

- SUBJECT:** Revising requirements for business entities and associations
- COMMITTEE:** Business and Industry — favorable, without amendment
- VOTE:** 8 ayes — Deshotel, Elkins, England, Gattis, Giddings, S. Miller, Quintanilla, S. Turner
- 0 nays
- 3 absent — Christian, Keffer, Orr
- WITNESSES:** For — Leon Lebowitz, Daryl Robertson, Texas Business Law Foundation
- Against — None
- On — (*Registered, but did not testify*: Carmen Flores, Texas Secretary of State Business & Public Filings)
- BACKGROUND:** The 78th Legislature in 2003 enacted HB 1156 by Giddings, which created the Business Organizations Code (BOC). The BOC was a joint project of the Business Law Section of the State Bar of Texas and the Secretary of State's Office, with editing and drafting assistance from the Texas Legislative Council.
- The BOC codified provisions of prior law found in the following:
- Texas Business Corporation Act (TBCA);
  - Texas Non-Profit Corporation Act (TNPCA);
  - Texas Miscellaneous Corporation Laws Act (TMCLA);
  - Texas Limited Liability Company Act (TLLCA);
  - Texas Revised Limited Partnership Act (TRLPA);
  - Texas Real Estate Investment Trust Act (TREITA);
  - Texas Uniform Unincorporated Nonprofit Associations Act (TUUNAA);
  - Texas Professional Corporation Act (TPCA);
  - Texas Professional Associations Act (TPAA);
  - Texas Revised Partnership Act (TRPA);
  - Cooperative Associations Act (CAA); and
  - other existing provisions of statutes governing domestic entities.

In 2005, the 79th Legislature enacted HB 1319 by Giddings, which made technical amendments to the BOC and incorporated changes made to prior source laws adopted by the 78th Legislature in 2003. In 2007, the 80th Legislature enacted HB 1737 by Giddings that made additional technical amendments to the BOC and made some additional substantive changes.

The BOC took effect January 1, 2006. It does not apply to an entity that existed before January 1, 2006, unless that entity expressly elects to adopt the BOC as its governing statute. Entities formed on or after January 1, 2006, are governed by the BOC in lieu of prior law.

As of January 1, 2010, the previous governing statutes for specific business entities and corporations will be repealed, and the BOC will apply to all entities, whether or not they were formed before or after January 1, 2006.

DIGEST:

HB 2235 would amend the Business Organizations Code largely to make technical amendments to correct errors, eliminate certain redundant or antiquated provisions, fill gaps in coverage, conform the code to language of source statutes where it unintentionally deviates, and make clarifying amendments related to the transition provisions for electing governance by the Business Organizations Code.

The bill also would include a number of substantive amendments affecting the following areas.

**Series limited liability companies.** HB 2235 would amend Business Organizations Code, ch. 101, adding subchapter m to allow for the establishment of one or more series of members, managers, membership interests, or assets that would have separate rights, powers, or duties with respect to a specific property, obligations, or profits or losses or would have a separate business purpose or investment objective. The bill also would add sec. 9.005 to specify the types of information that a foreign limited liability company was required to provide in a filing for a series limited liability company.

**Conversion and continuation.** HB 2235 would add Business Organizations Code, sec. 10.1025 to authorize a converting entity to continue its existing organizational form and jurisdiction of formation after its conversion. The provision would apply only to a domestic entity converting into a non-U.S. entity or a non-U.S. entity converting to a

domestic entity. Other provisions would provide that the laws of both jurisdictions would apply to the converted entity.

**Margins tax changes.** The bill would amend Business Organizations Code, sec. 11.101 (b) to reflect that changes in the margins tax applied to more entities than corporations and limited liability corporations. The revision would require that all entities, other than non-profit corporations, provide a comptroller's certificate showing that all taxes had been paid to file a certificate of termination with the secretary of state.

