

BILL ANALYSIS

Senate Research Center

S.B. 1203
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Business & Commerce
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Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

This bill amends provisions of the Business Organizations Code (Code) relating to domestic entities, corporations, partnerships, and limited liability companies.

The Code, enacted by the legislature in 2003, was a joint project of the Business Law Section of the State Bar of Texas and the Office of the Texas Secretary of State. The Texas Legislative Council also assisted in the editing and drafting.

To keep it current, uniform, and competitive with other leading business states, the Code requires continual updating and has been amended every regular legislative session since its initial codification. S.B. 1203 provides numerous critical updates to the Code, both substantive and technical, which are derived from interim working sessions of the Business Law Section Code Committee in coordination with the Secretary of State Business Filings Division.

S.B. 1203 contains enhancements to the operating capabilities of business entities during an emergency or disaster. The provisions in part provide for the temporary suspension of certain procedural requirements for meetings, so businesses do not grind to a halt during such times.

S.B. 1203 advances entity management functions. For LLCs, the designation process for a manager or member management format is improved. Also, entity governing documents may require the use of Texas judicial venues for internal disputes.

The bill provides procedural modifications that will help streamline operations. Included are revisions that clarify the use and meaning of unanimous and non-unanimous consents. Shareholder meeting rules are also updated to facilitate virtual participation. For entity distributions, a flexible and enhanced process for determining financial projections and value is provided. Winding-down procedures are addressed to more definitively handle final claims against a terminating entity.

Finally, regulatory and filing requirements administered by the Secretary of State Business Filings Division are improved and simplified.

S.B. 1203 amends current law relating to business entities.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Sections 1.002(33), (49), and (53), Business Organizations Code, to redefine "general partner," "limited partner," and "member" for purposes of the Business Organizations Code.

SECTION 2. Amends Subchapter B, Chapter 2, Business Organizations Code, by adding Section 2.115, as follows:

Sec. 2.115. CHOICE OF FORUM PROVISIONS. (a) Defines "internal entity claim."

(b) Authorizes the governing documents of a domestic entity to require, consistent with applicable state and federal jurisdictional requirements, that any internal entity claims be brought only in a court in Texas.

SECTION 3. Amends Section 3.010, Business Organizations Code, to require that the certificate of formation of a limited liability company state, in addition to the information required by Section 3.005 (Certificate of Formation), whether the limited liability company initially has or does not have managers, rather than whether the limited liability company will or will not have managers. Makes conforming changes.

SECTION 4. Amends Section 3.060(a), Business Organizations Code, to authorize a restated certificate of formation for a for-profit corporation or professional corporation to omit any prior statements regarding the number of directors and the names and addresses of the persons serving as directors and, at the corporation's election, to insert a statement regarding the current number of directors and the names and addresses of the persons currently serving as directors, rather than to update the current number of directors and the names and addresses of the persons serving as directors.

SECTION 5. Amends Section 3.061(a), Business Organizations Code, to authorize a restated certificate of formation for a nonprofit corporation to omit any prior statements regarding the number of directors and the names and addresses of the persons serving as directors and, at the corporation's election, to insert a statement regarding the current number of directors and the names and addresses of the persons currently serving as directors, rather than to update the current number of directors and the names and addresses of the persons serving as directors.

SECTION 6. Amends Section 3.0611, Business Organizations Code, as follows:

Sec. 3.0611. SUPPLEMENTAL PROVISIONS FOR RESTATED CERTIFICATE OF FORMATION FOR LIMITED LIABILITY COMPANY. Authorizes a restated certificate of formation for a limited liability company, in addition to the provisions authorized or required by Section 3.059 (Restated Certificate of Formation), to omit any prior statements regarding whether the company has or does not have managers and the names and addresses of managers or members and, at the company's election, to insert a statement regarding whether the company currently has or does not have managers; that the company currently has managers and the names and addresses of the persons currently serving as managers; or that the company currently does not have managers and the names and addresses of the current members of the company. Deletes existing text authorizing the restated certificate of formation for a limited liability company, if the company's certificate of formation states that the company will have one or more managers, to update the names and addresses of the persons serving as managers, or, if the certificate of formation states that the company will not have managers, update the names and addresses of the members of the company.

