation is required for approval of an amendment to the certificate of formation that would result the increase or decrease of the aggregate number of authorized shares of the class or series, unless an amendment to the certificate of formation is undertaken by the corporation's board of directors, by authorizing the number of authorized shares of any class or series to be increased or decreased, but not below the number of shares of the class or series then outstanding, by the affirmative vote of the holders of a majority of the stock of the corporation entitled to vote, as provided by one of the following:

- the certificate of formation; or
- an amendment of the certificate of formation that:
 - authorized the shares of the class or series;
 - was adopted before the issuance of any shares of the class or series; or
 - was authorized by one or more resolutions adopted by the affirmative vote of the holders of a majority of the shares of the class or series.

The bill establishes that the shares of a class or series that do not otherwise have a right to vote under the certificate of formation, if that certificate provides that any required vote by a class or series of shares of a corporation must be as a single class and without separate voting by class or series, must be treated as having no votes in the vote as a single class.

Changes in Vote Required for Certain Matters

C.S.S.B. 29 authorizes a certificate of formation, with respect to a matter for which the affirmative vote of the holders of a specified portion of the shares of a class or series is required by the Business Organizations Code, to provide that, notwithstanding any other provision of that code, all classes or series of stock must only be entitled to vote as a single class or series, and separate voting by class or series is not required, for the purpose of approving any matter, including in connection with any fundamental action or fundamental business transaction.

Board of Directors of a Corporation

Committees of a Board of Directors

C.S.S.B. 29 sets out a provision applicable to the board of directors of a corporation that has a class or series of voting shares listed on a national securities exchange or that has made an affirmative election to be governed by subsequently described provisions of the bill establishing specific presumptions for directors and officers of certain corporations who take or decline to take certain actions on any matters of a corporation's business. The bill authorizes such a board of directors to adopt resolutions that authorize the formation of a committee of independent and disinterested directors to review and approve transactions involving the corporation or any of its subsidiaries and a controlling shareholder, director, or officer and specifies that this authority applies whether or not the transactions are contemplated at the time of the committee's formation or at the time of a corporation's applicable petition to an appropriate court for an evidentiary hearing, as authorized under subsequently described bill provisions, to determine whether the directors appointed to the committee are independent and disinterested.

Determination of Independent and Disinterested Directors

C.S.S.B. 29 sets out provisions describing the process used to determine whether board directors who are appointed to a committee formed under the bill's provisions to review and approve transactions involving an applicable corporation or any of its subsidiaries and a controlling shareholder, director, or officer are independent and disinterested with respect to such transactions. Accordingly, the bill provides the following:

- an applicable corporation that adopts a resolution for purposes of authorizing the formation of such a committee may petition a court having jurisdiction to hold an evidentiary hearing to determine whether the directors appointed to the committee are independent and disinterested with respect to any transactions involving the corporation or any of its subsidiaries and a controlling shareholder, director, or officer;
- the petition must be filed in the business court unless the corporation's principal place of business in Texas is located in a county not contained within an operating division of the business court, in which case the petition may be filed in a district court in the county in which the corporation's principal place of business in Texas is located;
- in the petition, the applicable corporation must designate legal counsel to act on behalf of the corporation and its shareholders, other than the controlling shareholder, director, or officer involved in the transaction;
- the corporation must give notice to the corporation's shareholders that, as follows:
 - such a petition has been filed;
 - identifies the court in which the petition is filed and provides the case number for the proceeding;
 - identifies counsel designated to act on behalf of the corporation and its shareholders, other than the controlling shareholder, director, or officer involved in the transaction; and
 - the shareholders, other than the controlling shareholder, director, or officer involved in the transaction, have the right to participate in the proceeding in person or through counsel;
- the required notice, if the corporation has a class of its shares listed on a national securities exchange, may be provided through the filing of a current report with the U.S. Securities and Exchange Commission in accordance with the requirements of the federal Securities Exchange Act of 1934 and any rules promulgated under that act;
- the court, not earlier than the 10th day after the date the required notice is given, must hold a preliminary hearing to determine the appropriate legal counsel to represent the corporation and its shareholders, other than the controlling shareholder, director, or officer involved in the transaction, whether or not the same as the legal counsel identified in the petition; any other legal counsel representing a shareholder, other than the

controlling shareholder, director, or officer involved in the transaction, may participate in the hearing to:

