

[Sections 11.360-11.400 reserved for expansion]

SUBCHAPTER I. RECEIVERSHIP

Revised Law

Sec. 11.401. CODE GOVERNS. A receiver may be appointed for a domestic entity or for a domestic entity's property or business only as provided for and on the conditions set forth in this code. (TBCA 7.07.A (part); TLLCA 8.12.A; TNPCA 7.07.A (part).)

Source Law

[TBCA 7.07]

A. No receiver shall be appointed for any corporation to which this Act applies or for any of its assets or for its business except as provided for and on the conditions set forth in this Act. . . .

[TLLCA 8.12]

A. Subject to Section C of this Article, Articles 2.07, 4.14, and 5.14 and Part Seven of the TBCA apply to a limited liability company and its members, managers, and officers.

[TNPCA 7.07]

A. No receiver shall be appointed for any corporation in which this Act applies or for any of its assets or for its business except as provided for and on the conditions set forth in this Act. . . .

Revisor's Note

No substantive change is intended, other than extending the revised law to cover partnerships. The "only" language of Section 11.401 creates a facial conflict between Chapter 11 and the receivership provisions of Civil Practice and Remedies Code Chapter 64. The Civil Practices and Remedies Code provisions are very similar in some respects and different in others. Resolution of the conflict between the two groups of statutes is determined by whether the conflict is irreconcilable or by the principles dealing with conflicting or irreconcilable statutes. These include the Code Construction Act, Government Code Chapter 311, and Government Code Chapter 312. Among these principles are primacy of special statutes over general and

primacy of later statutes over earlier. Also important are harmonization if possible of the potentially conflicting statutes and consideration of legislative intent.

Revised Law

Sec. 11.402. JURISDICTION TO APPOINT RECEIVER. (a) A court that has subject matter jurisdiction over specific property of a domestic or foreign entity that is located in this state and is involved in litigation has jurisdiction to appoint a receiver for that property.

(b) A district court in the county in which the registered office or principal place of business of a domestic entity is located has jurisdiction to:

(1) appoint a receiver for the property and business of a domestic entity for the purpose of rehabilitating the entity; or

(2) order the liquidation of the property and business of a domestic entity and appoint a receiver to effect that liquidation. (TBCA 7.04.A (part), 7.05.A (part), 7.06.A (part); TLLCA 8.12.A; TNPCA 7.04.A (part), 7.05.A (part), 7.06.A (part).)

Source Law

[TBCA 7.04]

A. A receiver may be appointed by any court having jurisdiction of the subject matter for specific corporate assets located within the State, whether owned by a domestic or a foreign corporation, which are involved in litigation,

[TBCA 7.05]

A. A receiver may be appointed for the assets and business of a corporation by the district court for the county in which the registered office of the corporation is located,

[TBCA 7.06]

A. The district court for the county in which the registered office of a corporation is located may order the liquidation of the assets and business of the corporation and may appoint a receiver to effect such liquidation,

[TLLCA 8.12]

A. Subject to Section C of this Article, Articles 2.07, 4.14, and 5.14 and

Part Seven of the TBCA apply to a limited liability company and its members, managers, and officers.

[TNPCA 7.04]

A. A receiver may be appointed by any court having jurisdiction of the subject matter for specific corporate assets located within the State, whether owned by a domestic or a foreign corporation, which are involved in litigation,

[TNPCA 7.05]

A. A receiver may be appointed for the assets and business of a corporation by the district court for the county in which the registered office of the corporation is located,

[TNPCA 7.06]

A. The district court for the county in which the registered office of a corporation is located may order the liquidation of the assets and affairs of the corporation and may appoint a receiver to effect such liquidation,

Revisor's Note

No substantive change is intended, other than extending the revised law to cover partnerships and to authorize jurisdiction for a district court in the county in which the principal place of business of the entity is located.

Revised Law

Sec. 11.403. APPOINTMENT OF RECEIVER FOR SPECIFIC PROPERTY.

(a) Subject to Subsection (b), and on the application of a person whose right to or interest in any property or fund or the proceeds from the property or fund is probable, a court that has jurisdiction over specific property of a domestic or foreign entity may appoint a receiver in an action:

(1) by a vendor to vacate a fraudulent purchase of the property;

(2) by a creditor to subject the property or fund to the creditor's claim;

(3) between partners or others jointly owning or interested in the property or fund;

(4) by a mortgagee of the property for the foreclosure

of the mortgage and sale of the property, when:

(A) it appears that the mortgaged property is in danger of being lost, removed, or materially injured; or

(B) it appears that the mortgage is in default and that the property is probably insufficient to discharge the mortgage debt; or

(5) in which receivers for specific property have been previously appointed by courts of equity.

(b) A court may appoint a receiver for the property or fund under Subsection (a) only if:

(1) with respect to an action brought under Subsection (a)(1), (2), or (3), it is shown that the property or fund is in danger of being lost, removed, or materially injured;

(2) circumstances exist that are considered by the court to necessitate the appointment of a receiver to conserve the property or fund and avoid damage to interested parties;

(3) all other requirements of law are complied with; and

(4) the court determines that other available legal and equitable remedies are inadequate.

(c) The court appointing a receiver under this section has and shall retain exclusive jurisdiction over the specific property placed in receivership. The court shall determine the rights of the parties in the property or its proceeds.

(d) If the condition necessitating the appointment of a receiver under this section is remedied, the receivership shall be terminated immediately, and the receiver shall redeliver to the domestic entity all of the property remaining in receivership. (TBCA 7.04; TLLCA 8.12.A; TNPCA 7.04.)

Source Law

[TBCA]

7.04.A. A receiver may be appointed by any court having jurisdiction of the subject matter for specific corporate assets located within the State, whether owned by a domestic or a foreign corporation, which are involved in litigation, whenever circumstances exist deemed by the court to require the appointment of a receiver to conserve such assets and to avoid damage to parties at interest, but only if all other requirements of law are complied with and if other remedies available either at law or in equity are determined by the court to be inadequate and only in the following instances:

(1) In an action by a vendor to vacate a fraudulent purchase of property; or

by a creditor to subject any property or fund to his claim; or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff or any party whose right to or interest in the property or fund or the proceeds thereof is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured.

(2) In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed and that the property is probably insufficient to discharge the mortgage debt.

(3) In any other actions where receivers for specific assets have heretofore been appointed by the usages of the court of equity.

B. The court appointing such receiver shall have and retain exclusive jurisdiction over the specific assets placed in receivership and shall determine the rights of the parties in these assets or their proceeds.

[TLLCA 8.12]

A. Subject to Section C of this Article, Articles 2.07, 4.14, and 5.14 and Part Seven of the TBCA apply to a limited liability company and its members, managers, and officers.

[TNPCA]

7.04.A. A receiver may be appointed by any court having jurisdiction of the subject matter for specific corporate assets located within the State, whether owned by a domestic or a foreign corporation, which are involved in litigation, whenever circumstances exist deemed by the court to require the appointment of a receiver to conserve such assets and to avoid damage to parties at interest, but only if all other requirements of law are complied with and if other

remedies available either at law or in equity are determined by the court to be inadequate and only in the following instances:

(1) In an action by a vendor to vacate a fraudulent purchase of property; or by a creditor to subject any property or fund to his claim; or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff or any party whose right to or interest in the property or fund or the proceeds thereof is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured.

(2) In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition to the mortgage has not been performed and that the property is probably insufficient to discharge the mortgage debt.

(3) In any other actions where receivers for specific assets have heretofore been appointed by the usage of the court of equity.

B. The court appointing such receiver shall have and retain exclusive jurisdiction over the specific assets placed in receivership and shall determine the rights of the parties in these assets or their proceeds.

Revisor's Note

No substantive change is intended, other than extending the revised law to cover partnerships. The phrase "the condition of the mortgage has not been performed" in the source law is modernized in the revised law to read "the mortgage is in default." Subsection (d) of the revised law has no express counterpart in but may be implied from the source law. It is similar to source law from which Section 11.404(c) of the revised law is derived in the context of receivers appointed to rehabilitate corporations.

Revised Law

Sec. 11.404. APPOINTMENT OF RECEIVER TO REHABILITATE DOMESTIC ENTITY. (a) Subject to Subsection (b), a court that has jurisdiction over the property and business of a domestic entity under Section 11.402(b) may appoint a receiver for the entity's property and business if:

(1) in an action by an owner or member of the domestic entity, it is established that:

(A) the entity is insolvent or in imminent danger of insolvency;

(B) the governing persons of the entity are deadlocked in the management of the entity's affairs, the owners or members of the entity are unable to break the deadlock, and irreparable injury to the entity is being suffered or is threatened because of the deadlock;

(C) the actions of the governing persons of the entity are illegal, oppressive, or fraudulent;

(D) the property of the entity is being misapplied or wasted; or

(E) with respect to a for-profit corporation, the shareholders of the entity are deadlocked in voting power and have failed, for a period of at least two years, to elect successors to the governing persons of the entity whose terms have expired or would have expired on the election and qualification of their successors;

(2) in an action by a creditor of the domestic entity, it is established that:

(A) the entity is insolvent, the claim of the creditor has been reduced to judgment, and an execution on the judgment was returned unsatisfied; or

(B) the entity is insolvent and has admitted in writing that the claim of the creditor is due and owing; or

(3) in an action other than an action described by Subdivision (1) or (2), courts of equity have traditionally appointed a receiver.

(b) A court may appoint a receiver under Subsection (a) only if:

(1) circumstances exist that are considered by the court to necessitate the appointment of a receiver to conserve the property and business of the domestic entity and avoid damage to interested parties;

(2) all other requirements of law are complied with; and

(3) the court determines that all other available legal and equitable remedies, including the appointment of a receiver for specific property of the domestic entity under Section 11.402, are inadequate.

(c) If the condition necessitating the appointment of a

receiver under this section is remedied, the receivership shall be terminated immediately, the management of the domestic entity shall be restored to its managerial officials, and the receiver shall redeliver to the domestic entity all of its property remaining in receivership. (TBCA 7.05; TLLCA 8.12.A; TNPCA 7.05.)

Source Law

[TBCA]

7.05.A. A receiver may be appointed for the assets and business of a corporation by the district court for the county in which the registered office of the corporation is located, whenever circumstances exist deemed by the court to require the appointment of a receiver to conserve the assets and business of the corporation and to avoid damage to parties at interest, but only if all other requirements of law are complied with and if all other remedies available either at law or in equity, including the appointment of a receiver for specific assets of the corporation, are determined by the court to be inadequate, and only in the following instances:

(1) In an action by a shareholder when it is established:

(a) That the corporation is insolvent or in imminent danger of insolvency; or

(b) That the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof; or

(c) That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent; or

(d) That the corporate assets are being misapplied or wasted.

(e) That the shareholders are deadlocked in voting power, and have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the

election and qualification of their successors.

(2) In an action by a creditor when it is established:

(a) That the corporation is insolvent and the claim of the creditor has been reduced to judgment and an execution thereon returned unsatisfied; or

(b) That the corporation is insolvent and the corporation has admitted in writing that the claim of the creditor is due and owing.

(3) In any other actions where receivers have heretofore been appointed by the usages of the court of equity.

B. In the event that the condition of the corporation necessitating such an appointment of a receiver is remedied, the receivership shall be terminated forthwith and the management of the corporation shall be restored to the directors and officers, the receiver being directed to redeliver to the corporation all its remaining properties and assets.

[TLLCA 8.12]

A. Subject to Section C of this Article, Articles 2.07, 4.14, and 5.14 and Part Seven of the TBCA apply to a limited liability company and its members, managers, and officers.

[TNPCA]

7.05.A. A receiver may be appointed for the assets and business of a corporation by the district court for the county in which the registered office of the corporation is located, whenever circumstances exist deemed by the court to require the appointment of a receiver to conserve the assets and affairs of the corporation and to avoid damage to parties at interest, but only if all other requirements of law are complied with and if all other remedies available either at law or in equity, including the appointment of a receiver for specific assets of the corporation, are determined by the court to be inadequate, and only in the following

instances:

(1) In an action by a member when it is established:

(a) That the corporation is insolvent or in imminent danger of insolvency; or

(b) That the directors are deadlocked in the management of the corporate affairs and the members are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof; or

(c) That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent; or

(d) That the corporate assets are being misapplied or wasted.

(2) In an action by a creditor when it is established:

(a) That the corporation is insolvent and the claim of the creditor has been reduced to judgment and an execution thereon returned unsatisfied; or

(b) That the corporation is insolvent and the corporation has admitted in writing that the claim of the creditor is due and owing.

(3) In any other actions where receivers have heretofore been appointed by the usages of the court of equity.

B. In the event that the condition of the corporation necessitating such an appointment of a receiver is remedied, the receivership shall be terminated forthwith and the management of the corporation shall be restored to the directors and officers, the receiver being directed to redeliver to the corporation all its remaining properties and assets.

Revisor's Note

No substantive change is intended, other than extending the revised law to cover partnerships.

Revised Law

Sec. 11.405. APPOINTMENT OF RECEIVER TO LIQUIDATE DOMESTIC ENTITY; LIQUIDATION. (a) Subject to Subsection (b), a court that

has jurisdiction over the property and business of a domestic entity under Section 11.402(b) may order the liquidation of the property and business of the domestic entity and may appoint a receiver to effect the liquidation:

(1) when an action has been filed by the attorney general under this chapter to terminate the existence of the entity and it is established that liquidation of the entity's business and affairs should precede the entry of a decree of termination;

(2) on application of the entity to have its liquidation continued under the supervision of the court;

(3) if the entity is in receivership and the court does not find that any plan presented before the first anniversary of the date the receiver was appointed is feasible for remedying the condition requiring appointment of the receiver;

(4) on application of a creditor of the entity if it is established that irreparable damage will ensue to the unsecured creditors of the domestic entity as a class, generally, unless there is an immediate liquidation of the property of the domestic entity; or

(5) on application of a member or director of a nonprofit corporation or cooperative association and it appears the entity is unable to carry out its purposes.