SECTION 7. Amends Section 3.251, Business Organizations Code, as follows:

Sec. 3.251. New heading: DEFINITIONS. Defines "emergency," "emergency action," and "emergency period" in Subchapter F (Emergency Governance). Deletes existing text providing that for purposes of Subchapter F, an emergency exists if a majority of a domestic entity's governing persons cannot readily participate in a meeting because of the occurrence of a catastrophic event.

SECTION 8. Amends Section 3.252, Business Organizations Code, as follows:

Sec. 3.252. PROVISIONS IN GOVERNING DOCUMENTS. (a) Authorizes the governing persons and, if applicable, the owners or members of a domestic entity to adopt provisions in the domestic entity's governing documents regarding emergency actions, including provisions that apply only during an emergency period that authorize, limit, or prohibit certain procedures, requirements, and designations, including the

necessity of a quorum for action by vote at a meeting of the governing persons. Deletes existing text authorizing the governing persons, owners, or members of a domestic entity to adopt certain provisions in the entity's governing documents regarding the management of the entity during an emergency, except as otherwise provided by the entity's governing documents. Makes nonsubstantive changes.

(b) Requires that any provisions in a domestic entity's governing documents that apply only during an emergency period, rather than the emergency provisions, be adopted in accordance with certain requirements and provisions that apply outside of an emergency period.

SECTION 9. Amends Subchapter F, Chapter 3, Business Organizations Code, by adding Section 3.2535, as follows:

Sec. 3.2535. ACTIONS DURING EMERGENCY PERIOD. (a) Authorizes the governing authority of a domestic entity, except as otherwise limited or prohibited by the domestic entity's governing documents or except as provided by Subsection (b), to take an emergency action during an emergency period without satisfying the requirements of the entity's governing documents or this code that apply outside of an emergency period with respect to procedures for calling a meeting of the governing persons, the necessity of a quorum for action by vote at a meeting of the governing persons, minimum requirements for participation at a meeting of the governing persons, and any other procedural requirements for action at a meeting of the governing persons.

(b) Provides that Subsection (a) does not apply to an action by the governing authority of a domestic entity to amend the entity's governing documents, or that must be approved by a separate vote of the owners or members of the entity in accordance with the requirements of the entity's governing documents or this code that apply outside of an emergency period.

SECTION 10. Amends Section 3.255, Business Organizations Code, as follows:

Sec. 3.255. New heading: EFFECT OF EMERGENCY ACTION. Provides that an emergency action taken by the governing persons of a domestic entity in accordance with the entity's governing documents or Section 3.2535, if taken in good faith and based on the reasonable belief that the emergency action was in the entity's best interest, rather than an action of a domestic entity taken in good faith in accordance with the emergency provisions, is binding on the entity, and is prohibited from being used to impose liability on a managerial official, employee, or agent of the entity.

SECTION 11. Amends Section 6.201, Business Organizations Code, by amending Subsection (b) and adding Subsections (b-1), (b-2), (b-3), (b-4), and (b-5), as follows:

(b) Provides that, except as provided by Section 6.201 (Unanimous Written Consent to Action), the written consent or consents relating to taking action without holding a meeting, providing notice, or taking a vote if unanimous written consent is given take effect when signed by all persons entitled to vote on the action.

(b-1) Authorizes a written consent or consents, by a provision in the written consent or consents or by a written instruction to an agent of the filing entity by one or more persons granting the written consent or consents, to be made to take effect at a future time, which is required to be not later than the 60th day after the date all persons entitled to vote on the action have signed the consent or consents. Provides that if a written consent or consents described by this subsection are to take effect at a future time, all of the written consents take effect at that future effective time.

(b-2) Provides that if two or more of the written consents described by Subsection (b-1) have different future effective times, the latest future effective time of those consents applies to all of the consents. Provides that the written consent or consents are considered to have been given at the applicable effective time so long as all of the persons entitled to

vote on the action, which is determined as of that effective time or, if applicable, the record date established under Section 6.102 (Record Date for Written Consent to Action), have signed the consent or consents, and have not revoked their consent or consents before the applicable effective time.