- object to counsel designated by the corporation in the petition on the ground that the designated counsel is insufficiently independent and disinterested; or
 - request designation by the court as the appropriate legal counsel;
- the court, after determining the appropriate legal counsel, must promptly hold an evidentiary hearing as to whether the directors on the committee are independent and disinterested with respect to transactions involving the corporation or any of its subsidiaries and a controlling shareholder, director, or officer; the appropriate legal counsel and legal counsel for the corporation may participate in the hearing, and the court, after hearing and reviewing the evidence presented, must make its determination as to whether the directors on the committee are independent and disinterested; and
- the court's determination that the directors are independent and disinterested is dispositive in the absence of facts, not presented to the court, constituting evidence sufficient to prove that one or more of those directors is not independent and disinterested with respect to a particular transaction involving the corporation or any of its subsidiaries and a controlling shareholder, director, or officer.

Contracts or Transactions Involving Interested Directors and Officers

C.S.S.B. 29 sets out a provision applicable only to a corporation that has a class or series of voting shares listed on a national securities exchange or that has made an affirmative election to be governed by subsequently described provisions of the bill establishing specific presumptions for directors and officers of certain corporations who take or decline to take certain actions on any matters of a corporation's business. Accordingly, the bill establishes that, regardless of whether the conditions in current law under which an otherwise valid and enforceable contract or transaction involving interested directors and officers is valid and enforceable and is not void or voidable are satisfied, neither the corporation nor any of the corporation's shareholders will have a cause of action against any director or officer for breach of duty with respect to the making, authorization, or performance of the contract or transaction because the director or officer, as follows:

- had a relationship with an applicable corporation as a managerial official or had a financial interest; or
- took any of the following actions authorized for a person with such a relationship or interest unless the cause of action is permitted by the bill's provisions establishing specific presumptions for directors and officers of certain corporations who take or decline to take certain actions on any matters of a corporation's business:
 - was present at or participated in and, if the person is a director or committee member, voted at a meeting of the board of directors or of a committee of the board that authorizes the contract or transaction; or
 - signed, in the person's capacity as a director or committee member, a unanimous written consent of the directors or committee members to authorize the contract or transaction.

Presumptions for Directors and Officers of Certain Corporations

C.S.S.B. 29 sets out provisions applicable only to a corporation that has a class or series of voting shares listed on a national securities exchange or that has included in its governing documents a statement affirmatively electing to be governed by these applicable provisions. Accordingly, the bill provides the following:

- in taking or declining to take any action on any matters of an applicable corporation's business, a director or officer is presumed to act in good faith, on an informed basis, in furtherance of the interests of the corporation, and in obedience to the law and the corporation's governing documents;
- neither an applicable corporation nor any of the corporation's shareholders has a cause of action against the corporation's director or officer as a result of any act or omission in

the person's capacity as a director or officer unless the claimant rebuts one or more of the aforementioned presumptions and it is proven by the claimant that, as follows:

- the director's or officer's act or omission constituted a breach of one or more of the person's duties as a director or officer; and
- the breach involved fraud, intentional misconduct, an ultra vires act, or a knowing violation of law;
- such presumptions are in addition to any legal presumption arising under common law or the Business Organizations Code, in favor of any managerial official of a corporation to which these bill provisions apply, and do not abrogate, preempt, or lessen any other defense, presumption, immunity, or privilege under other constitutional, statutory, case, or common law or rule provisions, in favor of any managerial official of any domestic entity, including any corporation to which these bill provisions do not apply; and
- a party, in alleging fraud, intentional misconduct, an ultra vires act, or a knowing violation of the law under these bill provisions, must state with particularity the circumstances constituting the alleged action.