(b) A court may order a liquidation and appoint a receiver under Subsection (a) only if:

(1) the circumstances demand liquidation to avoid damage to interested persons;

(2) all other requirements of law are complied with; and

(3) the court determines that all other available legal and equitable remedies, including the appointment of a receiver for specific property of the domestic entity and appointment of a receiver to rehabilitate the domestic entity, are inadequate.

(c) If the condition necessitating the appointment of a receiver under this section is remedied, the receivership shall be terminated immediately, the management of the domestic entity shall be restored to its managerial officials, and the receiver shall redeliver to the domestic entity all of its property remaining in receivership. (TBCA 7.06; TLLCA 8.12.A; TNPCA 7.06.A, C.)

Source Law

[TBCA]

7.06.A. The district court for the county in which the registered office of a corporation is located may order the

liquidation of the assets and business of the corporation and may appoint a receiver to effect such liquidation, whenever circumstances demand liquidation in order to avoid damage to parties at interest, but only if all other requirements of law are complied with and if all other remedies available either at law or in equity, including the appointment of a receiver of specific assets of the corporation and appointment of a receiver to rehabilitate the corporation, are determined by the court to be inadequate and only in the following instances:

(1) When an action has been filed by the Attorney General, as provided in this Act, to dissolve a corporation and it is established that liquidation of its business and affairs should precede the entry of a decree of dissolution.

(2) Upon application by a corporation to have its liquidation continued under the supervision of the court.

(3) If the corporation is in receivership and no plan for remedying the condition of the corporation requiring appointment of the receiver, which the court finds to be feasible, has been presented within twelve (12) months after the appointment of the receiver.

(4) Upon application of any creditor if it is established that irreparable damage will ensue to the unsecured creditors of the corporation, generally, as a class, unless there be an immediate liquidation of the assets of the corporation.

B. In the event the condition of the corporation necessitating the appointment of a receiver is remedied, the receivership shall be terminated forthwith and the management of the corporation shall be restored to the directors and officers, the receiver being directed to redeliver to the corporation all its remaining properties and assets.

[TLLCA 8.12]

A. Subject to Section C of this

Article, Articles 2.07, 4.14, and 5.14 and Part Seven of the TBCA apply to a limited liability company and its members, managers, and officers.

[TNPCA 7.06]

A. The district court for the county in which the registered office of a corporation is located may order the liquidation of the assets and affairs of the corporation and may appoint a receiver to effect such liquidation, whenever circumstances demand liquidation in order to avoid damage to parties at interest, but only if all other requirements of law are complied with and if all other remedies available either at law or in equity, including the appointment of a receiver of specific assets of the corporation and appointment of a receiver to rehabilitate the corporation, are determined by the court to be inadequate and only in the following instances:

(1) When an action has been filed by the Attorney General, as provided in this Act, to dissolve a corporation and it is established that liquidation of its affairs should precede the entry of a decree of dissolution.

(2) Upon application by a corporation to have its liquidation continued under the supervision of the court.

(3) If the corporation is in receivership and no plan for remedying the condition of the corporation requiring appointment of the receiver, which the court finds to be feasible, has been presented within twelve (12) months after the appointment of the receiver.

(4) Upon application of any creditor if it is established that irreparable damage will ensue to the unsecured creditors of the corporation, generally, as a class, unless there be an immediate liquidation of the assets of the corporation.

(5) Upon application by a member or director when it is made to appear that the corporation is unable to carry out its

purposes.

C. In the event the condition of the corporation necessitating the appointment of a receiver is remedied, the receivership shall be terminated forthwith and the management of the corporation shall be restored to the directors and the officers, the receiver being directed to re-deliver to the corporation all its remaining properties and assets.

Revisor's Note

No substantive change is intended, other than extending the revised law to cover limited partnerships.

Revised Law

Sec. 11.406. RECEIVERS: QUALIFICATIONS, POWERS, AND DUTIES. (a) A receiver appointed under this chapter:

(1) must be an individual citizen of the United States or an entity authorized to act as receiver;

(2) shall give a bond in the amount required by the court and with any sureties as may be required by the court;

(3) may sue and be sued in the receiver's name in any court;

(4) has the powers and duties provided by other laws applicable to receivers; and

(5) has the powers and duties that are stated in the order appointing the receiver or that the appointing court:

(A) considers appropriate to accomplish the objectives for which the receiver was appointed; and

(B) may increase or diminish at any time during the proceedings.

(b) To be appointed a receiver under this chapter, a foreign entity must be registered to transact business in this state. (TBCA 7.07.A (part), B; TLLCA 8.12.A; TNPCA 7.07.A (part), B.)

Source Law

[TBCA 7.07]

A. . . . A receiver shall in all cases be a citizen of the United States or a corporation authorized to act as receiver, which corporation may be a domestic corporation or a foreign corporation authorized to transact business in this State, and shall in all cases give such bond as the court may direct with such sureties as

the court may require.

B. A receiver appointed by authority of this Act shall have authority to sue and be sued in all courts in his own name and shall have those powers and duties provided by laws of general applicability relating to receivers and in addition thereto may be accorded such other powers and duties as the court shall deem appropriate to accomplish the objectives for which the receiver was appointed. Such additional and unusual powers and duties shall be stated in the order appointing the receiver and may be increased or diminished at any time during the proceedings.

[TLLCA 8.12]

A. Subject to Section C of this Article, Articles 2.07, 4.14, and 5.14 and Part Seven of the TBCA apply to a limited liability company and its members, managers, and officers.

[TNPCA 7.07]

A. . . . A receiver shall in all cases be a citizen of the United States or a corporation authorized to act as receiver, which corporation may be a domestic corporation or a foreign corporation authorized to transact business in this State, and shall in all cases give such bond as the court may direct with such sureties as the court may require.

B. A receiver appointed by authority of this Act shall have authority to sue and be sued in all courts in his own name and shall have those powers and duties provided by laws of general applicability relating to receivers and in addition thereto may be accorded such other powers and duties as the court shall deem appropriate to accomplish the objectives for which the receiver was appointed. Such additional and unusual powers and duties shall be stated in the order appointing the receiver and may be increased or diminished at any time during the proceedings.

Revisor's Note

The revised law expands the type of entities that may act as a receiver. The source law limited the receiver to individuals and corporations authorized to act as receivers. The revised law allows as a receiver any other entity that is authorized to act as a receiver.

Revised Law

Sec. 11.407. COURT-ORDERED FILING OF CLAIMS. (a) In a proceeding involving a receivership of the property or business of a domestic entity, the court may require all claimants of the domestic entity to file with the clerk of the court or the receiver, in the form provided by the court, proof of their respective claims under oath.

(b) A court that orders the filing of claims under Subsection (a) shall:

(1) set a date, which may not be earlier than four months after the date of the order, as the last day for the filing of those claims; and

(2) prescribe the notice that shall be given to claimants of the date set under Subdivision (1).

(c) Before the expiration of the period under Subsection (b) for the filing of claims, a court may extend the period for the filing of claims to a later date.

(d) A court may bar a claimant who fails to file a proof of claim during the period authorized by the court from participating in the distribution of the property of the domestic entity unless the claimant presents to the court a justifiable excuse for its delay in filing. A court may not order or effect a discharge of a claim of the claimant described by this subsection. (TBCA 7.07.C; TLLCA 8.12.A; TNPCA 7.07.C.)

Source Law

[TBCA 7.07]

C. In proceedings involving any receivership of the assets or business of a corporation, the court may require all creditors of the corporation to file with the clerk of the court or with the receiver, in such form as the court may prescribe, proofs of their respective claims under oath. If the court requires the filing of claims, it shall fix a date as the last day for the filing thereof, which shall be not less than four months from the date of the order, and shall prescribe the notice that shall be given to creditors and claimants of the date so fixed.

Prior to the date so fixed, the court may extend the time for the filing of claims. Creditors and claimants failing to file proofs of claim on or before the date fixed therefor may be barred, by order of court (unless presenting to the court a justifiable excuse for delay in the filing), from participating in the distribution of the assets of the corporation; but no discharge shall be decreed or effected.

[TLLCA 8.12]

A. Subject to Section C of this Article, Articles 2.07, 4.14, and 5.14 and Part Seven of the TBCA apply to a limited liability company and its members, managers, and officers.

[TNPCA 7.07]

C. In proceedings involving any receivership of the assets or business of a corporation, the court may require all creditors of the corporation to file with the clerk of the court or with the receiver, in such form as the court may prescribe, proofs of their respective claims under oath. If the court requires the filing of claims, it shall fix a date as the last day for the filing thereof, which shall be not less than four months from the date of the order, and shall prescribe the notice that shall be given to creditors and claimants of the date so fixed. Prior to the date so fixed, the court may extend the time for the filing of claims. Creditors and claimants failing to file proofs of claim on or before the date fixed therefor may be barred, by order of court (unless presenting to the court a justifiable excuse for delay in the filing), from participating in the distribution of the assets of the corporation but no discharge shall be decreed or effected.

Revisor's Note

No substantive change is intended, other than extending the revised law to cover partnerships.

Revised Law

Sec. 11.408. SUPERVISING COURT; JURISDICTION; AUTHORITY.

(a) A court supervising a receivership under this subchapter may, from time to time:

(1) make allowances to a receiver or attorney in the proceeding; and

(2) direct the payment of a receiver or attorney from the property of the domestic entity that is within the scope of the receivership or the proceeds of any sale or disposition of that property.

(b) A court that appoints a receiver under this subchapter for the property or business of a domestic entity has exclusive jurisdiction over the domestic entity and all of its property, regardless of where the property is located. (TBCA 7.07.D, E; TLLCA 8.12.A; TNPCA 7.07.D, E.)

Source Law

[TBCA 7.07]

D. The court shall have power from time to time to make allowances to the receiver or receivers and to attorneys in the proceeding, and to direct the payment thereof out of the assets of the corporation within the scope of the receivership or the proceeds of any sale or disposition of such assets.

E. A court authorized to appoint a receiver for a corporation to which this Act applies, and no other court in this State, shall be authorized to appoint a receiver for the corporation or its assets and business; when such a court does appoint a receiver, as authorized by this Act, for the corporation or its assets and business, that court shall have exclusive jurisdiction of the corporation and all its properties, wherever situated.

[TLLCA 8.12]

A. Subject to Section C of this Article, Articles 2.07, 4.14, and 5.14 and Part Seven of the TBCA apply to a limited liability company and its members, managers, and officers.

[TNPCA 7.07]

D. The court shall have power from time to time to make allowances to the receiver or receivers and to attorneys in the proceeding,

and to direct the payment thereof out of the assets of the corporation within the scope of the receivership or the proceeds of any sale or disposition of such assets.

E. A court authorized to appoint a receiver for a corporation to which this Act applies, and no other court in this State, shall be authorized to appoint a receiver for the corporation or its assets and business; when such a court does appoint a receiver, as authorized by this Act, for the corporation or its assets and business, that court shall have exclusive jurisdiction of the corporation and all its properties, wherever situated.

Revisor's Note

No substantive change is intended, other than extending the revised law to cover partnerships.

Revised Law

Sec. 11.409. ANCILLARY RECEIVERSHIPS OF FOREIGN ENTITIES.

(a) Notwithstanding any provision of this code to the contrary, a district court in the county in which the registered office of a foreign entity doing business in this state is located has jurisdiction to appoint an ancillary receiver for the property and business of that entity when the court determines that circumstances exist to require the appointment of an ancillary receiver.

(b) A receiver appointed under Subsection (a) serves ancillary to a receiver acting under orders of an out-of-state court that has jurisdiction to appoint a receiver for the entity. (TBCA 7.07.F (part); TLLCA 8.12.A; TNPCA 7.07.F (part).)

Source Law

[TBCA 7.07]

F. Notwithstanding any provision of this Article or in this Act to the contrary, the district court for the county in which the registered office of any foreign corporation doing business in this State is located shall have jurisdiction to appoint an ancillary receiver for the assets and business of such corporation, to serve ancillary to the receiver for the assets and business of the corporation acting under orders of a court having jurisdiction to appoint such a receiver for the corporation,

located in any other state, whenever circumstances exist deemed by the court to require the appointment of such ancillary receiver. . . .

[TLLCA 8.12]

A. Subject to Section C of this Article, Articles 2.07, 4.14, and 5.14 and Part Seven of the TBCA apply to a limited liability company and its members, managers, and officers.

[TNPCA 7.07]

F. Notwithstanding any provision of this Article or in this Act to the contrary, the district court for the county in which the registered office of any foreign corporation doing business in this State is located shall have jurisdiction to appoint an ancillary receiver for the assets and business of such corporation, to serve ancillary to the receiver for the assets and business of the corporation acting under orders of a court having jurisdiction to appoint such a receiver for the corporation, located in any other state, whenever circumstances exist deemed by the court to require the appointment of such ancillary receiver. . . .

Revisor's Note

No substantive change is intended, other than extending the revised law to cover partnerships.

Revised Law

Sec. 11.410. RECEIVERSHIP FOR ALL PROPERTY AND BUSINESS OF FOREIGN ENTITY. (a) A district court may appoint a receiver for all of the property, in and outside this state, of a foreign entity doing business in this state and its business if the court determines, in accordance with the ordinary usages of equity, that circumstances exist that necessitate the appointment of a receiver even if a receiver has not been appointed by another court.