(b-3) Authorizes a person signing a written consent, by a provision in the written consent or by a written instruction to an agent of the filing entity, to provide that the person's consent is to take effect at a future time, which must be not later than the 60th day after the date all persons entitled to vote on the action have signed the person's consent or consents. Provides that a person's written consent is considered to have been given at the later of that future effective time or a later effective time determined under Subsection (b-1) or (b-2), so long as the person is entitled to vote on the action subject to the consent, which is determined as of the applicable effective time or, if applicable, the record date established under Section 6.102, and did not revoke the consent before the applicable effective time.

(b-4) Authorizes a person signing a written consent to revoke the person's consent any time before the applicable effective time of the consent.

(b-5) Provides that, for purposes of this section, a "future time" includes a time that is determined on the happening of an event.

SECTION 12. Amends Section 6.202, Business Organizations Code, by amending Subsection (c) and adding Subsections (c-1), (c-2), (c-3), (c-4), (e), and (f), as follows:

(c) Requires that a written consent or consents described by Subsection (b) (relating to authorizing the certificate of formation of a filing entity to authorize owners or members to take action without holding a meeting, providing notice, or taking a vote in certain circumstances) include:

(1) the date each owner or member signed the consent; and

(2) the date of signing of the latest dated consent satisfying the minimum number of owners or members necessary to approve the action that is the subject of the consent.

Deletes existing text providing that a written consent or consents described by Subsection (b) must include the date each owner or member signed the consent and is effective to take the action that is the subject of the consent only if the consent or consents are delivered to the entity not later than the 60th day after the date the earliest dated consent is delivered to the entity as required by Section 6.203 (Delivery of Less Than Unanimous Written Consent). Makes nonsubstantive changes.

(c-1) Creates this subsection from existing text. Requires that the date described by Subsection (c)(2) be not later than the 60th day after the date of the signing of the earliest dated consent of the owners or members signing the consent or consents. Provides that if a consent does not contain the date that an owner or member signed the consent, the date that the owner or member signed the consent is considered to be the date that the consent is received by the filing entity. Requires that a written consent or consents described by Subsection (b) that are not solicited by or on behalf of a filing entity or the filing entity's governing authority be delivered to the entity as required by Section 6.203 to take effect.

(c-2) Authorizes a written consent or consents described by Subsection (b), by a provision in the written consent or consents or by a written instruction to an agent of the filing entity from one or more persons granting the written consent or consents, to be made to take effect at a future time, which is required to be not later than the 60th day after the date the last of the minimum number of owners or members necessary to sign the consent or consents as required by Subsection (b) have signed the consent or consents. Provides that if the written consent or consents described by this subsection are

to take effect at a future time, all of the written consent or consents take effect at that future effective time.

(c-3) Provides that if two or more of the written consents described by Subsection (c-2) have different future effective times, the latest future effective time of those consents applies to all of the consents. Provides that the written consent or consents are considered to have been given for purposes of Section 6.202 (Action by Less Than Unanimous Written Consent) at the applicable effective time so long as owners or members satisfying the minimum requirements in Subsection (b):

(1) are determined to be owners or members, as applicable, as of that effective time, or if applicable, the record date established under Section 6.102; and

(2) have signed and not revoked the owner's or member's consent or consents at any time before the applicable effective time of the consent.

(c-4) Authorizes an owner or member of a filing entity signing a written consent described by Subsection (b), by a provision in the written consent or by a written instruction to an agent of the filing entity, to provide that the owner's or member's consent is to take effect at a future time, which is required to be not later than the 60th day after the date on which the consent is signed by the last of the minimum number of owners or members of the entity necessary to sign the consent or consents as required by Subsection (b). Provides that the owner's or member's consent is considered to have been given for purposes of this section at the later of that future effective time or a later effective time determined under Subsection (c-3) so long as:

(1) the person is an owner or member, as applicable, as of the applicable effective time, or if applicable, the record date established under Section 6.102; and

(2) the owner or member did not revoke the consent at any time before the applicable effective time of the consent.

(e) Authorizes an owner or member of a filing entity signing a written consent to revoke the owner's or member's consent at any time before the applicable effective time of the consent.

(f) Provides that for purposes of this section, a "future time" includes a time that is determined on the happening of an event.

SECTION 13. Amends Section 8.002(a), Business Organizations Code, to include Section 8.005 as an exception to the applicability of Chapter 8 (Indemnification and Insurance).