These bill provisions relating to the presumptions expressly do not limit the effectiveness or applicability of a provision contained in the certificate of formation or similar instrument of a corporation limiting monetary liability of a governing person.

Derivative Proceedings

Standing to Bring Proceeding

C.S.S.B. 29, for purposes of statutory provisions governing derivative proceedings, expands the definition of "shareholder" to include two or more shareholders acting in concert under an informal or formal agreement or understanding with respect to a derivative proceeding. The bill, with respect to a corporation with common shares listed on a national securities exchange or a corporation that has made an affirmative election to be governed by the aforementioned provisions of the bill establishing specific presumptions for directors and officers of certain corporations who take or decline to take certain actions on any matters of a corporation's business and has 500 or more shareholders, authorizes a shareholder to institute or maintain a derivative proceeding if at the time the derivative proceeding is instituted, the shareholder beneficially owns a number of the common shares sufficient to meet the required ownership threshold to institute a derivative proceeding in the right of the corporation identified in the corporation's certificate of formation or bylaws, provided that the required ownership threshold does not exceed three percent of the outstanding shares of the corporation. This authorization applies only to a derivative proceeding 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 that purpose.

Determination by Directors or Independent Persons

C.S.S.B. 29 authorizes an individual appointed by the court to a panel of independent and disinterested individuals for the purpose of making a determination of how to proceed on allegations made in a demand or petition relating to a derivative proceeding to be a director. The bill authorizes a corporation, before the corporation's determination of how to proceed on the allegations, to petition the court having jurisdiction to make a finding as to whether the directors identified or appointed by an affirmative vote are independent and disinterested with respect to the allegations made in the demand. The bill requires such a petition to be filed, as follows:

- if a derivative proceeding has been instituted, in the court in which the proceeding was instituted; and
- if no derivative proceeding has been instituted, in the business court.

However, the bill authorizes a petition to be filed in a district court in the county in which the corporation's principal place of business in Texas is located if no derivative proceeding has been instituted and the corporation's principal place of business in Texas is located in a county not contained within an operating division of the business court.

C.S.S.B. 29 requires the corporation to serve a copy of the petition on the shareholder filing the derivative proceeding or making the demand. The bill requires the court in which a petition is filed to conduct an evidentiary hearing on the petition on or before the 45th day after the date the petition is filed unless extended for good cause. The bill entitles a shareholder on whom a petition is served to be served with all notices and papers filed in the action and to intervene in the action to challenge the petition. Unless good cause is shown, a shareholder who is not already a party to the action must intervene not later than the seventh day before the date the petition is heard by the court. The bill requires the court, not later than the 75th day after the date the petition is filed unless extended for good cause, to sign an order stating whether the directors are independent and disinterested. The bill establishes that a court's finding that the directors or individuals are independent and disinterested is dispositive in the absence of discovery of facts, not presented to the court, constituting evidence sufficient to prove that one or more of those directors or individuals are not independent and disinterested.

Payment of Expenses on Termination of a Derivative Proceeding

C.S.S.B. 29 establishes that, for purposes of the provision authorizing a court to order payment of expenses on termination of a derivative proceeding, a substantial benefit to a corporation does not include additional or amended disclosures made to shareholders, regardless of materiality. This bill provision applies only to a derivative proceeding instituted on or after the bill's effective date. A derivative proceeding instituted before the bill's effective date is governed by the law in effect on the date the proceeding was instituted, and the former law is continued in effect for that purpose.

Application to Foreign Corporations

C.S.S.B. 29 clarifies that, for purposes of the applicability of certain Business Organizations Code provisions regarding derivative proceedings to foreign corporations, the consideration in current law of those provisions as procedural provisions that do not relate to the internal affairs of the foreign corporation applies only with respect to foreign corporations.