(b) The appointing court shall convert a receivership created under Subsection (a) into an ancillary receivership if the appointing court determines an ancillary receivership is appropriate because a court in another state has ordered a receivership of all property and business of the entity. (TBCA

Source Law

[TBCA 7.07]

F. . . . Moreover, such district court, whenever circumstances exist deemed by it to require the appointment of a receiver for all the assets in and out of this State, and the business, of a foreign corporation doing business in this State, in accordance with the ordinary usages of equity, may appoint such a receiver for all its assets in and out of this State, and its business, even though no receiver has been appointed elsewhere; such receivership shall be converted into an ancillary receivership when deemed appropriate by such district court in the light of orders entered by a court of competent jurisdiction in some other State, providing for a receivership of all assets and business of such corporation.

[TLLCA 8.12]

A. Subject to Section C of this Article, Articles 2.07, 4.14, and 5.14 and Part Seven of the TBCA apply to a limited liability company and its members, managers, and officers.

[TNPCA 7.07]

F. . . . Moreover, such district court, whenever circumstances exist deemed by it to require the appointment of a receiver for all the assets in and out of this State, and the business of a foreign corporation doing business in this State, in accordance with the ordinary usages of equity, may appoint such a receiver for all its assets in and out of this State, and its business, even though no receiver has been appointed elsewhere; such receivership shall be converted into an ancillary receivership when deemed appropriate by such district court in the light of orders entered by a court of competent jurisdiction in some other state, providing for a receivership of all assets and business of such corporation.

Revisor's Note

No substantive change is intended, other than extending the revised law to cover partnerships.

Revised Law

Sec. 11.411. GOVERNING PERSONS AND OWNERS NOT NECESSARY PARTIES DEFENDANT. Governing persons and owners or members of a domestic entity are not necessary parties to an action for a receivership or liquidation of the property and business of a domestic entity unless relief is sought against those persons individually. (TBCA 7.08; TLLCA 8.12.A; TNPCA 7.08.)

Source Law

[TBCA]

7.08.A. It shall not be necessary to make shareholders parties to any action or proceeding for a receivership or liquidation of the assets and business of a corporation unless relief is sought against them personally.

[TLLCA 8.12]

A. Subject to Section C of this Article, Articles 2.07, 4.14, and 5.14 and Part Seven of the TBCA apply to a limited liability company and its members, managers, and officers.

[TNPCA]

7.08.A. It shall not be necessary to make directors or members parties to any action or proceeding for involuntary dissolution, receivership or liquidation of the assets and business of a corporation unless relief is sought against them personally.

Revisor's Note

No substantive change is intended, other than extending the revised law to cover partnerships.

Revised Law

Sec. 11.412. DECREE OF INVOLUNTARY TERMINATION. In an action to liquidate the property and business of a domestic entity, the court shall enter a decree terminating the entity and the existence of the entity shall cease:

(1) when the costs and expenses of the action and all obligations and liabilities of the domestic entity have been paid

and discharged or adequately provided for and all of the entity's remaining property has been distributed to its owners and members; or

(2) if the entity's property is not sufficient to discharge the costs and other expenses of the action and all obligations and liabilities of the entity, when all the property of the entity has been applied toward their payment. (TBCA 7.09; TLLCA 8.12.A; TNPCA 7.09.)

Source Law

[TBCA]

7.09.A. In proceedings to liquidate the assets and business of a corporation, when the costs and expenses of such proceedings and all debts, obligations, and liabilities of the corporation shall have been paid and discharged, or adequate provision shall have been made therefor, and all of its remaining property and assets distributed to its shareholders, or, in case its property and assets are not sufficient to satisfy and discharge such costs, expenses, debts, and obligations, when all the property and assets have been applied so far as they will go to their payment, the court shall enter a decree dissolving the corporation, whereupon the existence of the corporation shall cease.

[TLLCA 8.12]

A. Subject to Section C of this Article, Articles 2.07, 4.14, and 5.14 and Part Seven of the TBCA apply to a limited liability company and its members, managers, and officers.

[TNPCA]

7.09.A. In proceedings to liquidate the assets and affairs of a corporation, when the costs and expenses of such proceedings and all debts, obligations, and liabilities of the corporation shall have been paid and discharged, or adequate provision has been made for the discharge, and all of its remaining property and assets distributed in accordance with the provisions of this Act, or in case its property and assets are not sufficient to satisfy and discharge such costs, expenses, debts, and obligations, when

all the property and assets have been applied so far as they will go to their payment, the court shall enter a decree dissolving the corporation, whereupon the corporation shall cease to exist.

Revisor's Note

No substantive change is intended, other than extending the revised law to cover partnerships.

Revised Law

Sec. 11.413. SUPPLEMENTAL PROVISIONS FOR APPLICATION OF PROCEEDS FROM LIQUIDATION OF NONPROFIT CORPORATION. (a) In proceedings under Section 11.405, the property of a nonprofit corporation or the proceeds resulting from a sale, conveyance, or other disposition of its property shall be applied to:

(1) pay, satisfy, and discharge all costs and expenses of the court proceedings and all liabilities and obligations of the nonprofit corporation; or

(2) make adequate provision for the payment, satisfaction, and discharge of the costs, expenses, liabilities, or obligations described by Subdivision (1).

(b) Any property remaining after application is made under this section must be applied and distributed in the manner provided by Section 22.304. (TNPCA 7.06.B.)

Source Law

B. The assets of the corporation or the proceeds resulting from a sale, conveyance, or other disposition thereof shall be applied and distributed as follows:

(1) All costs and expenses of the court proceedings and all liabilities and obligations of the corporation shall be paid, satisfied and discharged, or adequate provision shall be made therefor;

(2) Assets held by the corporation upon condition requiring return, transfer or conveyance, which condition occurs by reason of the dissolution or liquidation, shall be returned, transferred or conveyed in accordance with such requirements;

(3) Unless provided otherwise by a provision of the corporation's articles of incorporation that refers to this subsection, the remaining assets of the corporation shall be distributed only for tax exempt purposes to one or more organizations which are exempt

under Section 501(c)(3), Internal Revenue Code of 1954 (26 U.S.C. Section 501(c)(3)), or its successor statute, or which are described in Section 170(c)(1) or (2), Internal Revenue Code of 1954 (26 U.S.C. Section 170(c)(1) or (2)), or its successor statute. The distribution by the court shall be made in such manner as, in the judgment of the court, will best accomplish the general purposes for which the corporation was organized.

Revisor's Note

No substantive change is intended.

CHAPTER 12. ADMINISTRATIVE POWERS

SUBCHAPTER A. SECRETARY OF STATE

Revised Law

Sec. 12.001. AUTHORITY OF SECRETARY OF STATE. (a) The secretary of state may adopt procedural rules for the filing of instruments, including the filing of instruments by electronic or other means, authorized to be filed with the secretary of state under this code.

(b) The secretary of state has the power and authority reasonably necessary to enable the secretary to perform the duties imposed on the secretary under this code. (TBCA 9.03; TLLCA 8.03; TNPCA 9.04; TRPA 3.08(b)(15), 10.02(n); TMCLA 7.07.A (part).)

Source Law

[TBCA]

9.03. A. The Secretary of State shall have the power and authority reasonably necessary to enable him to administer this Act efficiently and to perform the duties therein imposed upon him.

[TLLCA]

8.03. A. The Secretary of State shall have the power and authority reasonably necessary to enable the Secretary of State to administer this Act efficiently and to perform the duties therein imposed upon the Secretary of State.

[TNPCA]

9.04. A. The Secretary of State shall have the power and authority reasonably necessary to enable him to administer this

Act efficiently and to perform the duties therein imposed upon him.

[TRPA 3.08(b)]

(15) The secretary of state may adopt procedural rules on filing documents under this subsection.

[TRPA 10.02]

(n) The secretary of state may adopt procedural rules on filing documents under this section.

[TMCLA 7.07]

A. . . . The Secretary of State may promulgate rules and adopt practices and procedures for the transmission, filing, and retention of instruments filed electronically or by use of other technological means.

Revisor's Note

No substantive change from current practices is intended. Section 12.001(a) authorizes the secretary of state to adopt procedural rules for the filing of instruments under the provisions of the code. Section 12.001(b) confers upon the secretary of state the power and authority reasonably necessary to perform the duties imposed by the code. Rulemaking authority is explicitly provided for under the Texas Revised Partnership Act and Texas Miscellaneous Corporation Laws Act and implicit under present provisions of the Texas Business Corporation Act, Texas Non-Profit Corporation Act, Texas Limited Liability Company Act, and Texas Revised Limited Partnership Act. The power to perform the duties of the office are explicitly provided in the Texas Business Corporation Act, Texas Limited Liability Company Act, and Texas Non-Profit Corporation Act and implicit under all other existing statutes requiring the secretary of state to file documents.

Chapter 12 does not apply to unincorporated nonprofit associations because of Section 252.017.

Revised Law

Sec. 12.002. INTERROGATORIES BY SECRETARY OF STATE. (a) As necessary and proper for the secretary of state to determine whether a filing entity or a foreign filing entity has complied with this code, the secretary of state may serve by mail interrogatories on the entity or a managerial official.

(b) An entity or individual to whom an interrogatory is sent by the secretary of state shall answer the interrogatory before the later of the 31st day after the date the interrogatory is mailed or a date set by the secretary of state. Each answer to an interrogatory must be complete, in writing, and under oath. An interrogatory directed to an individual shall be answered by the individual, and an interrogatory directed to an entity shall be answered by a managerial official.

(c) The secretary of state is not required to file any instrument to which an interrogatory relates until the interrogatory is answered as provided by this section and only if the instrument conforms to the requirements of this code. The secretary of state shall certify to the attorney general for action as the attorney general may consider appropriate an interrogatory and answer to the interrogatory that disclose a violation of this code.

(d) This section and Sections 12.003 and 12.004 do not apply to domestic real estate investment trusts. (TBCA 9.01; TLLCA 8.01.)

Source Law

[TBCA]

9.01. A. The Secretary of State may propound to any corporation, domestic or foreign, subject to the provisions of this Act, and to any officer or director thereof, such interrogatories as may be reasonably necessary and proper to enable him to ascertain whether such corporation has complied with all the provisions of this Act. Such interrogatories shall be answered within thirty days after the mailing thereof, or within such additional time as shall be fixed by the Secretary of State, and the answers thereto shall be full and complete and shall be made in writing and under oath. If such interrogatories be directed to an individual, they shall be answered by him, and if directed to a corporation, they shall be answered by an officer of the corporation. The Secretary of State need not file any document to which such interrogatories relate

until such interrogatories be answered as herein provided, and not then if the answers thereto disclose that such document is not in conformity with the provisions of this Act. The Secretary of State shall certify to the Attorney General, for such action as the Attorney General may deem appropriate, all interrogatories and answers thereto which disclose a violation of the provisions of this Act.

[TLLCA]

8.01. A. The Secretary of State may propound to any limited liability company, domestic or foreign, subject to the provisions of this Act, and to any manager thereof, such interrogatories as may be reasonably necessary and proper to enable the Secretary of State to ascertain whether such limited liability company has complied with all the provisions of this Act. Such interrogatories shall be answered within thirty days after the mailing thereof, or within such additional time as shall be fixed by the Secretary of State, and the answers thereto shall be full and complete and shall be made in writing and under oath. If such interrogatories be directed to an individual, they shall be answered by such individual, and if directed to a limited liability company, they shall be answered by an authorized manager or member of the limited liability company. The Secretary of State need not file any document to which such interrogatories relate until such interrogatories be answered as herein provided, and not then if the answers thereto disclose that such document is not in conformity with the provisions of this Act. The Secretary of State shall certify to the Attorney General, for such action as the Attorney General may deem appropriate, all interrogatories and answers thereto which disclose a violation of the provisions of this Act.

Revisor's Note

No substantive change for for-profit

corporations and limited liability companies is intended. The revised law expands the interrogatory powers of the Secretary of State to encompass other filing entities governed by the code, including in particular nonprofit corporations, cooperative associations, and limited partnerships. Professional associations and professional corporations are currently subject to those powers by virtue of the incorporation by reference of the Texas Business Corporation Act into the Texas Professional Association Act and Texas Professional Corporation Act. Because a real estate investment trust files its certificate of formation with a county clerk and not the Secretary of State, Subsection (d) excludes domestic real estate investment trusts from the coverage of Sections 12.002-12.004.

Revised Law

Sec. 12.003. INFORMATION DISCLOSED BY INTERROGATORIES. An interrogatory sent by the secretary of state and the answer to the interrogatory are subject to Chapter 552, Government Code. (TBCA 9.02; TLLCA 8.02.)

Source Law

[TBCA]

9.02. A. Interrogatories propounded by the Secretary of State and the answers thereto shall not be open to public inspection nor shall the Secretary of State disclose any facts or information obtained therefrom except insofar as his official duty may require the same to be made public or in the event such interrogatories or the answers thereto are required for evidence in any criminal proceedings or in any other action by this State.

[TLLCA]

8.02. A. Interrogatories propounded by the Secretary of State and the answers thereto shall not be open to public inspection nor shall the Secretary of State disclose any facts or information obtained therefrom except insofar as official duty may require the same to be made public or in the event such interrogatories or the answers

thereto are required for evidence in any criminal proceedings or in any other action by this State.

Revisor's Note

Section 12.003 provides that the interrogatories and answers to the interrogatories issued under Section 12.002 are subject to disclosure under the provisions of the Public Information Act, Chapter 552, Government Code. Existing law prohibits disclosure of any facts or information obtained from an interrogatory except when official duty would require the information to be made public or when needed as evidence in a criminal proceeding or other state action.