SECTION 14. Amends Section 8.003, Business Organizations Code, as follows:

Sec. 8.003. LIMITATIONS IN GOVERNING DOCUMENTS. Authorizes a governing document of an enterprise, rather than the certificate of formation of an enterprise, to restrict the circumstances under which the enterprise is required to or is authorized to indemnify or is authorized to advance expenses to a person under Chapter 8.

Deletes existing text of former Subsection (b) authorizing the written partnership agreement of a limited partnership to restrict the circumstances in the same manner as the certificate of formation under Subsection (a) (relating to restrictions on indemnification and advance expenses). Makes nonsubstantive changes.

SECTION 15. Amends Subchapter A, Chapter 8, Business Organizations Code, by adding Section 8.005, as follows:

Sec. 8.005. INDEMNIFICATION AGAINST NEGLIGENCE. (a) Provides that this section applies to an enterprise subject to Chapter 8 and applies, notwithstanding

Section 8.002 (Application of Chapter), to a general partnership or limited liability company.

(b) Provides that a requirement under the laws of this state that indemnification or exculpation for negligence be expressly and conspicuously stated does not apply to a provision in an enterprise's governing documents that provides for indemnification or exculpation.

SECTION 16. Amends Section 9.251, Business Organizations Code, to include acting as a governing person of a domestic or foreign entity that is registered to transact business in Texas in the list of certain activities that do not constitute transaction of business in Texas.

SECTION 17. Amends Section 11.001(3), Business Organizations Code, to redefine "existing claim" in Chapter 11 (Winding Up and Termination of Domestic Entity).

SECTION 18. Amends Section 11.153, Business Organizations Code, as follows:

Sec. 11.153. COURT REVOCATION OF FRAUDULENT TERMINATION. (a) Creates this subsection from existing text and makes no further changes.

(b) Provides that if the termination of an entity's existence is revoked under Subsection (a) (relating to the revocation of termination of an entity's existence by a court), the revocation relates back to the effective date of the termination and takes effect as of that date, and the entity's status as an entity continues in effect as if the termination of the entity's existence had never occurred.

SECTION 19. Amends Section 11.254, Business Organizations Code, as follows:

Sec. 11.254. REINSTATEMENT OF CERTIFICATE OF FORMATION FOLLOWING TAX FORFEITURE. (a) Creates this subsection from existing text. Provides that a filing entity whose certificate of formation is reinstated under the provisions of the Tax Code is considered to have continued in existence without interruption from the date of forfeiture.

(b) Provides that the reinstatement of a filing entity's certificate of formation after its forfeiture has no effect on any issue of the personal liability of the governing persons, officers, or agents of the filing entity during the period between forfeiture and reinstatement of the certificate of formation.

SECTION 20. Amends Section 11.359, Business Organizations Code, by adding Subsection (c), as follows:

(c) Provides that, notwithstanding Subsections (a) and (b) (relating to the conditions under which an early extinguishment of an existing claim by or against a terminated entity is authorized), the extinguishment of an existing claim with respect to a terminated filing entity as provided by Section 11.359 (Extinguishment of Existing Claim) is nullified if:

(1) the filing entity's termination is revoked with retroactive effect under Section 11.153 (Court Revocation of Fraudulent Termination);

(2) the terminated filing entity is reinstated with retroactive effect as provided by Section 11.206 (Effect of Reinstatement);

(3) the terminated filing entity is reinstated with retroactive effect as provided by Section 11.253(d) (relating to reinstatement of a terminated entity before the third anniversary of the date of its involuntary termination); or

(4) the terminated filing entity's certificate of formation is reinstated under the Tax Code with retroactive effect as provided by Section 11.254 (Reinstatement of Certificate of Formation Following Tax Forfeiture).

SECTION 21. Amends Section 21.314(a), Business Organizations Code, as follows:

(a) Authorizes, for purposes of Subchapter G (Distributions and Share Dividends) the determination of whether a corporation is or would be insolvent and the determination of the amount of a corporation's stated capital, or surplus, the value of the corporation's net assets, and the amount or value of any component of the corporation's stated capital, surplus, or net assets, to be based on financial statements of the corporation, which are authorized to include financial statements of subsidiary entities or other entities accounted for on a consolidated basis or on the equity method of accounting, that present the financial condition of the corporation, and any subsidiary or other entities included in those financial statements, in accordance with generally accepted accounting principles or international financial reporting standards, rather than financial statements of the corporation, including financial statements that include subsidiary corporations or other corporations accounted for on a consolidated basis or on the equity method of accounting, or present the financial condition of the corporation in accordance with generally accepted accounting principals. Makes nonsubstantive changes.

