

BILL ANALYSIS

S.B. 860
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Business & Industry
Committee Report (Unamended)

BACKGROUND AND PURPOSE

Interested parties have expressed concerns regarding current law not reflecting best practices with regards to corporations and fundamental business transactions. The parties contend that the applicable laws need to be updated and clarified in order to ensure Texas remains a leader in providing businesses with a clear statutory framework reflective of updated corporate practices. S.B. 860 seeks to address these concerns.

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

S.B. 860 amends the Business Organizations Code to revise statutory provisions relating to corporations and fundamental business transactions. The bill defines "owner liability," for purposes of the Business Organizations Code, as personal liability for a liability or other obligation of an organization that is imposed on a person by statute solely because of the person's status as an owner or member of the organization or by a governing document of an organization under a Business Organizations Code provision or the law of the organization's jurisdiction of formation that authorizes the governing document to make one or more specified owners or members of the organization liable in their capacity as owners or members for all or specified liabilities or other obligations of the organization. The bill revises the statutory prohibitions against a domestic entity's merger or conversion and against a plan of exchange being effected if the merger, conversion, or interest exchange results in certain liability for an owner or member of that entity without the owner's or member's consent to base the prohibitions on such an owner or member becoming subject to owner liability, rather than becoming personally liable, without the owner's or member's consent.

S.B. 860 changes the signature authorization for execution of a for-profit corporation's certificate of amendment and of a professional or for-profit corporation's restated certificate of formation, if shares of the corporation have not been issued and the certificate of amendment or restated certificate of formation, as applicable, is adopted by the corporation's board of directors, to authorize the signature of one or more directors, rather than a majority of the directors, on the certificate.

S.B. 860 revises the exemption to the requirement for the ownership interests in a for-profit corporation, real estate investment trust, or professional corporation to be certificated by

clarifying that such certification is not required except to the extent a governing document of the entity or a resolution adopted by the entity's governing authority provides that some or all of the classes or series of the ownership interests are uncertificated or provides that some or all of each of the classes or series of the ownership interests are uncertificated. The bill authorizes a for-profit corporation, real estate investment trust, or professional corporation to have outstanding both certificated and uncertificated ownership interests of the same class or series.

S.B. 860 requires a plan of merger to include, among other required information, the identification of any of the ownership or membership interests of an organization that is a party to the merger that are to remain outstanding rather than converted or exchanged if the organization survives the merger. The bill authorizes any of the terms of a plan of merger, plan of exchange, or plan of conversion to be made dependent on facts ascertainable outside of the plan, as applicable, if the manner in which those facts will operate on the terms of the merger is clearly and expressly stated in the plan. The bill authorizes a plan of merger to include restatements of or amendments and restatements of the governing documents of any surviving organization, including a certificate of amendment or a restated certificate of formation with or without amendments, as applicable.

S.B. 860 establishes that when a merger takes effect a certificate of amendment, a restated certificate of formation without amendment, or a restated certificate of formation containing amendments of a surviving filing entity will supersede the original certificate of formation and each prior amendment or restatement of the certificate of formation, with the restated certificate of formation becoming the effective certificate of formation, and establishes that the ownership or membership interests of each organization that is a party to the merger that are to remain outstanding will remain outstanding as provided in the plan of merger.

S.B. 860 requires a certificate of merger, if such a certificate is required to be filed in connection with a merger other than a short form merger, to include as an alternative to the plan of merger or to a statement certifying the amendments or changes to the certificate of formation of any filing entity that is a party to the merger, a statement that amendments or changes are being made to the certificate of formation of any filing entity that is a party to the merger as set forth in a restated certificate of formation containing amendments or a certificate of amendment attached to the certificate of merger. The bill removes the specification of a signature on the plan of merger or exchange that may be certified by a statement included in a filed certificate of merger or exchange as being on file at the principal place of business of each surviving, acquiring, or new domestic entity or non-code organization. The bill authorizes a certificate of merger to include as an attachment a certificate of amendment, a restated certificate of formation without amendment, or a restated certificate of formation containing amendments for any filing entity that is a party to the merger. The bill also removes the specification of a signature on the plan of conversion that may be certified by a statement in a filed certificate of conversion as being on file at the principal place of business of the converting entity or certified that it will be on file after the conversion at the principal place of business of the converted entity.