Revised Law

Sec. 12.004. APPEALS FROM SECRETARY OF STATE. (a) If the secretary of state does not approve the filing of a filing instrument, the secretary of state shall, before the 11th day after the date of the delivery of the filing instrument to the secretary of state, notify the person delivering the filing instrument of the disapproval and specifying each reason for the disapproval. The disapproval of a filing instrument by the secretary of state may be appealed only to a district court of Travis County by filing with the court clerk a petition, a copy of the filing instrument sought to be filed, and a copy of any written disapproval by the secretary of state of the filing instrument. The court shall try the appeal de novo and shall sustain the action of the secretary of state or direct the secretary to take any action the court considers to be proper.

(b) A final order or judgment entered by the district court under this section in review of any ruling or decision of the secretary of state may be appealed as in other civil actions.

(TBCA 9.04.A; TLLCA 8.04; TNPCA 9.05.)

Source Law

[TBCA 9.04]

A. If the Secretary of State shall fail to approve any articles of incorporation, application for certificate of authority to transact business in this State, amendment, merger, share exchange, conversion, or dissolution, or any other document required by this Act to be approved by the Secretary of State before the same shall be filed in his office, he shall, within ten days after

the delivery thereof to him, give written notice of his disapproval to the person, corporation, or other entity, domestic or foreign, delivering the same, specifying in such notice the reasons therefor. From such disapproval such person, corporation, or other entity may appeal to any district court of Travis County by filing with the clerk of such court a petition setting forth a copy of the articles or other document sought to be filed and a copy of the written disapproval thereof by the Secretary of State; whereupon the matter shall be tried de novo by the court, and the court shall either sustain the action of the Secretary of State or direct him to take such action as the court may deem proper.

[TLLCA]

8.04. A. If the Secretary of State shall fail to approve any articles of organization, application for certificate of authority to transact business in this State, amendment, merger, consolidation, or dissolution, or any other document required by this Act to be approved by the Secretary of State before the same shall be filed in the office of the Secretary of State, the Secretary of State shall, within ten days after the delivery thereof to the Secretary of State, give written notice of disapproval to the person or limited liability company, domestic or foreign, delivering the same, specifying in such notice the reasons therefor. From such disapproval, such person or limited liability company may appeal to any district court of Travis County by filing with the clerk of such court a petition setting forth a copy of the articles or other document sought to be filed and a copy of the written disapproval thereof by the Secretary of State; whereupon the matter shall be tried de novo by the court, and the court shall either sustain the action of the Secretary of State or direct the Secretary of State to take such action as the court may deem proper.

B. Appeals from all final orders and

judgments entered by the district court under this Article in review of any ruling or decision of the Secretary of State may be taken as in other civil actions.

[TNPCA]

9.05. A. If the Secretary of State shall fail to approve any articles of incorporation, application for certificate of authority to conduct affairs in this State, amendment, merger, consolidation, or dissolution, or any other document required by this Act to be approved by the Secretary of State before the same shall be filed in his office, he shall, within ten (10) days after the delivery thereof to him, give written notice of his disapproval to the person or corporation, domestic or foreign, delivering the same, specifying in such notice the reasons therefor. From such disapproval such person or corporation may appeal to any district court of Travis County by filing with the clerk of such court a petition setting forth a copy of the articles or other document sought to be filed and a copy of the written disapproval thereof by the Secretary of State; whereupon the matter shall be tried de novo by the court, and the court shall either sustain the action of the Secretary of State or direct him to take such action as the court may deem proper.

B. Appeals from all final orders and judgments entered by the district court under this Article in review of any ruling or decision of the Secretary of State may be taken as in other civil actions.

Revisor's Note

The revised law expands the appeal provisions to all filings submitted to the Secretary of State under the provisions of the code. The source law currently applies to filings submitted by corporations (including nonprofit and professional), professional associations, and limited liability companies under the provisions of the Texas Business Corporation Act, Texas Limited Liability Act, and Texas Non-Profit

Corporation Act. This provision does not apply to domestic real estate investment trusts, which do not make a filing with the Secretary of State. The primary filing entity affected by the expansion of the appeal provisions is the limited partnership.

[Sections 12.005-12.150 reserved for expansion]

SUBCHAPTER B. ATTORNEY GENERAL

Revised Law

Sec. 12.151. AUTHORITY OF ATTORNEY GENERAL TO EXAMINE BOOKS AND RECORDS. Each filing entity and foreign filing entity shall permit the attorney general to inspect, examine, and make copies, as the attorney general considers necessary in the performance of a power or duty of the attorney general, of any record of the entity. A record of the entity includes minutes and a book, account, letter, memorandum, document, check, voucher, telegram, constitution, and bylaw. (TMCLA 5.01.)

Source Law

5.01. A. Every corporation, domestic or foreign, doing business in Texas, shall permit the Attorney General or any of his authorized assistants or representatives, to make examination of all the books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and bylaws, and other records of said corporation as he may deem necessary.

Revisor's Note

Subchapter B expands the authority of the Attorney General to examine books and records to all domestic and foreign filing entities. Current authority is limited to those entities subject to the provisions of the Texas Miscellaneous Corporation Laws Act.

Revised Law

Sec. 12.152. REQUEST TO EXAMINE. To examine the business of a filing entity or foreign filing entity, the attorney general shall make a written request to a managerial official, who shall immediately permit the attorney general to inspect, examine, and make copies of the records of the entity. (TMCLA 5.02, 5.03.)

Source Law

5.02. A. A written request shall be made to the president or other officer of said domestic or foreign corporation at the time the Attorney General or his assistants

desire to examine the business of said corporation. It shall be the duty of the officer or agent of any corporation to whom said request is presented to immediately permit the Attorney General, or his authorized assistant or representative, to inspect and examine all the said books, records, and other documents of said corporation.

5.03. A. The Attorney General, or any of his assistants or representatives, when authorized by the Attorney General, has the power and authority to make investigation into the organization, conduct and management of any corporation, domestic or foreign, authorized to do business within this State, and has authority to inspect and examine any of its said books, records, and other documents, and take such copies thereof as in his judgment may show or tend to show said corporation has been or is engaged in acts or conduct in violation of its charter rights and privileges, or in violation of any law of this State.

Revisor's Note

Except as described in the Revisor's Note to Section 12.151, no substantive change is intended.

Revised Law

Sec. 12.153. AUTHORITY TO EXAMINE MANAGEMENT OF ENTITY. The attorney general may investigate the organization, conduct, and management of a filing entity or foreign filing entity and determine if the entity has been or is engaged in acts or conduct in violation of:

- (1) its governing documents; or
- (2) any law of this state. (TMCLA 5.03.)

Source Law

5.03. A. The Attorney General, or any of his assistants or representatives, when authorized by the Attorney General, has the power and authority to make investigation into the organization, conduct and management of any corporation, domestic or foreign, authorized to do business within this State, and has authority to inspect and examine any of its said books, records, and other

documents, and take such copies thereof as in his judgment may show or tend to show said corporation has been or is engaged in acts or conduct in violation of its charter rights and privileges, or in violation of any law of this State.

Revisor's Note

Except as described in the Revisor's Note to Section 12.151, no substantive change is intended.

Revised Law

Sec. 12.154. AUTHORITY TO DISCLOSE INFORMATION. Information held by the attorney general and derived in the course of an examination of an entity's records or documents is not public information, is not subject to Chapter 552, Government Code, and may not be disclosed except:

- (1) in the course of an administrative or judicial proceeding in which the state is a party;
- (2) in a suit by the state to:
 - (A) revoke the registration of the foreign filing entity or terminate the certificate of formation of the filing entity; or
 - (B) collect penalties for a violation of the law of this state; or
- (3) to provide information to any officer of this state charged with the enforcement of its laws. (TMCLA 5.04.)

Source Law

5.04. A. The Attorney General, or his authorized assistants or representatives, shall not make public, or use said copies or any information derived in the course of said examination of said records or documents, except in the course of some judicial proceedings in which the State is a party, or in a suit by the State to cancel the permit or forfeit the charter of such domestic or foreign corporation, or to collect penalties for a violation of the laws of this State, or for information of any officer of this State charged with the enforcement of its laws.

Revisor's Note

Except as described in the Revisor's Note to Section 12.151, no substantive change is intended.

Revised Law

Sec. 12.155. FORFEITURE OF BUSINESS PRIVILEGES. A foreign filing entity or a filing entity that fails or refuses to permit the attorney general to examine or make copies of a record, without regard to whether the record is located in this or another state, forfeits the right of the entity to do business in this state, and the entity's registration or certificate of formation shall be revoked or terminated. (TMCLA 5.05.A.)

Source Law

A. Any foreign corporation doing business in Texas under a permit granted under the laws of this State, or any officer or agent thereof, or any domestic corporation which shall fail or refuse to permit the Attorney General, or his authorized representative or representatives, to examine or take copies of any of its said books, records and other documents whether the same be situated within this or any other state within the United States, shall thereby forfeit its right to do business in this State; and its permit or charter shall be canceled or forfeited.

Revisor's Note

Except as described in the Revisor's Note to Section 12.151, no substantive change is intended.

Revised Law

Sec. 12.156. CRIMINAL PENALTY. (a) A managerial official or other individual having the authority to manage the affairs of a filing entity or foreign filing entity commits an offense if the official or individual fails or refuses to permit the attorney general to make an investigation of the entity or to examine or to make copies of a record of the entity.

(b) An offense under this section is a Class B misdemeanor. (TMCLA 5.05.B.)

Source Law

B. If any president, vice-president, treasurer, secretary, manager, agent or other officer of any domestic or foreign corporation doing business under permit or charter from this State shall fail or refuse to permit the Attorney General or any of his assistants or representatives who may be authorized in writing by the Attorney General

to make such examination, to examine or to take copies of any or all of the books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws and other records of said corporation, he shall be fined not less than one hundred nor more than one thousand dollars, and be imprisoned in jail not less than thirty nor more than one hundred days. Each day of such failure or refusal shall be a separate offense.

Revisor's Note

Section 12.156 clarifies that the failure or refusal of a managerial official or other authorized individual managing the affairs of an entity to permit the attorney general to make an investigation of the entity or take copies of a record of the entity is a Class B misdemeanor. Existing law establishes a monetary fine and time of imprisonment without referencing that the offense is a Class B misdemeanor. Criminal penalties are extended to the managerial officials of all domestic and foreign filing entities. Current criminal penalties are only applicable to officers, managers, and agents of entities that are subject to the Texas Miscellaneous Corporation Laws Act.

[Sections 12.157-12.200 reserved for expansion]

SUBCHAPTER C. ENFORCEMENT LIEN

Revised Law

Sec. 12.201. LIEN FOR LAW VIOLATIONS. (a) If a filing entity or foreign filing entity violates a law of this state, including the law against trusts, monopolies, and conspiracies, or combinations or contracts in restraint of trade, for the violation of which a fine, penalties, or forfeiture is provided, all of the entity's property in this state at the time of the violation or that after the violation comes into this state is, because of the violation, liable for any fine or penalty under this chapter and for costs of suit and costs of collection.

(b) The state has a lien on all property of a filing entity or foreign filing entity in this state on the date a suit is instituted by or under the direction of the attorney general in a court of this state for the purpose of forfeiting the certificate of formation or revoking the registration of the entity or for the collection of a fine or penalty due to the state.

(c) The filing of a suit for a fine, penalties, or

forfeiture is notice of the lien.

(d) In addition to the property subjected to the lien under Subsection (b), the lien applies to any property that comes into the possession of a receiver appointed under Subchapter D. (TMCLA 5.07, 5.08, 5.11 (part).)

Source Law

5.07. A. Whenever any domestic or foreign corporation in this State shall violate any law of this State, including the law against trusts, monopolies and conspiracies or combinations or contracts in restraint of trade, for the violation of which fines or penalties or forfeitures are provided, all property of such corporation within this State at the time of such violation, or which may thereafter come within this State, shall, by reason of such violation, become liable for such fines or penalties and for costs of suit and costs of collection.

5.08. A. The State of Texas shall have a lien on all such property from the date that suit shall be instituted by the Attorney General or district or county attorney acting under his direction, in any court of competent jurisdiction within this State, for the purpose of forfeiting the charter or canceling the permit of such domestic or foreign corporation, or for such fines or penalties. The institution of such suit for such fine, penalties or forfeiture, shall constitute notice of such lien.

5.11. A. . . . and all property not otherwise exempt by law that may come into the possession of any receiver appointed under any provision of such Articles, shall be subject to the lien herein created, and for the payment of any such fine or penalty.

Revisor's Note

Subchapters C and D expand the powers and authorities of the State and the Attorney General to all domestic and foreign filing entities. The source law only applies to those entities subject to the Texas Miscellaneous Corporation Laws Act.

[Sections 12.202-12.250 reserved for expansion]

SUBCHAPTER D. ENFORCEMENT PROCEEDINGS

Revised Law

Sec. 12.251. RECEIVER. In a suit filed by this state against a filing entity or foreign filing entity for the termination of the entity's certificate of formation or registration or for a fine or penalty, the court in this state in which the suit is pending:

(1) shall appoint a receiver for the property and business of the entity in this state or that subsequently comes into this state during the receivership if the filing entity or foreign filing entity commences the process of winding up its business in this or another state or a judgment is rendered against it in this or another state for the termination of the entity's certificate of formation or registration; and

(2) may appoint a receiver for the entity if the interest of the state requires the appointment. (TMCLA 5.10.)

Source Law

5.10. A. Whenever a domestic or foreign corporation, against which the State has instituted suit for forfeiture of its charter or cancellation of its permit or for fines or penalties, shall dissolve in this or any other state, or shall have a judgment rendered against it in this or any other state for the forfeiture of its charter, the court in this State in which such suit is pending shall appoint a receiver for the property and business of such corporation within this State, or that may come or be brought within this State during such receivership; or the court may, in any case wherein the State is suing any such corporation for the forfeiture of its charter, or of its permit to do business in this State, or for fines or penalties, appoint a receiver for such corporation whenever the interest of the State may seem to require such action.