SECTION 22. Amends Subchapter H, Chapter 21, Business Organizations Code, by adding Section 21.3521, as follows:

Sec. 21.3521. SHAREHOLDER MEETINGS BY REMOTE COMMUNICATION. Provides that, except for any limitation or other requirements in the governing documents of the corporation, if a meeting of a corporation's shareholders under Section 21.351 (Annual Meeting) or 21.352 (Special Meetings) is held by means of a telephone conference or other communication system authorized by Section 6.002 (Alternative Forms of Meetings), the meeting is considered to have satisfied the requirement of Section 6.002(a) (relating to authorizing that a meeting be held using certain communications equipment) that shareholders participating in the meeting be able to communicate with all other persons participating in the meeting if the corporation implements reasonable measures to provide each shareholder entitled to vote at the meeting, or the shareholder's proxyholder, a reasonable opportunity to vote on matters submitted to the shareholders, and to read or hear the proceedings of the meeting substantially concurrently with those proceedings.

SECTION 23. Amends Section 21.551(2), Business Organizations Code, to provide that, for purposes of Subchapter L (Derivative Proceedings), the term "shareholder" includes, rather than means, a shareholder as defined by Section 1.002 (Definitions) or a beneficial owner whose shares are held in a voting trust or by a nominee on the beneficial owner's behalf.

SECTION 24. Amends Section 21.908(a), Business Organizations Code, to delete existing text providing that the filing of another filing instrument or document is not required after the filing of a certificate of validation with respect to a defective corporate act in accordance with Chapter 4 (Filings).

SECTION 25. Amends Section 22.508(a), Business Organizations Code, to delete existing text providing that the filing of another filing instrument or document is not required after the filing of a certificate of validation with respect to a defective corporate act in accordance with Chapter 4.

SECTION 26. Amends Section 101.052(d), Business Organizations Code, to delete existing text authorizing the company agreement of a limited liability company to contain any provisions for the regulation and management of the affairs of the limited liability company not inconsistent with the certificate of formation.

SECTION 27. Amends Section 101.206, Business Organizations Code, by adding Subsections (c-1), (c-2), and (g), as follows:

(c-1) Authorizes the determination of the amount of a limited liability company's liabilities or the value of a company's assets, for purposes of Section 101.206 (Prohibited Distribution; Duty to Return), to be based on:

(1) financial statements of the company, which are authorized to include the financial statements of subsidiary entities or other entities accounted for on a consolidated basis or on the equity method of accounting, that present the financial condition of the company and any subsidiary or other entities included in those financial statements, in accordance with generally accepted accounting principles or international financial reporting standards, or that have been prepared using the method of accounting used to file the company's federal income tax return or using any other accounting practices and principles that are reasonable under the circumstances;

(2) financial information, including condensed or summary financial statements, that is prepared on the same basis as financial statements described by Subdivision (1);

(3) projections, forecasts, or other forward-looking information relating to the future economic performance, financial condition, or liquidity of the company that is reasonable under the circumstances;

(4) a fair valuation or information from any other method that is reasonable under the circumstances; or

(5) a combination of a statement, valuation, or information authorized by this subsection.

(c-2) Provides that Subsection (c-1) does not apply to the computation of the franchise tax or any other tax imposed on a limited liability company under the laws of this state.

(g) Requires that an action alleging a distribution is made in violation of Section 101.206 be commenced not later than the second anniversary of the date of the distribution.

SECTION 28. Amends Section 101.251, Business Organizations Code, as follows:

Sec. 101.251. GOVERNING AUTHORITY. (a) Creates this subsection from existing text. Provides that the governing authority of a limited liability company consists of:

(1) the managers of the company, if the company agreement provides that the company is managed by one or more managers, rather than if the company's certificate of formation states that the company will have one or more managers; or

(2) the members of the company, if the company agreement provides that the company is managed by the members, rather than if the company's certificate of formation states that the company will not have managers.