**Emergency provisions.** HB 2235 would amend Business Organizations Code, ch. 3, adding subchapter f to authorize a business entity to adopt emergency provisions that would be triggered by a catastrophic event and when a majority of the governing body cannot meet because of the emergency. The emergency provisions would be allowed only during the emergency and would be binding on the business entity as long as the measures were taken in good faith.

In addition, HB 2235 would:

- prohibit issuance of bearer shares or scrip;
- eliminate current prohibitions against using the Business Organizations Code to form a railroad company;
- allow dissenting holders of ownership rights to file a petition for an appraisal of the business entity's assets; and
- provide that mere ownership of real or personal property would not trigger a requirement that a foreign business entity be required to register with the secretary of state under the Business Organizations Code.

The bill would take effect September 1, 2009.

**SUPPORTERS  
SAY:**

HB 2235 would be the final review and revision before the Business Organizations Code (BOC) will apply to all business entities and corporations in Texas. As of January 1, 2010, the distinction between entities formed before or after January 1, 2006, will come to an end, and all would be covered by this uniform statute. It is critical that the Legislature adopt these needed changes before the transition date to allow businesses to operate under uniform standards.

Adoption of the BOC revisions would continue efforts to modernize business regulation and would reflect changes in how corporations and other entities actually function. Businesses should have the flexibility to adopt innovative practices. It would help Texas economic development efforts to remain competitive and aggressive. The BOC would match or exceed benefits offered to those organizing corporations or other business entities, especially those available in Delaware. Already, other states view the Texas BOC as an example of model legislation, and HB 2235 would improve what is considered an excellent legal standard.

This is the sixth consecutive session in which the Legislature has considered this legislation. During each interim, diverse groups have reviewed and revised it, creating legislation that is both comprehensive and more favorable to all Texans, not simply to a particular group. The length of time over which this legislation has evolved and the lack of systematic opposition offers assurance as to its quality and fairness.

HB 2235 would help provide transparency and clarity in both business operations and the registration process. The bill would not eliminate any of the stringent and necessary requirements to form corporations or other business entities.

HB 2235 also continues the effort to reduce greatly the confusion and time required to research the business laws. This simplified approach would make it easier for people other than lawyers to create business entities. By simplifying filing procedures, the bill would reduce filing mistakes that may cause the secretary of state to reject documents. This would reduce reliance on the secretary of state's resources for help in creating new entities and would cut down on the inquiries that the secretary receives.

Experience has vindicated the "hub and spoke" structure originally developed for the BOC. Common requirements can be located in the centralized portion of the code, and the provisions addressing the idiosyncrasies of the different entities are found in the other sections of the code. In cases where there has been no consensus on changes or revisions, the sections from existing statutes have been incorporated in the BOC.

Any legal code or statute can be gamed by those with bad intentions. HB 2235 would help strike a balance between the need to modernize business organizations and to provide transparency and accountability in business operations.

HB 2235 would provide workable solutions to dilemmas raised when dealing with the threats from terrorists and natural disasters. The provision that would prohibit business entities from issuing bearer bonds and scrip would help curb use of these financial instruments in money laundering by international criminals and terrorists. The bill also would allow emergency procedures to respond to catastrophes such as the 9/11 destruction of the World Trade Centers or Hurricanes Katrina and Ike.

OPPONENTS  
SAY:

Encouraging more aggressive efforts by corporations to adopt more complex organization could make financial operations even more opaque to regulators and stockholders. Corporations such as Enron were able to exploit the old business code regulations to construct schemes to hide financial improprieties. Allowing for more flexibility under HB 2235 could encourage other business enterprises to push the envelope and could result in more questionable and financially disastrous business decisions.

NOTES:

The companion bill, SB 1442 by Fraser, passed the Senate by 31-0 on April 9 on the Local and Uncontested Calendar and was reported favorably, without amendment, by the House Business and Industry Committee on April 27, making it eligible to be considered in lieu of HB 2235.