Revisor's Note

Except as described in the Revisor's Note to Section 12.201, no substantive change is intended. Consistent with the provisions of Title 1 of the code, the term "termination" is substituted for the term "forfeiture," "certificate of formation" is substituted for the term "charter," the term

"registration" is substituted for the term "permit," and the phrase "commences the process of winding up" is substituted for the term "dissolve."

Revised Law

Sec. 12.252. FORECLOSURE. (a) The attorney general may bring suit to foreclose a lien created by this chapter.

(b) If a filing entity or a foreign filing entity subject to this code has commenced the winding up process or has had the entity's certificate of formation or registration terminated by a judgment, citation in a suit for foreclosure may be served on any person in this state who acted and was acting as agent of the entity in this state when the entity commenced the winding up process or the entity's certificate of formation or registration was terminated. (TMCLA 5.12.)

Source Law

5.12. A. The Attorney General or any district or county attorney acting under his direction, may bring suit in the name of this State for foreclosure of such lien. In case the suit for foreclosure is brought against any domestic or foreign corporation which has dissolved or had a judgment for the forfeiture of its charter or the cancellation of its permit rendered against it, pending any suit by the State of Texas against such corporation for the forfeiture of its charter or cancellation of its permit or for penalties or fines, service may be had upon any person within this State who acted and was acting as agent of any such corporation in this State at the time of such dissolution or forfeiture of charter or cancellation of permit.

Revisor's Note

Except as described in the Revisor's Note to Section 12.201, no substantive change is intended. The delegation of authority to the district or county attorney is found in Section 12.254 of the code.

Revised Law

Sec. 12.253. ACTION AGAINST INSOLVENT ENTITY. When the attorney general is convinced that a filing entity or foreign filing entity is insolvent, the attorney general shall institute quo warranto or other appropriate proceedings to terminate the certificate of formation or registration of the filing entity or

foreign filing entity that is insolvent. (TMCLA 5.14.)

Source Law

5.14. A. The Attorney General, when convinced that any corporation is insolvent, shall institute quo warranto or other appropriate proceedings to forfeit its charter or cancel its permit.

Revisor's Note

Except as described in the Revisor's Note to Section 12.201, no substantive change is intended.

Revised Law

Sec. 12.254. SUITS BY DISTRICT OR COUNTY ATTORNEY. A district or county attorney shall bring and prosecute a proceeding under Section 12.252 or 12.253 when directed to do so by the attorney general. (TMCLA 5.12 (part), 5.15.)

Source Law

5.12. A. The Attorney General or any district or county attorney acting under his direction, may bring suit in the name of this State for foreclosure of such lien. . . .

5.15. A. Each district and county attorney shall bring and prosecute the proceedings mentioned in the preceding Article whenever directed to do so by the Attorney General. The court trying said cause, after the corporation has been shown to be insolvent, may, in its discretion, appoint a receiver or receivers for said corporation and all its properties, with full power to settle its affairs, collect its outstanding debts and divide the moneys and other properties belonging to said company among the stockholders thereof, after paying the debts due and owing by such corporation, and all expenses incident to the judicial proceedings and receivership. The court may continue the existence of such corporation for three (3) years, and for such further reasonable time as may be necessary to accomplish the objects and purposes of this law.

Revisor's Note

Except as described in the Revisor's Note to Section 12.201, no substantive change is intended. The provisions of Texas Miscellaneous Corporation Laws Act Section 5.15 relating to the authority of the court to appoint a receiver are found in Section 12.258 of the code.

Revised Law

Sec. 12.255. PERMISSION TO SUE. Before a petition may be filed by the attorney general or by a district or county attorney in a suit authorized by Section 12.252 or 12.253, leave must be granted by the judge of the court in which the proceeding is to be filed. (TMCLA 5.17.)

Source Law

5.17. A. Before such petition is filed by the Attorney General, or under his authority, as provided in Articles 5.14 and 5.15 of this Part, leave therefor shall first be granted by the judge of the court in which the proceeding is to be instituted.

Revisor's Note

No substantive change in procedures is intended.

Revised Law

Sec. 12.256. EXAMINATION AND NOTICE. (a) The judge of a court in which a proceeding under Section 12.252 or 12.253 is to be filed shall carefully examine the petition before granting leave to sue. The judge may also require an examination into the facts. If it appears with reasonable certainty from the petition or from the petition and facts that there is a prima facie showing for the relief sought, the judge may grant leave to file.

(b) On an application for the appointment of a receiver, the entity proceeded against is entitled to 10 days' notice before the day set for the hearing. (TMCLA 5.18.)

Source Law

5.18. A. On presentation of such petition, before granting leave to sue, the judge shall carefully examine the same; and he may also require an examination into the facts; and if it shall be made to appear with reasonable certainty from said petition, or from the petition and facts, that the relief sought should be granted, the judge may grant such relief. On an application for the

appointment of a receiver, the corporation proceeded against shall have ten full days' notice prior to the day set for the hearing.

Revisor's Note

No substantive change in procedures is intended.

Revised Law

Sec. 12.257. DISMISSAL OF ACTION. (a) A suit authorized by Section 12.253 or 12.258 may not be filed or, if filed, shall be dismissed if the entity, through its owners or members, reduces its indebtedness so that it is not insolvent.

(b) The respondent shall pay the costs of a dismissed suit under this section. (TMCLA 5.16.)

Source Law

5.16. A. If any suit authorized by Articles 5.14 and 5.15 of this Part has been instituted, the same shall be dismissed at the cost of the defendant; or, if not instituted, the same shall not be begun, if the defendant corporation, through its stockholders, shall pay off its indebtedness or reduce the same by paying, so that it is relieved of insolvency.

Revisor's Note

No substantive change in procedures is intended. Consistent with other provisions of title 1 of the code, the terms "owners" and "members" are used in place of "shareholders" to reflect the expansion of these provisions to other filing entities.

Revised Law

Sec. 12.258. LIQUIDATION OF INSOLVENT ENTITY. (a) A court hearing a proceeding under Section 12.253 against an insolvent entity may, after the entity has been shown to be insolvent, appoint one or more receivers for the entity and its property. The receiver may settle the affairs of the entity, collect outstanding debts, and divide the money and property belonging to the entity among its owners after paying the debts of the entity and all expenses incidental to the judicial proceedings and receivership.

(b) The court may continue the existence of the entity for three years and for additional reasonable time as necessary to accomplish the purposes of this subchapter. (TMCLA 5.15.)

Source Law

5.15. A. Each district and county attorney shall bring and prosecute the proceedings mentioned in the preceding Article whenever directed to do so by the Attorney General. The court trying said cause, after the corporation has been shown to be insolvent, may, in its discretion, appoint a receiver or receivers for said corporation and all its properties, with full power to settle its affairs, collect its outstanding debts and divide the moneys and other properties belonging to said company among the stockholders thereof, after paying the debts due and owing by such corporation, and all expenses incident to the judicial proceedings and receivership. The court may continue the existence of such corporation for three (3) years, and for such further reasonable time as may be necessary to accomplish the objects and purposes of this law.

Revisor's Note

No substantive change in procedures is intended.

Revised Law

Sec. 12.259. EXTRAORDINARY REMEDIES; BOND. The state has a right to a writ of attachment, garnishment, sequestration, or injunction, without bond, to aid in the enforcement of the state's rights created by this chapter. (TMCLA 5.11 (part).)

Source Law

5.11. A. The State shall have the right to writs of attachment, garnishment, sequestration or injunction, without bond, to aid in the enforcement of its rights created by Articles 5.07, 5.08, 5.09, and 5.10 of this Part;

Revisor's Note

No substantive change in procedures or rights of the State is intended other than the expansion of these provisions to other filing entities governed by the code.

Revised Law

Sec. 12.260. ABATEMENT OF SUIT. An action or cause of

action for a fine, penalty, or forfeiture that this state has or may have against a filing entity or foreign filing entity does not abate because the entity dissolves, voluntarily or otherwise, or the entity's certificate of formation is terminated or the entity's registration is revoked. (TMCLA 5.09.)

Source Law

5.09. A. Any action or cause of action for any fine, forfeiture or penalty that the State of Texas has, or may have, against any domestic or foreign corporation shall not abate or become abated by reason of the dissolution of such corporation, whether voluntary or otherwise, or by the forfeiture of its charter or permit.

Revisor's Note

No substantive change in procedures is intended.

Revised Law

Sec. 12.261. PROVISIONS CUMULATIVE. Each right or remedy provided by this chapter is cumulative and does not affect any other right or remedy for the enforcement, payment, or collection of a fine, forfeiture, or penalty or any other means provided by law for securing or preserving testimony or inquiring into the rights or privileges of an entity. (TMCLA 5.06, 5.13, 5.19.)

Source Law

5.06. A. The provisions of Articles 5.01, 5.02, 5.03, 5.04, and 5.05 of this Part shall be cumulative of all other laws now in force in this State, and shall not be construed as repealing any other means afforded by law for securing testimony or inquiring into the charter rights and privileges of domestic or foreign corporations.

5.13. A. The rights and remedies given by Articles 5.07, 5.08, 5.09, 5.10, 5.11, and 5.12 of this Part shall be construed as cumulative of all other laws in force in this State, and shall not affect, change or repeal any other remedies or rights now existing in this State for the enforcement, payment or collection of fines, penalties and forfeitures.

5.19. A. The rights and remedies given by Articles 5.14, 5.15, 5.16, 5.17, and 5.18 of this Part are cumulative, and shall not affect, change or repeal any other remedies or rights now existing in this State for the enforcement, payment or collection of fines, forfeitures and penalties.

Revisor's Note

No substantive change is intended.

TITLE 2. CORPORATIONS

CHAPTER 20. GENERAL PROVISIONS

Revised Law

Sec. 20.001. REQUIREMENT THAT FILING INSTRUMENT BE SIGNED BY OFFICER. Unless otherwise provided by this title, a filing instrument of a corporation must be signed by an officer of the corporation. (TBCA 2.10.B (part), 2.12.C(3) (part), 2.13.E (part), 2.22.E(2) (part), 4.10.B (part), 4.11.B (part), 4.12.B (part); TNPCA 4.03 (part), 4.06.D (part), 6.05 (part).)

Source Law

[TBCA 2.10]

B. The statement required by this article shall be executed on behalf of the corporation by an officer. . . .

[TBCA 2.12.C]

(3) The statement shall be executed on behalf of the corporation by an officer. . . .

[TBCA 2.13]

E. Such statement shall be executed on behalf of the corporation by an officer. . . .

[TBCA 2.22.E]

(2) Such statement shall be executed on behalf of the corporation by an officer. . . .

[TBCA 4.10]

B. The statement of cancellation shall be executed on behalf of the corporation by an officer and

[TBCA 4.11]

B. The statement of cancellation shall

be executed on behalf of the corporation by an officer and

[TBCA 4.12]

B. . . . a statement shall be executed on behalf of the corporation by an officer and

[TNPCA]

4.03.A. The articles of amendment shall be signed on behalf of the corporation by an officer and

[TNPCA 4.06]

D. Such restated articles of incorporation shall be signed on behalf of the corporation by an officer. . . .

[TNPCA]

6.05.A. . . . articles of dissolution shall be signed on behalf of the corporation by an officer and

Revisor's Note

No substantive change is intended. The revised law uses the new generic term "filing instrument," as defined in Chapter 1, to refer to all documents that are filed with the secretary of state.

Revised Law

Sec. 20.002. ULTRA VIRES ACTS. (a) Lack of capacity of a corporation may not be the basis of any claim or defense at law or in equity.

(b) An act of a corporation or a transfer of property by or to a corporation is not invalid because the act or transfer was:

(1) beyond the scope of the purpose or purposes of the corporation as expressed in the corporation's certificate of formation; or

(2) inconsistent with a limitation on the authority of an officer or director to exercise a statutory power of the corporation, as that limitation is expressed in the corporation's certificate of formation.

(c) The fact that an act or transfer is beyond the scope of the expressed purpose or purposes of the corporation or is inconsistent with an expressed limitation on the authority of an officer or director may be asserted in a proceeding:

(1) by a shareholder or member against the corporation to enjoin the performance of an act or the transfer of property

by or to the corporation;

(2) by the corporation, acting directly or through a receiver, trustee, or other legal representative, or through members in a representative suit, against an officer or director or former officer or director of the corporation for exceeding that person's authority; or

(3) by the attorney general to:

(A) terminate the corporation;

(B) enjoin the corporation from performing an unauthorized act; or

(C) enforce divestment of real property acquired or held contrary to the laws of this state.

(d) If the unauthorized act or transfer sought to be enjoined under Subsection (c)(1) is being or is to be performed or made under a contract to which the corporation is a party and if each party to the contract is a party to the proceeding, the court may set aside and enjoin the performance of the contract. The court may award to the corporation or to another party to the contract, as appropriate, compensation for loss or damage resulting from the action of the court in setting aside and enjoining the performance of the contract, excluding loss of anticipated profits. (TBCA 2.04; TNPCA 2.03.)

Source Law

[TBCA]

2.04.A. Lack of capacity of a corporation shall never be made the basis of any claim or defense at law or in equity.

B. No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that such act, conveyance or transfer was beyond the scope of the purpose or purposes of the corporation as expressed in its articles of incorporation or by reason of limitations on authority of its officers and directors to exercise any statutory power of the corporation, as such limitations are expressed in the articles of incorporation, but that such act, conveyance or transfer was, or is, beyond the scope of the purpose or purposes of the corporation as expressed in its articles of incorporation or inconsistent with any such expressed limitations of authority, may be asserted:

(1) In a proceeding by a shareholder against the corporation to enjoin the doing of any act or acts or the transfer

of real or personal property by or to the corporation. If the unauthorized act or transfer sought to be enjoined is being, or is to be, performed or made pursuant to any contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the proceeding and if it deems the same to be equitable, set aside and enjoin the performance of such contract, and in so doing may allow to the corporation or to the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of such contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as a part of loss or damage sustained.