(b) Provides that if the company agreement does not provide otherwise, the governing authority of a limited liability company consists of the managers of the company, if the company's certificate of formation states that the company has managers, or the members of the company, if the company's certificate of formation does not state that the company has managers.

SECTION 29. Amends Section 101.451(3), Business Organizations Code, to provide that in Subchapter J (Derivative Proceedings) the term "member" includes, rather than means, a person who is a member or is an assignee of a membership interest or a person who beneficially owns a membership interest through a voting trust or a nominee on the person's behalf.

SECTION 30. Amends Section 101.457, Business Organizations Code, as follows:

Sec. 101.457. TOLLING OF STATUTE OF LIMITATIONS. Provides that a written demand filed with the limited liability company under Section 101.453 (Demand) tolls the statute of limitations on the claim on which demand is made until the later of the 31st day after the expiration of any waiting period under Section 101.453(a) (relating to when a derivative proceeding may be instituted), rather than Section 153.403; or the 31st day after the expiration of any stay granted under Section 101.455 (Stay of Proceeding), rather than Section 153.405 (Stay of Proceeding), including all continuations of the stay.

SECTION 31. Amends Section 153.151, Business Organizations Code, by adding Subsection (a-1), as follows:

(a-1) Provides that on formation of a limited partnership, a person becomes a general partner if the person has entered into the partnership agreement as a general partner, and is named as a general partner in the certificate of formation of the limited partnership.

SECTION 32. Amends Section 153.210, Business Organizations Code, by adding Subsections (c), (d), and (e), as follows:

(c) Authorizes the determination of the amount of a limited partnership's liabilities or the value of a limited partnership's assets, for purposes of Section 153.210 (Limitation on Distribution), to be based on:

(1) financial statements of the limited partnership, which are authorized to include the financial statements of subsidiary entities or other entities accounted for on a consolidated basis or on the equity method of accounting, that present the financial condition of the limited partnership and any subsidiary or other entities included in those financial statements in accordance with generally accepted accounting principles or international financial reporting standards, or that have been prepared using the method of accounting used to file the partnership's federal income tax return or using any other accounting practices and principles that are reasonable under the circumstances;

(2) financial information, including condensed or summary financial statements, that are prepared on the same basis as financial statements described by Subdivision (1);

(3) projections, forecasts, or other forward-looking information relating to the future economic performance, financial condition, or liquidity of the limited partnership that is reasonable under the circumstances;

(4) a fair valuation or information from any other method that is reasonable under the circumstances; or

(5) a combination of a statement, valuation, or information authorized by this subsection.

(d) Provides that Subsection (c) does not apply to the computation of the franchise tax or any other tax imposed on a limited partnership under the laws of this state.

(e) Requires that an action alleging a distribution is made in violation of Section 153.210 be commenced not later than the second anniversary of the date of the distribution.

SECTION 33. Amends Section 200.209, Business Organizations Code, as follows:

Sec. 200.209. DETERMINATION OF SOLVENCY, NET ASSETS, STATED CAPITAL, AND SURPLUS. (a) Authorizes the determination of whether a real estate investment trust is or would be insolvent and the determination of the amount of a real estate investment trust's stated capital or surplus or any component of the trust's stated capital or surplus, or the value of the real estate investment trust's net assets or any

component of the trust's net assets, rather than the determination of whether a real estate investment trust is or would be insolvent and the determination of the value of a real estate investment trust's net assets, stated capital, or surplus, and each of the components of net assets, stated capital, or surplus, to be based on certain financial statements, including financial statements of the real estate investment trust that present the financial condition of the real estate investment trust in accordance with international financial reporting standards.

(b) Provides that Subsection (a) does not apply to the computation of the franchise tax or any other tax imposed on a real estate investment trust under the laws of this state, rather than to the computation of any tax imposed under the laws of this state.

SECTION 34. Repealer: Section 3.253 (Effect of Emergency Provisions), Business Organizations Code.

Repealer: Section 3.254 (Effect of Other Provisions in Governing Documents During Emergency), Business Organizations Code.

SECTION 35. Makes application of Sections 101.206 and 153.210, Business Organizations Code, as amended by this Act, prospective.

SECTION 36. Effective date: September 1, 2021.