

BILL ANALYSIS

S.B. 1523
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Business & Industry
Committee Report (Unamended)

BACKGROUND AND PURPOSE

The State Bar of Texas and Texas Business Law Foundation routinely suggest updates to the Business Organizations Code in order to ensure that Texas business law is in line with other states. Texas law permits the creation and use of "series" entities in Texas limited liability companies, but there have been calls to update the law to provide for the formation of a registered series, which is a more formally-created type of series requiring a more complete and detailed creation-filing with the secretary of state. The existence of a registered series can be verified by checking the public records of the secretary of state. The establishment of registered series will improve the functionality, attractiveness, and transparency of series use by limited liability companies. S.B. 1523 seeks to provide the option of registering a series with the state and to rename an existing type of series as a protected series.

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. 1523 amends the Business Organizations Code to provide for the formation of a registered series of a limited liability company through the filing of a certificate of registered series with the secretary of state. The bill designates a series that is established under existing law without filing a certificate of registered series as a protected series, provided it meets applicable requirements for a series relating to the enforceability of obligations and expenses against assets. The bill specifies that statutory provisions governing series of limited liability companies apply to protected series and registered series. However, nothing in those provisions may be construed to limit the freedom to contract to a series that is not a protected series or a registered series.

S.B. 1523 sets out provisions relating to certain filings made by or for a registered series, provides requirements for the name of a registered series, establishes procedures for mergers and for the conversion of a protected or registered series to the other type of series, and makes certain other changes relating to the regulation of series.

Registered Series Filings

S.B. 1523 sets out provisions relating to the filing of a certificate of registered series that do the following:

- prescribe the required content of the certificate and authorize the inclusion of any other provisions not inconsistent with applicable law;
- provide for the certificate to be executed by the limited liability company and filed with the secretary of state in accordance with specified law and to take effect as a filing instrument;
- establish that the certificate is not an amendment to the certificate of formation of the limited liability company;
- require the certificate to be filed simultaneously with a certificate of conversion or certificate of merger if a new registered series is established under a plan of conversion or plan of merger; and
- establish that the formation and existence of a registered series that results from a conversion or merger takes effect and commences on the effectiveness of the conversion or merger.

S.B. 1523 establishes that a certificate of registered series is amended by filing a certificate of amendment and provides for the manner in which an amendment is adopted. The bill, with respect to the certificate of amendment, does the following:

- sets out the information that the certificate of amendment is required to state;
- provides for a required amendment of a certificate of registered series that contains a false statement or otherwise becomes false in any material respect; and
- provides for the certificate to be executed by the registered series and filed with the secretary of state in accordance with specified law and to take effect as a filing instrument.

S.B. 1523 requires a certificate of termination to be filed on completion of the winding up of a registered series. The bill sets out the required content of the certificate and provides for the certificate to be executed by the registered series and filed with the secretary of state in accordance with specified law and to take effect as a filing instrument. The bill prohibits the secretary of state from issuing a certificate of fact confirming the existence of a registered series if the limited liability company has ceased to be in existence.

S.B. 1523 prescribes the fees for filing a certificate of registered series, certificate of amendment, or certificate of termination under these provisions. For a filing by or for a registered series when no other fee has been provided, the secretary of state is required to impose the same fee as the filing fee for a similar instrument under the law applicable to filings in general.

Registered Series Name Requirements

S.B. 1523 requires the name of each registered series in a series' certificate of registered series to contain the name of the limited liability company, contain the phrase "registered series" or the abbreviation "RS" or "R.S." of that phrase, and comply with other applicable requirements of statutory provisions governing the names of entities. The bill revises those provisions as follows:

- requires the secretary of state to deliver a notice to a registered series that files a certificate of registered series that the filing of the certificate does not authorize the use of a name in Texas in violation of the rights of another under applicable federal, state, or common law;
- authorizes a protected or registered series to transact business in Texas under an assumed name by filing an assumed name certificate;
- prohibits a registered series from having a name that contains any word or phrase that indicates or implies that the series is engaged in a business that it is not authorized by law to pursue;
- subjects a registered series to requirements regarding distinguishable names and to prohibitions against using certain names associated with the lottery or veterans; and

- authorizes the secretary of state to reserve and register a name only if the name is distinguishable in the secretary of state's records from the name of an existing registered series.