(2) In a proceeding by the corporation, whether acting directly or through a receiver, trustee, or other legal representative, or through shareholders in a representative suit, against the incumbent or former officers or directors of the corporation for exceeding their authority.

(3) In a proceeding by the Attorney General, as provided in this Act, to dissolve the corporation, or in a proceeding by the Attorney General to enjoin the corporation from transacting unauthorized business, or to enforce divestment of real property acquired or held contrary to the laws of this State.

[TNPCA]

2.03.A. Lack of capacity of a corporation shall never be made the basis of any claim or defense at law or in equity.

B. No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that such act, conveyance or transfer was beyond the scope of the purpose or purposes of the corporation as expressed in its articles of incorporation or by reason of limitations on authority of its officers and directors to exercise any

statutory power of the corporation, as such limitations are expressed in the articles of incorporation, but that such act, conveyance or transfer was, or is, beyond the scope of the purpose or purposes of the corporation as expressed in its articles of incorporation or inconsistent with any such expressed limitations of authority, may be asserted:

(1) In a proceeding by a member against the corporation to enjoin the doing of any act or acts or the transfer of real or personal property by or to the corporation. If the unauthorized act or transfer sought to be enjoined is being, or is to be, performed or made pursuant to any contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the proceedings and if it deems the same to be equitable, set aside and enjoin the performance of such contract, and in so doing may allow to the corporation or to the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of such contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as part of the loss or damage sustained.

(2) In a proceeding by the corporation, whether acting directly or through a receiver, trustee, or other legal representative, or through members in a representative suit, against the incumbent or former officers or directors of the corporation for exceeding their authority.

(3) In a proceeding by the Attorney General, as provided in this Act, to dissolve the corporation, or in a proceeding by the Attorney General to enjoin the corporation from performing unauthorized acts, or to enforce divestment of real property acquired or held contrary to the laws of this State.

Revisor's Note

No substantive change is intended. The revised law substitutes the new generic term "certificate of formation," as defined in Chapter 1, for "articles of incorporation" throughout Chapters 20-23. The references to real and personal property have been deleted as unnecessary and redundant to the term "property."

CHAPTER 21. FOR-PROFIT CORPORATIONS

SUBCHAPTER A. GENERAL PROVISIONS

Revised Law

Sec. 21.001. APPLICABILITY OF CHAPTER. This chapter applies only to a:

- (1) domestic for-profit corporation formed under this code; and
 - (2) foreign for-profit corporation that is transacting business in this state, regardless of whether the foreign corporation is registered to transact business in this state.
- (New.)

Revisor's Note

This new provision clarifies the scope of Chapter 21 and can be implied from the scope of the Texas Business Corporation Act. The revised law uses the new term "for-profit corporation," as defined in Chapter 1, to refer to corporations governed by Chapter 21.

Revised Law

Sec. 21.002. DEFINITIONS. In this chapter:

- (1) "Authorized share" means a share of any class the corporation is authorized to issue.
- (2) "Board of directors" includes each person who is authorized to perform the functions of the board of directors under a shareholders' agreement as authorized by this chapter.
- (3) "Cancel," with respect to an authorized share of a corporation, means the restoration of an issued share to the status of an authorized but unissued share.
- (4) "Consuming assets corporation" means a corporation that:
 - (A) is engaged in the business of exploiting assets subject to depletion or amortization;
 - (B) states in its certificate of formation that it is a consuming assets corporation;
 - (C) includes the phrase "a consuming assets corporation" as part of its official corporate name and gives the phrase equal prominence with the rest of the corporate name on the financial statements and certificates of ownership of the corporation; and

(D) includes in each of the certificates of ownership of the corporation the sentence, "This corporation is permitted by law to pay dividends out of reserves that may impair its stated capital."

(5) "Corporation" or "domestic corporation" means a domestic for-profit corporation subject to this chapter.

(6)(A) "Distribution" means a transfer of property, including cash, or issuance of debt, by a corporation to its shareholders in the form of:

(i) a dividend on any class or series of its outstanding shares;

(ii) a purchase or redemption, directly or indirectly, of any of its own shares; or

(iii) a payment by the corporation in liquidation of all or a portion of its assets.

(B) The term does not include:

(i) a split-up or division of the issued shares of a class of a corporation into a larger number of shares within the same class that does not increase the stated capital of the corporation; or

(ii) a transfer of the corporation's own shares or rights to acquire its own shares.

(7) "Foreign corporation" means a for-profit corporation formed under the laws of a jurisdiction other than this state.

(8) "Investment Company Act" means the Investment Company Act of 1940 (15 U.S.C. Section 80a-1 et seq.), as amended.

(9) "Net assets" means the amount by which the total assets of a corporation exceed the total debts of the corporation.

(10) "Share dividend" means a dividend by a corporation that is payable in authorized but unissued shares or treasury shares of the corporation. The term does not include:

(A) an amendment to the corporation's certificate of formation to change the shares of a class or series, with or without par value, into the same or a different number of shares of the same or a different class or series, with or without par value; or

(B) a split-up or division of the issued shares of a class of a corporation into a larger number of shares within the same class that does not increase the stated capital of the corporation.

(11) "Stated capital" means the sum of:

(A) the par value of all shares of the corporation with par value that have been issued;

(B) the consideration, as expressed in terms of United States dollars, determined by the corporation in the

manner provided by Section 21.160 for all shares of the corporation without par value that have been issued, except that part, but not all, of the consideration that:

- (i) has been actually received; and
- (ii) the board, by resolution adopted not later than the 60th day after the date of issuance of those shares, has allocated to surplus; and

(C) an amount not included in Paragraphs (A) and (B) that has been transferred to stated capital of the corporation, on the payment of a share dividend or on adoption by the board of directors of a resolution directing that all or part of surplus be transferred to stated capital, minus each reduction made as permitted by law.

(12) "Surplus" means the amount by which the net assets of a corporation exceed the stated capital of the corporation.

(13) "Treasury shares" means shares of a corporation that have been issued, and subsequently acquired by the corporation, that belong to the corporation and that have not been canceled. The term does not include shares held by a corporation in a fiduciary capacity, whether directly or through a trust or similar arrangement. (TBCA 1.02.A(3), (4), (7), (11), (13), (14), (17), (19), (21), (24), (27), (28) (part), 2.38-2.)

Source Law

[1.02.A]

(3) "Authorized shares" means the shares of all classes which the corporation is authorized to issue.

(4) "Cancel" means to restore issued shares to the status of authorized but unissued shares.

. . .

(7) "Consuming assets corporation" means a corporation which is engaged in the business of exploiting assets subject to depletion or amortization and which elects to state in its articles of incorporation that it is a consuming assets corporation and includes as a part of its official corporate name the phrase "a consuming assets corporation," giving such phrase equal prominence with the rest of the corporate name on its financial statements and certificates representing shares. All its certificates representing shares shall also contain a further sentence: "This corporation is permitted by law to pay

dividends out of reserves which may impair its stated capital."

. . .

(11) "Corporation" or "domestic corporation" means a corporation for profit subject to the provisions of this Act, except a foreign corporation.

. . .

(13) "Distribution" means a transfer of money or other property (except its own shares or rights to acquire its own shares), or issuance of indebtedness, by a corporation to its shareholders in the form of:

(a) a dividend on any class or series of the corporation's outstanding shares;

(b) a purchase, redemption, or other acquisition by the corporation, directly or indirectly, of any of its own shares; or

(c) a payment by the corporation in liquidation of all or a portion of its assets.

(14) "Foreign corporation" means a corporation for profit organized under laws other than the laws of this State.

. . .

(17) "Investment Company Act" means the Investment Company Act of 1940 (15 U.S.C. Sec. 80a-1 et seq.);

. . .

(19) "Net assets" means the amount by which the total assets of a corporation exceed the total debts of the corporation.

. . .

(21) "Share dividend" means a dividend by a corporation that is payable in its own authorized but unissued shares or in treasury shares. An amendment to a corporation's articles of incorporation to change the shares of any class or series, whether with or without par value, into the same or a different number of shares, either with or without par value, of the same class or series or another class or series does not constitute a share dividend.

. . .

(24) "Stated capital" means, at any particular time, the sum of:

(a) the par value of all shares of the corporation having a par value that have been issued;

(b) the consideration fixed by the corporation in the manner provided by Article 2.15 of this Act for all shares of the corporation without par value that have been issued, except such part of the consideration that is actually received therefor (which part must be less than all of that consideration) that the board by resolution adopted no later than sixty (60) days after the issuance of those shares may have allocated to surplus; and

(c) such amounts not included in paragraphs (a) and (b) of this subsection as have been transferred to stated capital of the corporation, whether upon the payment of a share dividend or upon adoption by the board of directors of a resolution directing that all or part of surplus be transferred to stated capital, minus all reductions from such sum as have been effected in a manner permitted by law.

. . .

(27) "Surplus" means the excess of the net assets of a corporation over its stated capital.

(28) "Treasury shares" means shares of a corporation which have been issued, have been subsequently acquired by and belong to the corporation, and have not been canceled and restored to the status of authorized but unissued shares. Treasury shares do not include shares held by a corporation, either directly or through a trust or similar arrangement, in a fiduciary capacity. . . .

. . .

[2.38-2]

A split-up or division of the issued shares of any class of a corporation into a greater number of shares of the same class without increasing the stated capital of the corporation does not constitute a share

dividend or a distribution.

Revisor's Note

No substantive change is intended. The definition of "board of directors" has been added to clarify that persons who are authorized to perform the functions of a board of directors under a shareholder agreement are included in the definition of "board of directors."

[Sections 21.003-21.050 reserved for expansion]

SUBCHAPTER B. FORMATION AND GOVERNING DOCUMENTS

Revised Law

Sec. 21.051. NO PROPERTY RIGHT IN CERTIFICATE OF FORMATION. A shareholder of a corporation does not have a vested property right resulting from the certificate of formation, including a provision in the certificate of formation relating to the management, control, capital structure, dividend entitlement, purpose, or duration of the corporation. (TBCA 4.01.B.)

Source Law

B. A shareholder of the corporation does not have a vested property right resulting from any provision in the articles of incorporation, including provisions relating to management, control, capital structure, dividend entitlement, or purpose or duration of the corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.052. PROCEDURES TO ADOPT AMENDMENT TO CERTIFICATE OF FORMATION. (a) To adopt an amendment to the certificate of formation of a corporation as provided by Subchapter B, Chapter 3, the board of directors of the corporation shall:

(1) adopt a resolution stating the proposed amendment; and

(2) follow the procedures prescribed by Sections 21.053-21.055.

(b) The resolution may incorporate the proposed amendment in a restated certificate of formation that complies with Section 3.059.

(c) The certificate of amendment must be filed in accordance with Chapter 4 and takes effect as provided by Subchapter B, Chapter 3. (TBCA 4.02.A (part).)

Source Law

A. The articles of incorporation may be amended in the following manner:

(1) The board of directors shall adopt a resolution setting forth the proposed amendment and, The resolution may incorporate the proposed amendment in restated articles of incorporation which

Revisor's Note

No substantive change is intended. Subsection (c) has been added to serve as a cross-reference to the provisions governing filing procedures and effectiveness of filings in Chapters 3 and 4.

Revised Law

Sec. 21.053. ADOPTION OF AMENDMENT BY BOARD OF DIRECTORS. If a corporation does not have any issued and outstanding shares, the board of directors may adopt a proposed amendment to the corporation's certificate of formation by resolution without shareholder approval. (TBCA 4.02.A(1) (part).)

Source Law

(1) . . . If no shares have been issued, the amendment shall be adopted by resolution of the board of directors and the provisions for adoption by shareholders shall not apply. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.054. ADOPTION OF AMENDMENT BY SHAREHOLDERS. If a corporation has issued and outstanding shares:

(1) a resolution described by Section 21.052 must also direct that the proposed amendment be submitted to a vote of the shareholders at a meeting; and

(2) the shareholders must approve the proposed amendment in the manner provided by Section 21.055. (TBCA 4.02.A (part).)

Source Law

A. The articles of incorporation may be amended in the following manner:

(1) . . . if shares have been issued, directing that it be submitted to a

vote at a meeting of shareholders, which may be either an annual or a special meeting.

. . . .

Revisor's Note

No substantive change is intended. The reference to an annual or special meeting has been deleted as unnecessary and redundant of the term "meeting." Subdivision (2) has been added to cross-reference to provisions in Section 21.055 governing the procedures for obtaining shareholder approval.

Revised Law

Sec. 21.055. NOTICE OF AND MEETING TO CONSIDER PROPOSED AMENDMENT. (a) Each shareholder of record entitled to vote shall be given written notice containing the proposed amendment or a summary of the changes to be effected within the time and in the manner provided by this code for giving notice of meetings to shareholders. The proposed amendment or summary may be included in the notice required to be provided for an annual meeting.

(b) At the meeting, the proposed amendment shall be adopted only on receiving the affirmative vote of shareholders entitled to vote required by Section 21.364.

(c) An unlimited number of amendments may be submitted for adoption by the shareholders at a meeting. (TBCA 4.02.A (part), B.)

Source Law

A. . . .

(2) Written or printed notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given to each shareholder of record entitled to vote thereon within the time and in the manner provided in this Act for the giving of notice of meetings of shareholders. If the meeting be an annual meeting, the proposed amendment or such summary may be included in the notice of such annual meeting.

(3) At such meeting a vote of the shareholders entitled to vote thereon shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of the holders of

B. Any number of amendments may be submitted to the shareholders, and voted upon

by them, at one meeting.