Limited Liability Companies

Presumptions for Governing Persons of Certain Limited Liability Companies

C.S.S.B. 29 sets out provisions applicable only to a limited liability company that has a class or series of voting membership interests listed on a national securities exchange and establishes that nothing in the bill's provision providing for such applicability prohibits a limited liability company from adopting, in its company agreement, a provision that duplicates the effect of these provisions, regardless of whether the limited liability company has a class or series of membership interests listed on a national securities exchange. Accordingly, the bill provides the following:

- in taking or declining to take any action on any matters of a limited liability company's business, a governing person or officer, and each affiliate or associate of a governing person or officer, is presumed to act in good faith and in compliance with:
 - the person's or officer's duties required under common law or the governing documents of the limited liability company; and
 - the governing documents of the limited liability company;
- neither an applicable limited liability company nor any of the company's members has a cause of action against a governing person or officer or any affiliate or associate of a governing person or officer of the company as a result of any act or omission in the person's capacity as a governing person or officer of the company unless the claimant rebuts one or more of the aforementioned presumptions and it is proven by the claimant that, as follows:

- the act or omission of the governing person or officer or affiliate or associate of a governing person or officer constituted a breach of one or more of the person's duties as a governing person or officer to the extent the duty has not been modified or eliminated through an affirmative election contained in the governing documents as permitted by state law governing limited liability companies; and
- the breach involved fraud, intentional misconduct, an ultra vires act, or a knowing violation of law;
- such presumptions are in addition to any legal presumption arising under common law or the Business Organizations Code, in favor of any governing person or officer to which these bill provisions apply, and do not abrogate, preempt, or lessen any other defense, presumption, immunity, or privilege under other constitutional, statutory, case, or common law or rule provisions, in favor of any governing person or officer of any domestic entity, including any limited liability company to which these bill provisions do not apply; and
- a party, in alleging fraud, intentional misconduct, an ultra vires act, or a knowing violation of the law under these provisions, must state with particularity the circumstances constituting the alleged action.

These provisions expressly do not limit the effectiveness or applicability of a provision contained in the certificate of formation or company agreement or similar instrument of a limited liability company limiting monetary liability of a governing person or officer.

Elimination of Duties and Liabilities

C.S.S.B. 29 authorizes the company agreement of a limited liability company to eliminate any duties, including fiduciary duties, and related liabilities that a member, manager, officer, or other person has to the company or to a member or manager of the company, in addition to the authority in current law for such a company agreement to expand or restrict such duties and liabilities.

Derivative Proceedings

Payment of Expenses on the Termination of a Derivative Proceeding

C.S.S.B. 29 establishes that, for purposes of the statutory authorization for a court to order the payment of certain expenses on termination of a derivative proceeding, a substantial benefit to the limited liability company does not include additional or amended disclosures made to the members, regardless of materiality.

Supplemental Recordkeeping Requirements: Right to Examine Records

C.S.S.B. 29, with respect to the right of certain members of a limited liability company or assignees of a membership interest in a limited liability company to examine and copy, on written demand, applicable records of that company for a proper purpose, prohibits the inclusion in those records of emails, text messages or similar electronic communications, or information from social media accounts unless such communication or information effectuates an action by the company or the company agreement expressly states otherwise. The bill conditions such a right of an applicable member or assignee on whether the governing documents of the limited liability company provide otherwise.

Partnerships

Effect of Partnership Agreement

C.S.S.B. 29 authorizes a partnership agreement to eliminate any or all of the partner's duty of loyalty, the partner's duty of care, and the obligation of good faith under applicable Business

Organizations Code provisions, to the extent the governing documents of the partnership include a statement affirmatively electing to do so. This authorization applies only to a partnership that has a class or series of partnership interests listed on a national securities exchange. The provision establishing that the authorization is applicable only to a partnership that has a class or series of partnership interests listed on a national securities exchange may not be construed as prohibiting any partnership from adopting, in its partnership agreement, provisions that duplicate the effect of those provisions, regardless of whether the partnership has a class or series of partnership interests listed on a national securities exchange.