S.B. 860 entitles an owner of an ownership interest in a domestic entity subject to dissenters' rights to dissent from a merger effected under a plan of merger that, under certain circumstances, does not require approval by the shareholders of the corporation if, in that merger, the shares of the shareholders are converted or exchanged. The bill excludes a corporation that is party to such a merger in which a plan of merger does not require shareholder approval from the application of the provision prohibiting an owner's dissent from a plan of merger or conversion in which there is a single surviving or new domestic entity or non-code organization, or from a plan of exchange, under certain conditions.

S.B. 860 requires the responsible organization, if a corporation effects a merger under a plan of merger that does not require shareholder approval, to notify those shareholders who have a right to dissent to the plan of merger of their rights not later than the 10th day after the merger's effective date and sets out related provisions for the content and delivery of such notice. The bill

adds as an alternative to the deadlines by which an owner, in order to perfect the owner's rights of dissent and appraisal, must give to the responsible organization a demand in writing for payment of the fair value of the ownership interests for which the rights of dissent and appraisal are sought, a deadline of not later than the 20th day after the date the responsible organization gives to the shareholder the required notice of the right of dissent and appraisal or the date of the consummation of the tender or exchange offer for all of the corporation's outstanding shares on the terms provided in the plan of merger that would be entitled to vote on the approval of the plan of merger, whichever is later, if the action is a merger effected under a plan of merger that does not required approval by the corporation's shareholders.

S.B. 860 authorizes a certificate of termination, a certificate of reinstatement, a certificate of amendment to cancel an event requiring winding up, or a restated certificate of formation that contains an amendment to cancel an event requiring winding up to be signed by one of the organizers or one of the directors if the winding up, the reinstatement, or the cancellation of an event requiring winding up was authorized by the organizers or the board of directors, as applicable.

S.B. 860 establishes that statutory provisions establishing procedures for adoption of an amendment to a certificate of formation do not affect the authority of a domestic for-profit corporation's shareholders to consent in writing to the cancellation of an event requiring winding up or the authority of the organizers of a domestic for-profit corporation to adopt a resolution to cancel such an event. The bill authorizes the board of directors of a domestic for-profit corporation that has outstanding shares to adopt without shareholder approval an amendment to the corporation's certificate of formation to change the word or abbreviation in its corporate name required by law to identify the type of entity to a different word or abbreviation as provided by law. The bill provides, as an alternative to the procedures for a domestic for-profit corporation's adoption of a restated certificate of formation, for the shareholders to give written consent, or for the organizers to adopt a resolution, to authorize a restated certificate of formation that contains an amendment to cancel an event requiring winding up.

S.B. 860 requires any limit on the term or duration of a domestic for-profit corporation's shareholders' agreement to be set forth in the agreement, removes a provision establishing the validity of such a shareholders' agreement for a period of 10 years, and establishes that a shareholders' agreement that was in effect before September 1, 2015, remains in effect for 10 years, unless the agreement provides otherwise. The bill authorizes the amount of the consideration to be received for shares of a domestic for-profit corporation to be determined by the board of directors, a plan of conversion, or plan of merger, as applicable, by means of approval of a formula to determine that amount.

S.B. 860 authorizes a domestic for-profit corporation's bylaws to require one or both of the following: that, when soliciting proxies or consents with respect to an election of directors, the corporation include in both its proxy statement and any form of its proxy or consent one or more individuals nominated by a shareholder in addition to individuals nominated by the board of directors or that the corporation reimburse expenses incurred by a shareholder in soliciting proxies or consents with respect to an election of directors so long as the reimbursement requirement does not apply to any election for which the record date precedes that requirement's adoption.

S.B. 860 sets out conditions under which a plan of merger is not required to be approved by a corporation's shareholders, unless such approval is required by the corporation's certificate of formation, and specifies that these provisions apply only to a domestic for-profit corporation that is a party to the merger and whose shares are, immediately before the date its board of directors approves the plan of merger, either listed on a national securities exchange or held of record by at least 2,000 shareholders.

S.B. 860 removes the specification that the authority to adopt a restated certificate of formation

is vested in a domestic nonprofit corporation's board of directors, instead vesting that authority in the domestic nonprofit corporation, and provides as an alternative to the procedures for a domestic nonprofit corporation's adoption of such a certificate for the corporation's members to give written consent, or for the corporation's organizers to adopt a resolution, to authorize a restated certificate of formation that contains an amendment to cancel an event requiring winding up.