Revisor's Note

No substantive change is intended. The reference in Article 4.02.A(3), Texas Business Corporation Act, to "a vote of the shareholders . . . shall be taken" has been deleted as unnecessary and redundant. The reference in Subsection B of the source law to "and voted upon by them" has been deleted as unnecessary and redundant.

Revised Law

Sec. 21.056. RESTATED CERTIFICATE OF FORMATION. (a) A corporation may adopt a restated certificate of formation as provided by Subchapter B, Chapter 3, by following the same procedures to amend its certificate of formation under Sections 21.052-21.055, except that shareholder approval is not required if an amendment is not adopted.

(b) The restated certificate of formation shall be filed in accordance with Chapter 4 and takes effect as provided by Subchapter B, Chapter 3. (TBCA 4.07.A (part), D (part).)

Source Law

A. A corporation may, by following the procedure to amend the articles of incorporation provided by this Act (except that no shareholder approval shall be required where no amendment is made), authorize, execute, and file restated articles of incorporation which may restate either:

. . . .

D. . . . The original and a copy of the restated articles of incorporation shall be delivered to the Secretary of State.

. . . .

Revisor's Note

No substantive change is intended. Subsection (b) has been added to cross-reference to the provisions of Chapters 3 and 4 governing effectiveness of filings and filing procedures.

Revised Law

Sec. 21.057. BYLAWS. (a) The board of directors of a corporation shall adopt initial bylaws.

(b) The bylaws may contain provisions for the regulation

and management of the affairs of the corporation that are consistent with law and the corporation's certificate of formation.

(c) A corporation's board of directors may amend or repeal bylaws or adopt new bylaws unless:

(1) the corporation's certificate of formation or this code wholly or partly reserves the power exclusively to the corporation's shareholders; or

(2) in amending, repealing, or adopting a bylaw, the shareholders expressly provide that the board of directors may not amend, repeal, or readopt that bylaw. (TBCA 2.23.A, B.)

Source Law

A. The initial bylaws of a corporation shall be adopted by its board of directors. The bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation.

B. A corporation's board of directors may amend or repeal the corporation's bylaws, or adopt new bylaws, unless:

(1) the articles of incorporation or this Act reserves the power exclusively to the shareholders in whole or part; or

(2) the shareholders in amending, repealing, or adopting a particular bylaw expressly provide that the board of directors may not amend or repeal that bylaw.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.058. DUAL AUTHORITY. Unless the certificate of formation or a bylaw adopted by the shareholders provides otherwise as to all or a part of a corporation's bylaws, a corporation's shareholders may amend, repeal, or adopt the corporation's bylaws regardless of whether the bylaws may also be amended, repealed, or adopted by the corporation's board of directors. (TBCA 2.23.C.)

Source Law

C. Unless the articles of incorporation or a bylaw adopted by the shareholders provides otherwise as to all or some portion of a corporation's bylaws, a corporation's shareholders may amend, repeal, or adopt the corporation's bylaws even though the bylaws

may also be amended, repealed, or adopted by its board of directors.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.059. ORGANIZATION MEETING. (a) This section does not apply to a corporation created as a result of a conversion or merger the plan of which states the bylaws and names the officers of the corporation.

(b) After the filing of a certificate of formation takes effect, an organization meeting shall be held at the call of the majority of the initial board of directors or the persons named in the certificate of formation under Section 3.007(a)(4) for the purpose of adopting bylaws, electing officers, and transacting other business.

(c) Not later than the third day before the date of the meeting, the directors or other persons calling the meeting shall send notice of the time and place of the meeting to each other director or person named in the certificate of formation. (TBCA 3.06.)

Source Law

3.06.A. Except as provided by Section B of this Article, after the issuance of the certificate of incorporation, an organization meeting of the initial board of directors named in the articles of incorporation (or of the person or persons who, in conformance with Section A(12), Article 3.02 of this Act, are named in the articles of incorporation as the person or persons who will perform the functions of the initial board of directors provided for by this Act) shall be held, either within or without this State, at the call of a majority of the directors named in the articles of incorporation, for the purpose of adopting bylaws, electing officers, and transacting such other business as may come before the meeting. The directors calling the meeting shall give at least three (3) days notice thereof by mail to each director so named, stating the time and place of the meeting.

B. The provisions of Section A of this Article shall not apply to a corporation that is a converted entity or a corporation that is created pursuant to a plan of merger if

the plan of conversion or the plan of merger, as the case may be, sets forth the bylaws and officers of the corporation.

Revisor's Note

No substantive change is intended with respect to the specific provisions addressing the organizational meeting. The Code does eliminate a requirement related to the organization and commencement of business of the corporation in that it eliminates the requirement of Article 3.05.A of the Texas Business Corporation Act that a corporation receive consideration of a value of at least \$1,000 for the issuance of its shares before the corporation commences business or incurs indebtedness. Correspondingly, the provision in Article 2.41.A(2) under which directors may have personal liability where this requirement is not met has also been eliminated. A \$1,000 minimum capitalization requirement has become outmoded and provides little comfort as to adequate capitalization. Neither Delaware corporate law nor the Revised Model Business Corporation Act contain a similar minimum capitalization requirement.

[Sections 21.060-21.100 reserved for expansion]

SUBCHAPTER C. SHAREHOLDERS' AGREEMENTS

Revised Law

Sec. 21.101. SHAREHOLDERS' AGREEMENT. (a) The shareholders of a corporation may enter into an agreement that:

(1) restricts the discretion or powers of the board of directors;

(2) eliminates the board of directors and authorizes the business and affairs of the corporation to be managed, wholly or partly, by one or more of its shareholders or other persons;

(3) establishes the individuals who shall serve as directors or officers of the corporation;

(4) determines the term of office, manner of selection or removal, or terms or conditions of employment of a director, officer, or other employee of the corporation, regardless of the length of employment;

(5) governs the authorization or making of distributions whether in proportion to ownership of shares, subject to Section 21.303;

(6) determines the manner in which profits and losses will be apportioned;

(7) governs, in general or with regard to specific matters, the exercise or division of voting power by and between the shareholders, directors, or other persons, including use of disproportionate voting rights or director proxies;

(8) establishes the terms of an agreement for the transfer or use of property or for the provision of services between the corporation and another person, including a shareholder, director, officer, or employee of the corporation;

(9) authorizes arbitration or grants authority to a shareholder or other person to resolve any issue about which there is a deadlock among the directors, shareholders, or other persons authorized to manage the corporation;

(10) requires winding up and termination of the corporation at the request of one or more shareholders or on the occurrence of a specified event or contingency, in which case the winding up and termination of the corporation will proceed as if all of the shareholders had consented in writing to the winding up and termination as provided by Subchapter K; or

(11) otherwise governs the exercise of corporate powers, the management of the business and affairs of the corporation, or the relationship among the shareholders, the directors, and the corporation as if the corporation were a partnership or in a manner that would otherwise be appropriate only among partners and not contrary to public policy.

(b) A shareholders' agreement authorized by this section must be:

(1) contained in:

(A) the certificate of formation or bylaws if approved by all of the shareholders at the time of the agreement; or

(B) a written agreement that is:

(i) signed by all of the shareholders at the time of the agreement; and

(ii) made known to the corporation; and

(2) amended only by all of the shareholders at the time of the amendment, unless the agreement provides otherwise.

(TBCA 2.30-1.A, B (part).)

Source Law

A. Scope of Agreement. An agreement among the shareholders of a corporation that complies with this article is effective among the shareholders and the corporation even though it is inconsistent with one or more provisions of this Act in that it:

(1) restricts the discretion or powers of the board of directors;

(2) eliminates the board of

directors and permits management of the business and affairs of the corporation by its shareholders, or in whole or in part by one or more of its shareholders, or by one or more persons not shareholders;

(3) establishes the natural persons who shall be the directors or officers of the corporation, their term of office or manner of selection or removal, or terms or conditions of employment of any director, officer, or other employee of the corporation, regardless of the length of employment;

(4) governs the authorization or making of distributions whether in proportion to ownership of shares, subject to the limitations in Article 2.38 of this Act, or determines the manner in which profits and losses shall be apportioned;

(5) governs, in general or in regard to specific matters, the exercise or division of voting power by and between the shareholders, directors (if any), or other persons or by or among any of them, including use of disproportionate voting rights or director proxies;

(6) establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer, or employee of the corporation, or other person or among any of them;

(7) authorizes arbitration or grants authority to any shareholder or other person as to any issue about which there is a deadlock among the directors, shareholders, or other person or persons empowered to manage the corporation to resolve that issue;

(8) requires dissolution of the corporation at the request of one or more of the shareholders or on the occurrence of a specified event or contingency, in which case the dissolution of the corporation shall proceed as if all the shareholders had consented in writing to dissolution of the corporation as provided in Article 6.02 of this Act; or

(9) otherwise governs the exercise of corporate powers, the management of the business and affairs of the corporation, or the relationship among the shareholders, the directors, and the corporation, or among any of them, as if the corporation were a partnership or in a manner that would otherwise be appropriate only among partners, and is not contrary to public policy.

B. Procedures Required. An agreement authorized by this article shall be:

(1) set forth (a) in the articles of incorporation or bylaws and approved by all persons who are shareholders at the time of the agreement, or (b) in a written agreement that is signed by all the persons who are shareholders at the time of the agreement and is made known to the corporation;

(2) subject to amendment only by all persons who are shareholders at the time of the amendment, unless the agreement provides otherwise; and

. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.102. TERM OF AGREEMENT. A shareholders' agreement under this subchapter is valid for 10 years, unless the agreement provides otherwise. (TBCA 2.30-1.B (part).)

Source Law

B. . . .

(3) valid for 10 years, unless the agreement provides otherwise.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.103. DISCLOSURE OF AGREEMENT; RECALL OF CERTAIN CERTIFICATES. (a) The existence of an agreement authorized by this subchapter shall be noted conspicuously on the front or back of each certificate for outstanding shares or on the information statement required for uncertificated shares by Section 3.205.

(b) The disclosure required by this section must include the sentence, "These shares are subject to the provisions of a shareholders' agreement that may provide for management of the

corporation in a manner different than in other corporations and may subject a shareholder to certain obligations or liabilities not otherwise imposed on shareholders in other corporations."

(c) A corporation that has outstanding shares represented by certificates at the time the shareholders of the corporation enter into an agreement under this subchapter shall recall the outstanding certificates and issue substitute certificates that comply with this subchapter.

(d) The failure to note the existence of the agreement on the certificate or information statement does not affect the validity of the agreement or an action taken pursuant to the agreement. (TBCA 2.30-1.C.)

Source Law

C. Notation of Existence. The existence of an agreement authorized by this article shall be noted conspicuously on the front or back of each certificate for outstanding shares or on the information statement required for uncertificated shares by Article 2.19 of this Act and shall include the following: "These shares are subject to the provisions of a shareholders' agreement that may provide for management of the corporation in a manner different than in other corporations and may subject a shareholder to certain obligations or liabilities not otherwise imposed on shareholders in other corporations." If at the time of the agreement the corporation has shares outstanding represented by certificates, the corporation shall recall the outstanding certificates and issue substitute certificates that comply with this section. The failure to note the existence of the agreement on the certificate or information statement shall not affect the validity of the agreement or any action taken pursuant to it.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.104. EFFECT OF SHAREHOLDERS' AGREEMENT. A shareholders' agreement that complies with this subchapter is effective among the shareholders and between the shareholders and the corporation even if the terms of the agreement are inconsistent with this code. (TBCA 2.30-1.A (part).)

Source Law

A. Scope of Agreement. An agreement among the shareholders of a corporation that complies with this article is effective among the shareholders and the corporation even though it is inconsistent with one or more provisions of this Act

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.105. RIGHT OF RESCISSION; KNOWLEDGE OF PURCHASER OF SHARES. (a) A purchaser of shares who does not have knowledge at the time of purchase of the existence of a shareholders' agreement authorized by this subchapter is entitled to rescind the purchase.

(b) A purchaser is considered to have knowledge of the existence of the shareholders' agreement for purposes of this section if:

(1) the existence of the agreement is noted on the certificate or information statement for the shares as required by Section 21.103; and

(2) with respect to shares that are not represented by a certificate, the information statement noting existence of the agreement is delivered to the purchaser not later than the time the shares are purchased.

(c) An action to enforce the right of rescission authorized by this section must be commenced not later than the earlier of:

(1) the 90th day after the date the existence of the shareholder agreement is discovered; or

(2) the second anniversary of the purchase date of the shares. (TBCA 2.30-1.D.)

Source Law

D. Right of Rescission. Any purchaser of shares who, at the time of purchase, did not have knowledge of the existence of an agreement authorized by this article shall be entitled to rescission of the purchase. A purchaser shall be deemed to have knowledge of the existence of the agreement if its existence is noted on the certificate or information statement for the shares in compliance with Section C of this article and, if the shares are not represented by a certificate, the information statement noting existence of the agreement is delivered to

the purchaser at or prior to the time of purchase of the shares. An action to enforce the right of rescission authorized by this section must be commenced within the earlier of 90 days after discovery of the existence of the agreement or two years after time of the purchase of the shares.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.106. AGREEMENT LIMITING AUTHORITY OF AND SUPPLANTING BOARD OF DIRECTORS; LIABILITY. (a) A shareholders' agreement authorized by this subchapter that limits the discretion or powers of the board of directors or supplants the board of directors relieves the directors of, and imposes on a person in whom the discretion or powers of the board of directors or the management of the business and affairs of the corporation is vested, liability for an act or omission of the person in accordance with Subsection (b).

(b) A person on whom liability for an act or omission is imposed under this section is liable in the same manner and to the same extent as a director on whom liability for an act or omission is imposed by this code or other law. (TBCA 2.30-1.F.)