General Standards of Partner's Conduct

C.S.S.B. 29 specifies that the following provisions relating to general standards of a partner's conduct apply, except as otherwise specified in the partnership agreement:

- the provision establishing that a partner owes to the partnership, the other partners, and a transferee of a deceased partner's partnership interest as designated under applicable state law a duty of loyalty and a duty of care; and
- the requirement for a partner to discharge the partner's duties to the partnership and the other partners under the Business Organizations Code or under the partnership agreement and exercise any rights and powers in the conduct or winding up of the partnership business in good faith and in a manner the partner reasonably believes to be in the best interest of the partnership.

Presumptions for General Partners and Officers of Certain Limited Partnerships

C.S.S.B. 29 sets out provisions applicable only to a partnership that has a class or series of partnership interests listed on a national securities exchange. Accordingly, the bill provides the following:

- in taking or declining to take any action on any matters of a limited partnership's business, any general partner of the limited partnership, including any director, officer, member, or other affiliate of the general partner, is presumed to act in good faith and in compliance with the person's duties required under the Business Organizations Code, common law, and the partnership agreement of the partnership and the partnership agreement of such limited partnership;
- neither an applicable limited partnership nor any of the limited partnership's partners has a cause of action against a general partner of the limited partnership, including any director, officer, member, or other affiliate of the general partner, as a result of any act or omission in the person's capacity as a general partner or as an officer or director of the general partner unless the claimant rebuts one or more of the aforementioned presumptions and it is proven by the claimant that:
 - the act or omission of the general partner's or any director, officer, member, or other affiliate of the general partner constituted a breach of one or more of the person's duties as a general partner, director, or officer to the extent the duty has not been modified or eliminated through an affirmative election contained in the governing documents as permitted by statutory provisions relating to limited partnerships; and
 - the breach involved fraud, intentional misconduct, an ultra vires act, or a knowing violation of law;
- such presumptions are in addition to any legal presumption arising under common law or the Business Organizations Code, in favor of any general partner or member or managerial official of a general partner to which these bill provisions apply, and do not abrogate, preempt, or lessen any other defense, presumption, immunity, or privilege under other constitutional, statutory, case, or common law or rule provisions, in favor of any managerial official of any domestic entity, including any limited partnership to which these bill provisions do not apply; and

- a party, in alleging fraud, intentional misconduct, an ultra vires act, or a knowing violation of the law under these provisions, must state with particularity the circumstances constituting the alleged action.

These bill provisions expressly do not limit the effectiveness or applicability of a provision contained in the certificate of formation or partnership agreement or similar instrument of a partnership limiting monetary liability of a governing person. The provision establishing that these provisions are applicable only to a partnership that has a class or series of partnership interests listed on a national securities exchange may not be construed as prohibiting any partnership from adopting, in its partnership agreement, provisions that duplicate the effect of those provisions, regardless of whether the partnership has a class or series of partnership interests listed on a national securities exchange.

Derivative Actions

Payment of Expenses on Termination of a Derivative Proceeding

C.S.S.B. 29 establishes that, for purposes of the statutory provisions authorizing a court to order the payment of certain expenses on termination of a derivative proceeding, a substantial benefit to the limited partnership does not include additional or amended disclosures made to the limited partners, regardless of materiality.

Right to Examine Records

C.S.S.B. 29, with respect to the right of a partner or an assignee of a partnership interest in a limited partnership to examine and copy, on written demand, applicable records of that partnership for a proper purpose, prohibits the inclusion in those records of emails, text messages or similar electronic communications, or information from social media accounts unless such communication or information effectuates an action by the limited partnership or the partnership agreement expressly states otherwise. The bill conditions such a right of an applicable partner or assignee on whether the governing documents of the limited partnership provide otherwise.