S.B. 860 establishes that, if a domestic nonprofit corporation has no members or has no members with voting rights and the corporation does not hold any assets and has not solicited any assets or otherwise engaged in activities, the vote required for approval of a fundamental action consisting of an amendment to the certificate of formation to cancel an event requiring winding up or for approval of certain other fundamental actions is the affirmative vote of a majority of either the organizers or of the directors in office.

S.B. 860 makes the statutory requirement for a domestic nonprofit corporation with no members or with no members with voting rights to approve a voluntary winding up, a reinstatement, a cancellation of an event requiring winding up, a revocation of a voluntary decision to wind up, or a distribution plan by means of a resolution adopted by an affirmative vote of a majority of the corporation's board of directors applicable only to a corporation that holds any assets or has solicited any assets or otherwise engaged in activities. The bill sets out the corresponding requirement for approval of such actions by a corporation that does not hold any assets and has not solicited any assets or otherwise engaged in activities to require a majority of either the corporation's organizers or its board of directors to adopt such a resolution by an affirmative vote of that majority.

S.B. 860 sets out provisions relating to the ratification of defective corporate acts or shares. The bill establishes that a defective corporate act or putative shares are not void or voidable solely as a result of a failure of authorization if the act or shares are ratified in accordance with these provisions or validated by the district court. The bill requires the board of directors of the domestic for-profit corporation, in order to ratify a defective corporate act, to adopt a resolution stating the defective corporate act to be ratified; the time of the defective corporate act; if the defective corporate act involved the issuance of putative shares, the number and type of putative shares issued and the date or dates on which the putative shares were purportedly issued; the nature of the failure of authorization with respect to the defective corporate act to be ratified; and that the board of directors approves the ratification of the defective corporate act. The bill authorizes the resolution to also state that, notwithstanding the adoption of the resolution by the shareholders, the board of directors at any time before the validation effective time may abandon the resolution without further shareholder action.

S.B. 860 sets out provisions establishing quorum and voting requirements for the adoption of such a resolution and provisions relating to the requirement for shareholder adoption of the resolution, notice requirements for a resolution submitted for shareholder approval, the shareholder meeting and its quorum and voting requirements, and requirements for the filing of a certificate of validation. The bill prohibits each defective corporate act set forth in the adopted resolution, unless determined otherwise in an action regarding the act's validity, on or after the validation effective time, from being considered void or voidable as a result of a failure of authorization identified in the resolution and requires the effect to be retroactive to the time of the defective corporate act. The bill prohibits each putative share or fraction of a putative share issued or purportedly issued pursuant to the defective corporate act and identified in the resolution, unless determined otherwise in an action regarding the act's validity, on or after the validation effective time, from being considered void or voidable as a result of a failure of authorization identified in the resolution and, in the absence of any failure of authorization not ratified, specifies that such shares or fractions are considered to be an identical share or fraction of a share outstanding as of the time it was purportedly issued. The bill requires shareholder notification regarding the resolution's adoption and applicable notice requirements.

S.B. 860 establishes that, in the absence of actual fraud in the transaction, the judgment of the board of directors of a domestic for-profit corporation that shares of the corporation are valid shares or putative shares is conclusive, unless otherwise determined by the district court in a proceeding regarding the validity of defective corporate acts and shares. The bill prohibits ratification or validation of an act or transaction from being considered to be the exclusive means of ratifying or validating any act or transaction taken by or on behalf of the corporation, including any defective corporate act or any issuance of putative shares or other shares. The bill establishes that the absence or failure of ratification or of validation of an act or transaction may not, of itself, affect the validity or effectiveness of any act or transaction or the issuance of any shares properly ratified under common law or otherwise and does not create a presumption that any such act or transaction is or was a defective corporate act or that those shares are void or voidable.

S.B. 860 authorizes the corporation, any successor entity to the corporation, any member of the corporation's board of directors, and any record or beneficial holder of valid shares or putative shares of the corporation, any record or beneficial holder of valid shares or putative shares as of the time a defective corporate act was ratified, or any other person claiming to be substantially and adversely affected by a ratification to bring an action regarding the validity of defective corporate acts and shares. The bill provides exclusive jurisdiction to hear and determine any action brought under these provisions to the district court in the county in which the corporation's principal office in Texas is located or, if the corporation does not have a principal office in Texas, the county in which the corporation's registered office in Texas is located; sets out provisions relating to the proceedings; and establishes a statute of limitations prohibiting specified actions from being brought after the expiration of the 120th day of the validation effective time.

EFFECTIVE DATE

September 1, 2015.