

## **BILL ANALYSIS**

S.B. 1971  
By: Hancock  
Business & Industry  
Committee Report (Unamended)

### **BACKGROUND AND PURPOSE**

It has been noted that since its adoption in 2003, the Business Organizations Code has undergone a number of technical and substantive revisions. There have been calls for that code to be revised once again, particularly in light of the fact that the Delaware laws on which certain provisions of the code were modeled were themselves recently revised. S.B. 1971 seeks to revise the Business Organizations Code with respect to domestic corporations and other domestic entities.

### **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. 1971 amends the Business Organizations Code to revise provisions relating to a written voting agreement entered into to provide the manner of voting of the ownership interests of a domestic entity that is not set forth in the entity's governing documents. The bill authorizes such an agreement to be deposited with the entity at the entity's principal executive office or registered office. The bill removes and repeals provisions providing for the specific enforceability of such an agreement. The bill makes such an agreement instead specifically enforceable against the owner of an ownership interest that is the subject of the agreement if the owner executes the agreement or acknowledges in writing that the owner or the ownership interest is bound by the agreement and sets out provisions providing for the specific enforceability of the agreement against any subsequent owner of the ownership interest subject to the agreement. The bill clarifies that provisions relating to voting agreements do not impair the right of the domestic entity to treat an owner of record as entitled to vote the ownership interest standing in the owner's name or to accept that owner's vote of the ownership interest.

S.B. 1971 revises provisions relating to the applicability of the exception to shareholder approval for a plan of merger for a corporation party to a merger with shares that are, immediately before the date its board of directors approves the plan, either listed on a national securities exchange or held of record by at least 2,000 shareholders if certain conditions are met to include any such corporation that has a class or series of shares that are so listed or held. The bill revises the requisite condition relating to the consummation of an offer by an organization by specifying that the offer may be conditioned on the tender of a minimum number or percentage of shares of the corporation or of any class or series of shares of the corporation and may exclude any excluded shares and the organization may consummate separate offers for separate classes or series of shares. The bill provides for definitions of "excluded shares," "qualified affiliate," and "rollover shares" for purposes of the exception.

S.B. 1971 prohibits 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 by an owner of an ownership interest in a domestic entity subject to dissenters' rights, if, with respect to a plan of merger that does not require shareholder approval, the ownership interest, or a depository receipt in respect of the ownership interest, held by the owner is part of a class or series of ownership interests, or depository receipts in respect of ownership interests, that, immediately before the date the board of directors of the corporation that issued the ownership interest held, directly or indirectly, by the owner approves the plan of merger, are either listed on a national securities exchange or held of record by at least 2,000 owners. The bill revises that prohibition with respect to a plan of merger, conversion, or exchange, as appropriate, the terms of which require an owner to accept for the owner's ownership interest any consideration other than cash instead of fractional ownership interests the owner would otherwise be entitled to receive or certain combinations of cash and ownership interests to clarify that the prohibition applies also with respect to fractional depository receipts in respect of ownership interests.

S.B. 1971 provides an exception to the requirement for a notice of redemption of redeemable shares of a for-profit corporation to be sent to each holder of redeemable shares being called not later than the 21st day or earlier than the 60th day before the date set for redemption based on another deadline being provided by the terms of the class or series of shares contained in the certificate of formation.

S.B. 1971 expands the definition of "failure of authorization" for purposes of provisions governing the ratification of defective for-profit corporate acts or shares to include the failure to authorize or effect an act or transaction in compliance with the disclosure set forth in any proxy or consent solicitation statement. The bill revises the definition of "defective corporate act" to include any act or transaction purportedly taken by or on behalf of the corporation that meets certain other conditions and is taken without regard to the failure of authorization identified in the ratification of the act. The bill provides an exception to shareholder approval of a ratified defective corporate act if, as of the record date for determining the shareholders entitled to vote on the ratification, there are no valid shares outstanding and entitled to vote on the ratification, regardless of whether as of that record date there exist any putative shares. The bill requires the notice for the shareholder meeting for purposes of approving the ratification of a defective corporate act that involved the establishment of a putative record date to be given at least 20 days before the date of the meeting to each holder of record of valid shares and putative shares, regardless of whether the shares are voting or nonvoting, other than to a holder whose identity or address cannot be ascertained from the corporation's records, as of that putative record date. The bill establishes that the meeting notice required to be provided to each holder of record of valid shares and putative shares is considered given if the corporation in question has a class of stock listed on a national securities exchange and the information contained in the notice is disclosed in a document publicly filed by the corporation with the federal Securities and Exchange Commission. The bill defines "putative record date" as a record date established in connection with any defective corporate act for a meeting of or action by shareholders or any other purpose.

S.B. 1971 provides for third-party preparation of the alphabetical list of the shareholders entitled to vote at a shareholder meeting or at any adjournment of the meeting. The bill clarifies the applicability of the requirement that a notice for uncertificated ownership interest in a public benefit corporation state conspicuously that the corporation is a public benefit corporation governed by state law pertaining to certificates representing ownership interest.

S.B. 1971 clarifies that, with respect to a nonprofit corporation, the term "director" means a person who is a member of the board of directors, regardless of the name or title used to designate the person, and does not include a person designated as a director of the corporation, or as an ex officio, honorary, or other type of director of the corporation if the person is not entitled to vote as a director. The bill revises the provision authorizing a meeting of the members of a nonprofit corporation, the corporation's board of directors, or any committee designated by the

board to be held by means of a remote electronic communications system to remove conditions on that authority and to clarify that such a meeting may be held by means of a conference telephone or similar communications equipment, another suitable electronic communications system, or any combination of those means, in accordance with applicable state law.

S.B. 1971 removes provisions providing for the designation of ex officio members of a nonprofit corporation's board of directors. The bill authorizes the certificate of formation or bylaws of such a corporation instead to provide that a person who is not a director is entitled to receive notice of and to attend board meetings. The bill establishes that, by having those rights, the person does not have the authority, duties, or liabilities of a director and is not a governing person of the corporation.

S.B. 1971 repeals Sections 6.252(d) and (e), Business Organizations Code.

**EFFECTIVE DATE**

September 1, 2019.