EFFECTIVE DATE

On passage, or, if the bill does not receive the necessary vote, September 1, 2025.

COMPARISON OF SENATE ENGROSSED AND SUBSTITUTE

While C.S.S.B. 29 may differ from the engrossed in minor or nonsubstantive ways, the following summarizes the substantial differences between the engrossed and committee substitute versions of the bill.

The substitute omits the following provisions of the engrossed:

- a prohibition against the plain meaning of the text of the Business Organizations Code from being supplanted, contravened, or modified by the laws or judicial decisions of any other state;
- for purposes of statutory provisions governing derivative proceedings with respect to limited liability companies, a provision expanding the definition of "member" to include two or more members acting in concert under an informal or formal agreement or understanding with respect to a derivative proceeding;
- with respect to a limited liability company with membership interests listed on a national securities exchange or that has made an affirmative election to be governed by the bill's provisions relating to presumptions for governing persons of certain limited liability companies and has 500 or more members, an authorization for a member to institute or maintain a derivative proceeding if at the time the derivative proceeding is instituted, the member beneficially owns a number of the membership interests sufficient to meet the required ownership threshold to institute a derivative proceeding in the right of the

limited liability company identified in the limited liability company's certificate of formation or company agreement, provided that the required ownership threshold does not exceed three percent of the outstanding membership interests of the limited liability company;

- for purposes of the right of a member or assignee to examine and copy an applicable limited liability company's records for a proper purpose and applicable only to a limited liability company that has a class or series of voting membership interests listed on a national securities exchange or that has made an affirmative election to be governed by the bill's provisions relating to presumptions for governing persons of certain limited liability companies or statutory provisions relating to the expansion or restriction of duties and liabilities, as applicable:
 - a provision restricting the authority to make the written demand to a member or an assignee that has held the membership interest for at least six months immediately preceding the member's or assignee's demand; and
 - a provision establishing that a written demand is not for a proper purpose if the applicable limited liability company reasonably determines that the demand is in connection with an active or pending derivative proceeding in the right of the limited liability company that is or is expected to be instituted or maintained by the applicable member or assignee or the member's or assignee's affiliate or an active or pending civil lawsuit to which the company, or its affiliate, and the applicable member or assignee, or the member's or assignee's affiliate, are or are expected to be adversarial named parties;
- a provision establishing that the bill's provisions relating to the proper purpose of a written demand expressly do not impair any rights of an applicable member or assignee or the member's or assignee's affiliate to obtain discovery of records from the limited liability company in a civil lawsuit described by those provisions or in the derivative proceeding subject to discovery;
- for purposes of statutory provisions governing derivative actions with respect to limited partnerships, a provision expanding the definition of "limited partner" to include two or more limited partners acting in concert under an informal or formal agreement or understanding with respect to a derivative proceeding;
- with respect to a limited partnership with limited partnership interests listed on a national securities exchange or that has made an affirmative election to be governed by the bill's provisions relating to the effect of a partnership agreement or relating to presumptions for general partners and officers of certain limited partnerships and has 500 or more limited partners, an authorization for a limited partner to institute or maintain a derivative proceeding if at the time the derivative proceeding is instituted, the partner beneficially owns a number of limited partnership interests sufficient to meet the required ownership threshold to institute a derivative proceeding in the right of the limited partnership identified in the limited partnership's certificate of formation or partnership agreement, provided that the required ownership threshold does not exceed three percent of the outstanding limited partnership interests of the limited partnership;
- for purposes of the right of a partner or assignee to examine and copy an applicable limited partnership's records for a proper purpose and applicable only to a limited partnership that has a class or series of voting limited partnership interests listed on a national securities exchange or that has made an affirmative election to be governed by the bill's provisions relating to the effect of a partnership agreement or relating to presumptions for general partners and officers of certain limited partnerships:
 - a provision restricting the authority to make the written demand to a limited partner or an assignee that has held the limited partnership interest for at least six months immediately preceding the limited partner's or assignee's demand; and
 - a provision establishing that a written demand is not for a proper purpose if the limited partnership reasonably determines that the demand is in connection with an active or pending derivative proceeding in the right of the limited partnership that is or is expected to be instituted or maintained by the limited partner or assignee or the limited partner's or assignee's affiliate or an active or pending

civil lawsuit to which the partnership, or its affiliate, and the limited partner or assignee, or the limited partner's or assignee's affiliate, are or are expected to be adversarial named parties; and