Conversion of Series

S.B. 1523 establishes a process for a registered series of a domestic limited liability company to convert to a protected series or for a protected series of such a company to convert to a registered series. For a conversion to a protected series, a certificate of conversion must be filed with the secretary of state, and for a conversion to a registered series, both a certificate of conversion and a certificate of registered series must be filed simultaneously. The bill clarifies that an existing registered series may not become a protected series except as provided by these provisions of the bill.

S.B. 1523 authorizes a conversion of a series of a domestic limited liability company to a converted series of the company by adopting a plan of conversion. The bill, with respect to the conversion, does the following:

- provides for the manner in which a plan of conversion is adopted;
- prohibits a converting series from converting if a member associated with the converting series, as a result of the conversion, would become subject to liability under the company agreement as a member, without that member's consent, for a liability or other obligation of the converted series for which the member is not liable under the company agreement as a member of the converting series before the conversion;
- establishes that, at the time a conversion takes effect, each member of the converting series has, unless otherwise agreed to by that member, a membership interest in and is the member of the converted series;
- requires the plan of conversion to be in writing, sets out information that is required to be included in the plan, and authorizes certain components to be included by an attachment or exhibit to the plan; and
- authorizes any of the terms of the plan of conversion to be made dependent on a fact ascertainable outside of the plan if the manner in which those facts will operate on the terms of the conversion is clearly and expressly stated in the plan.

S.B. 1523 establishes that, unless otherwise agreed, a conversion of a converting series does not require the limited liability company or the converting series to wind up the series' affairs or to pay the series' liabilities and distribute its assets and does not constitute an event requiring winding up of the company or the converting series.

S.B. 1523 provides for the effects of a conversion. The bill requires the certificate of conversion, after the adoption of the requisite plan, to be signed by the converting series and to include a statement certifying specified information. The bill requires the certificate of conversion to be filed with the secretary of state in accordance with applicable provisions of the bill. The bill authorizes a company agreement to prohibit the conversion of a registered or protected series of the company.

Mergers

S.B. 1523 authorizes one or more merging series of the same limited liability company to affect a merger as provided by an approved plan of merger and requires the plan of merger to provide for one or more surviving or new protected or registered series. The bill sets out provisions relating to the plan of merger, including provisions that provide for the following:

- the manner in which a plan is approved;
- the content of the plan, including the generally required content and content that is required only if more than one series is to survive or to be created by the plan of merger;

- the authorization for plan terms to be made dependent on facts ascertainable outside of the plan if the manner in which those facts will operate on the terms of the merger is clearly and expressly stated in the plan; and
- the termination or amendment of a plan.

The bill prohibits a merging series from merging if a member of that merging series that is a party to the merger will, as a result of the merger, become subject to liability under the company agreement as a member, without that member's consent, for a liability or other obligation of any other person for which the member is not liable under the company agreement as a member of that merging series before the merger.

S.B. 1523 requires a certificate of merger, after approval of the plan, to be signed by each merging series that is a party to the merger and include a statement certifying specified information if a registered series is a party to the merger or if a new registered series is to be created by the merger. The bill sets out certain other provisions relating to a certificate of merger, including a requirement to file it with the secretary of state.

S.B. 1523 also sets out provisions relating to the effects of the merger, including provisions that provide for a proportional interest in property, liability, and obligation for each surviving and new series if the plan of merger does not provide for an allocation and provisions excluding the merger from consideration as a winding up event. The bill authorizes a company agreement to provide that a protected series or registered series company does not have the power to merge.