- a provision establishing that the bill's provisions relating to the right of a partner or assignee of an applicable limited partnership to make an applicable written demand expressly do not impair any rights of the applicable partner or assignee or the limited partner's or assignee's affiliate to obtain discovery of records from the limited partnership in a civil lawsuit described by those provisions relating to the proper purpose or in the derivative proceeding subject to discovery.

The substitute revises the engrossed version's provisions relating to the presumptions for governing persons of certain limited liability companies by removing the applicability of those provisions to a limited liability company that has included in its company agreement a statement affirmatively electing to be governed by those provisions. The substitute includes a provision absent from the engrossed establishing that its provision providing for the applicability of those provisions may not be construed as prohibiting a limited liability company from adopting, in its company agreement, a provision that duplicates the effect of those provisions, regardless of whether the limited liability company has a class or series of voting membership interests listed on a national securities exchange.

The substitute revises the engrossed version's provision relating to the effect of a limited partnership agreement by removing the applicability of that provision to a limited partnership that has included in its governing documents a statement affirmatively electing to be governed by that provision. The substitute establishes that its provision providing for the applicability of that provision may not be construed as prohibiting any partnership from adopting, in its partnership agreement, provisions that duplicate the effect of the bill's provision relating to the effect of a limited partnership agreement, regardless of whether the partnership has a class or series of partnership interests listed on a national securities exchange. The engrossed did not do this.

The substitute revises the engrossed version's provisions relating to the presumptions for general partners and officers of certain limited partnerships by removing the applicability of those provisions to a limited partnership that has included in its governing documents a statement affirmatively electing to be governed by those provisions. The substitute establishes that its provision providing for the applicability of those provisions may not be construed as prohibiting any partnership from adopting, in its partnership agreement, provisions that duplicate the effect of the bill's provisions relating to the presumptions for general partners and officers of certain limited partnerships, regardless of whether the partnership has a class or series of partnership interests listed on a national securities exchange. The engrossed did not do this.

The substitute includes a provision absent from the engrossed that specifies that the following provisions relating to general standards of a partner's conduct apply except as otherwise specified in the partnership agreement:

- the provision establishing that a partner owes to the partnership, the other partners, and a transferee of a deceased partner's partnership interest as designated under applicable state law a duty of loyalty and a duty of care; and
- the requirement for a partner to discharge the partner's duties to the partnership and the other partners under the Business Organizations Code or under the partnership agreement and exercise any rights and powers in the conduct or winding up of the partnership business in good faith and in a manner the partner reasonably believes to be in the best interest of the partnership.

With respect to the requirements for the records of a limited liability company and a limited partnership, as applicable, to not include emails, text messages or similar electronic communications, or information from social media accounts unless the particular email, communication, or social media information effectuates an action by the limited liability

company, the substitute specifies that the requirement applies unless the applicable company agreement expressly states otherwise, whereas the engrossed did not.

While both the engrossed and substitute establish that the bill's provisions relating to standing to bring proceeding and relating to payment of certain expenses with regard to for-profit corporations apply only to a derivative proceeding instituted on or after the bill's effective date, the substitute omits the engrossed version's provisions establishing that the following provisions of the bill apply only to a derivative proceeding instituted on or after the bill's effective date:

- the provision relating to the payment of certain expenses by a limited liability company; and
- the provision relating to the payment of certain expenses by a limited partnership.