Other Changes

S.B. 1523 clarifies that a protected or registered series may carry on any business, purpose, or activity, whether or not for profit, that is not prohibited by applicable law and that the merger and conversion procedures established by the bill are the only means by which a series may merge or convert. The bill specifies the manner in which the provisions of a company agreement that govern a protected or registered series may be amended.

S.B. 1523 revises the exceptions to the requirements regarding the enforceability of obligations and expenses of a series against assets. The bill establishes that a company agreement does not need to use the term "protected" or "registered" or refer to the statute section establishing those requirements when referencing a series.

S.B. 1523 clarifies that the notice of the limitation on liabilities of a protected or registered series that must be included in the limited liability company's certificate of formation does not need to use the term "protected" or "registered" when referencing the series or to include a reference to the statute section establishing the limitation. The bill establishes that the fact that the certificate of formation contains the notice of the limitation on liabilities of a protected or registered series is notice of that limitation on liabilities of a protected or registered series.

S.B. 1523 authorizes a member or manager associated with a protected or registered series or a member or manager of the limited liability company to agree to be obligated personally for any or all of the debts, obligations, and liabilities of one or more protected series or registered series under the company agreement or another agreement. The bill includes authorization for a company agreement to provide for the taking of certain actions without the vote or approval of any member or manager or class or group of members or managers.

S.B. 1523 authorizes the determination of the amount of the liabilities or the value of the assets of a protected or registered series to be based on the following:

- certain financial statements and financial information prepared on a specified basis;
- projections, forecasts, or other forward-looking information relating to the future economic performance, financial condition, or liquidity of the series that is reasonable under the circumstances;

- a fair valuation or information from any other method that is reasonable under the circumstances;
- a combination of such a statement, valuation, or information.

This provision does not apply to the computation of any tax imposed on the series under state law.

S.B. 1523 requires an action alleging that a distribution made by a limited liability company with respect to a protected or registered series was made in violation of applicable law to be commenced not later than the second anniversary of the date of the distribution.

S.B. 1523 establishes that, with certain exceptions, a registered series terminates on the completion of the winding up of the business and affairs of the registered series in accordance with applicable law and the effectiveness of the filing with the secretary of state of a certificate of termination for the registered series.

S.B. 1523 specifies that the following provisions apply to a registered series and the associated members and managers of the registered series:

- provisions relating to the reinstatement of a terminated entity;
- provisions relating to the involuntary termination of a filing entity by the secretary of state; and
- a provision specifying that the existence of a filing entity terminates on the filing of a certificate of termination with the filing officer.

S.B. 1523 revises the definition of "person" under the Business Organizations Code to specify that the series included under that definition are protected or registered series. The bill clarifies the series that are subject to statutory provisions relating to service of process on series of a domestic limited liability company or a series of a foreign entity.

S.B. 1523 establishes that the reinstatement of a terminated limited liability company automatically reinstates any protected or registered series that terminated because of the company's termination. The bill requires a filing instrument of a registered series to be signed by an authorized officer, manager, or member of the series.

S.B. 1523 prohibits statutory provisions governing protected or registered series from being waived or modified in a company agreement, with specified exceptions.

S.B. 1523 amends the Business & Commerce Code to provide for the application of the Assumed Business or Professional Name Act to registered series. The bill establishes that the act does not require a registered series or its members to file a certificate to conduct business or render a professional service in Texas under the name of the registered series as stated in the series' certificate of registered series. The bill requires a registered series to file an assumed name certificate with the secretary of state under certain circumstances and specifies the names that must be stated on an assumed name certificate if the registrant is a registered series or if the registrant is a limited liability company that is filing under an assumed name used by a protected series of the company.

S.B. 1523 revises the definition of "person" under the Business & Commerce Code to specify that the series included under that definition are protected or registered series. The bill clarifies the series that are considered registered organizations for purposes of Uniform Commercial Code provisions governing secured transactions.

EFFECTIVE DATE

June 1, 2022.