Source Law

F. Managerial Liabilities. An agreement authorized by this article that limits the discretion or powers of the board of directors or supplants the board of directors shall relieve the directors of, and impose on the person or persons in whom such discretion or powers or management of the business and affairs of the corporation are vested, liability for action or omissions imposed by this Act or other law on directors to the extent that the discretion or powers of the directors are limited or supplanted by the agreement.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.107. LIABILITY OF SHAREHOLDER. The existence of or a performance under a shareholders' agreement authorized by this subchapter is not a ground for imposing personal liability on a shareholder for an act or obligation of the corporation by disregarding the separate existence of the corporation or

otherwise, even if the agreement or a performance under the agreement:

(1) treats the corporation as if the corporation were a partnership or in a manner that otherwise is appropriate only among partners;

(2) results in the corporation being considered a partnership for purposes of taxation; or

(3) results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement. (TBCA 2.30-1.G.)

Source Law

G. Limitation of Liability. The existence or performance of an agreement authorized by this article shall not be grounds for imposing personal liability on any shareholder for the acts or obligations of the corporation by disregarding the separate entity of the corporation or otherwise, even if the agreement or its performance:

(1) treats the corporation as if it were a partnership or in a manner that otherwise is appropriate only among partners;

(2) results in the corporation being considered a partnership for purposes of taxation; or

(3) results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.108. PERSONS ACTING IN PLACE OF SHAREHOLDERS. An organizer or a subscriber for shares may act as a shareholder with respect to a shareholders' agreement authorized by this subchapter if no shares have been issued when the agreement is signed. (TBCA 2.30-1.H.)

Source Law

H. If No Shares Issued. Incorporators or subscribers for the shares may act as shareholders with respect to an agreement authorized by this article if no shares have been issued when the agreement is signed.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.109. AGREEMENT NOT EFFECTIVE. (a) A shareholders' agreement authorized by this subchapter ceases to be effective when shares of the corporation are:

(1) listed on a national securities exchange or similar system;

(2) quoted on an interdealer quotation system of a national securities association or successor system; or

(3) regularly traded in a market maintained by one or more members of a national or affiliated securities association.

(b) If a corporation does not have a board of directors and an agreement of the shareholders of the corporation entered into under this subchapter ceases to be effective, a board of directors shall be instituted or reinstated to govern the corporation in the manner provided by Section 21.710(c).

(c) If a shareholders' agreement that ceases to be effective is contained in or referred to by the certificate of formation or bylaws of a corporation, the board of directors of the corporation may adopt an amendment to the certificate of formation or bylaws, without shareholder action, to delete the agreement and any references to the agreement. (TBCA 2.30-1.E.)

Source Law

E. Cessation. An agreement authorized by this article shall cease to be effective when shares of the corporation are listed on a national securities exchange, quoted on an interdealer quotation system of a national securities association, or regularly traded in a market maintained by one or more members of a national or affiliated securities association. If the agreement ceases to be effective for any reason and the corporation does not have a board of directors, governance by a board of directors shall be instituted or reinstated in the manner provided in Section C, Article 12.23, of this Act. If the agreement is contained or referred to in the corporation's articles of incorporation or bylaws, the board of directors may adopt an amendment to the articles of incorporation or bylaws, without shareholder action, to delete the agreement and any references to it.

Revisor's Note

No substantive change is intended.

[Sections 21.110-21.150 reserved for expansion]

SUBCHAPTER D. SHARES, OPTIONS, AND CONVERTIBLE SECURITIES

Revised Law

Sec. 21.151. NUMBER OF AUTHORIZED SHARES. A corporation may issue the number of authorized shares stated in the corporation's certificate of formation. (TBCA 2.12.A (part).)

Source Law

A. Each corporation may issue the number of shares stated in its articles of incorporation. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.152. CLASSES AND SERIES OF SHARES. (a) A corporation's certificate of formation may divide the corporation's authorized shares into one or more classes and may divide one or more classes into one or more series. The certificate of formation must designate each class and series of authorized shares to distinguish that class and series from any other class or series.

(b) Shares of the same class must be of the same par value or be without par value, as stated in the certificate of formation.

(c) Shares of the same class must be identical in all respects unless the shares have been divided into one or more series. If the shares of a class have been divided into one or more series, the shares may vary between series, but all shares of the same series will be identical in all respects. (TBCA 2.12.A (part).)

Source Law

A. . . . Such shares may be divided into one or more classes, any or all of which classes may consist of shares with par value or shares without par value, as shall be stated in the articles of incorporation. Any such class of shares may be divided into one or more series, as shall be stated in the articles of incorporation. All shares of the same class shall be of the same par value or be without par value. Unless the shares of a class have been divided into series, all shares of the same class shall be identical in all respects. If the shares of a class

have been divided into series, shares of the same class may vary between series, but all shares of the same series shall be identical in all respects. Any such class or series of shares shall be so designated as to distinguish the shares of that class or series from the shares of all other classes and series. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.153. DESIGNATIONS, PREFERENCES, LIMITATIONS, AND RIGHTS OF A CLASS OR SERIES. (a) Each class or series of authorized shares of a corporation must have the designations, preferences, limitations, and relative rights, including voting rights, stated in the corporation's certificate of formation.

(b) The certificate of formation may limit or deny the voting rights of, or provide special voting rights for, the shares of a class or series or the shares of a class or series held by a person or class of persons to the extent the limitation, denial, or provision is not inconsistent with this code.

(c) A designation, preference, limitation, or relative right, including a voting right, of a class or series of shares of a corporation may be made dependent on facts not contained in the certificate of formation, including future acts of the corporation, if the manner in which those facts will operate on the designation, preference, limitation, or right is clearly and expressly stated in the certificate of formation. (TBCA 2.12.A (part).)

Source Law

A. . . . Any such class or series shall have such designations, preferences, limitations, and relative rights, including voting rights, as shall be stated in the articles of incorporation. The articles of incorporation may limit or deny the voting rights of, or provide special voting rights for, the shares of any class or series to the extent that such limitation, denial, or provision is not inconsistent with the provisions of this Act. Any of the designations, preferences, limitations, and relative rights, including voting rights, of any class or series of shares may be made dependent upon facts ascertainable outside

the articles of incorporation, which facts may include future acts of the corporation, provided that the manner in which such facts shall operate upon the designations, preferences, limitations, and relative rights, including voting rights, of such class or series of shares is clearly and expressly set forth in the articles of incorporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.154. CERTAIN OPTIONAL CHARACTERISTICS OF SHARES.

(a) Subject to Section 21.153, if authorized by the corporation's certificate of formation, a corporation may issue shares that:

(1) are redeemable, at the option of the corporation, shareholder, or other person or on the occurrence of a designated event, subject to Sections 21.303 and 21.304;

(2) entitle the holders of the shares to cumulative, noncumulative, or partially cumulative distributions;

(3) have preferences over any or all other classes or series of shares with respect to payment of distributions;

(4) have preferences over any or all other classes or series of shares with respect to the assets of the corporation on the voluntary or involuntary winding up and termination of the corporation;

(5) are exchangeable, at the option of the corporation, shareholder, or other person or on the occurrence of a designated event, for shares, obligations, indebtedness, evidence of ownership, rights to purchase securities of the corporation or one or more other entities, or other property or for a combination of those rights, assets, or obligations, subject to Section 21.303; and

(6) are convertible into shares of any other class or series, at the option of the corporation, shareholder, or other person or on the occurrence of a designated event.

(b) Shares without par value may not be converted into shares with par value unless:

(1) at the time of conversion, the part of the corporation's stated capital represented by the shares without par value is at least equal to the aggregate par value of the shares to be converted; or

(2) the amount of any deficiency computed under Subdivision (1) is transferred from surplus to stated capital.
(TBCA 2.12.B.)

Source Law

B. Without being limited to the authority herein contained, a corporation, when so provided in its articles of incorporation, may issue shares of one or more classes or series:

(1) Redeemable, subject to compliance by the corporation with Articles 2.38 and 4.08 of this Act, at the option of the corporation, the shareholder or another person or upon the occurrence of a designated event.

(2) Entitling the holders thereof to cumulative, noncumulative, or partially cumulative dividends.

(3) Having preference over any other class, classes or series of shares as to the payment of dividends.

(4) Having preference in the assets of the corporation over any other class, classes or series of shares upon the voluntary or involuntary liquidation of the corporation.

(5) Exchangeable, subject to compliance by the corporation with Article 2.38 of this Act, at the option of the corporation, the shareholder or another person or upon the occurrence of a designated event, for shares, obligations, indebtedness, evidence of ownership, rights to purchase securities or other securities of the corporation or one or more other domestic or foreign corporations or other entities or for other property or for any combination of the foregoing.

(6) Convertible at the option of the corporation, the shareholder or another person or upon the occurrence of a designated event, into shares of any other class or series, but shares without par value shall not be converted into shares with par value unless that part of the stated capital of the corporation represented by such shares without par value is, at the time of conversion, at least equal to the aggregate par value of the shares into which shares without par value are to be converted or the

amount of any such deficiency is transferred from surplus to stated capital.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.155. SERIES OF SHARES ESTABLISHED BY BOARD OF DIRECTORS. (a) If expressly authorized by the corporation's certificate of formation and subject to the certificate of formation, the board of directors of a corporation may establish series of unissued shares of any class by setting and determining the designations, preferences, limitations, and relative rights, including voting rights, of the shares of the series to be established to the same extent that the designations, preferences, limitations, or relative rights could be stated if fully specified in the certificate of formation.

(b) To establish a series if authorized by the certificate of formation, the board of directors must adopt a resolution specifying the designations, preferences, limitations, and relative rights, including voting rights, of the series to be established or specifying any designation, preference, limitation, or relative right that is not set and determined by the certificate of formation.

(c) If the certificate of formation does not expressly restrict the board of directors from increasing or decreasing the number of unissued shares of a series to be established under Subsection (a), the board of directors may increase or decrease the number of shares in each series to be established, except that the board of directors may not decrease the number of shares in a particular series to a number that is less than the number of shares in that series that are issued at the time of the decrease.

(d) To increase or decrease the number of shares of a series under Subsection (c), the board of directors must adopt a resolution setting and determining the new number of shares of each series in which the number of shares is increased or decreased. If the number of shares of a series is decreased, the shares by which the series is decreased will resume the status of authorized but unissued shares of the class of shares from which the series was established, unless otherwise provided by the certificate of formation or the terms of the class or series.

(e) If no shares of a series established by board resolution under Subsection (b) are outstanding because no shares of that series have been issued or no issued shares of that series remain outstanding, the board of directors by resolution may delete the series from the certificate of formation and delete any reference to the series contained in the certificate of formation. Unless otherwise provided by the certificate of

formation, the shares of any series deleted from the certificate of formation under this section shall resume the status of authorized but unissued shares of the class of shares from which the series was established.

(f) If no shares of a series established by resolution of the board of directors under Subsection (b) are outstanding because no shares of that series have been issued, the board of directors may amend the designations, preferences, limitations, and relative rights, including voting rights, of the series or amend any designation, preference, limitation, or relative right that is not set and determined by the certificate of formation. (TBCA 2.13.A, B, C; New.)

Source Law

A. If the articles of incorporation shall expressly vest such authority in the board of directors, then the board of directors shall have authority to establish series of unissued shares of any class by fixing and determining the designations, preferences, limitations, and relative rights, including voting rights, of the shares of any series so established to the same extent that such designations, preferences, limitations, and relative rights could be stated if fully set forth in the articles of incorporation, but subject to and within the limitations set forth in the articles of incorporation. In order to establish a series, where authority so to do is contained in the articles of incorporation, the board of directors shall adopt a resolution setting forth the designation of the series and fixing and determining the designations, preferences, limitations and relative rights, including voting rights, thereof or so much thereof as shall not be fixed and determined by the articles of incorporation.

B. If the articles of incorporation shall expressly vest authority in the board of directors to establish series of unissued shares of a class and do not expressly restrict the board of directors from increasing or decreasing the number of shares of such a series, then the board of directors shall have authority to increase or decrease the number of shares within each such series;

provided, however, that the board of directors may not decrease the number of shares within a series to less than the number of shares within such series that are then issued.

In order to so increase or decrease the number of shares of a series, the board of directors shall adopt a resolution fixing and determining the new number of shares of each series in which the number of shares is increased or decreased. In case the number of shares of a series shall be so decreased, the shares by which the series is decreased shall resume the status of authorized but unissued shares of the class of shares from which such series was established, unless otherwise provided in the articles of incorporation or the terms of such class or series.

C. If the articles of incorporation shall expressly vest authority in the board of directors to establish series of unissued shares, then if no shares of a series established by resolution of the board of directors are outstanding, either because none were issued or because no issued shares of such series remain outstanding or held as treasury shares, the board of directors shall have authority to eliminate from the articles of incorporation such series and all references to such series contained therein. In order to eliminate such series and such references from the articles of incorporation, the board of directors shall adopt a resolution eliminating such series and all reference to such series from the articles of incorporation. The shares of any such eliminated series shall resume the status of authorized but unissued shares of the class of shares from which such series was established, unless otherwise provided in the articles of incorporation.

Revisor's Note

Other than new Subsection (f), no substantive change is intended. Subsection (f) has been added to permit directors to amend in a direct, simple way the terms of a series of stock established by board resolution if no shares of that series are outstanding. Under the existing law, the board can effect the same thing but only through the two-step process of cancelling the designation of the series and adopting a designation of a new series containing the amended terms.

Revised Law

Sec. 21.156. ACTIONS WITH RESPECT TO SERIES OF SHARES. (a) To effect an action authorized under Section 21.155, the corporation must file with the secretary of state a statement that contains:

- (1) the name of the corporation;
- (2) if the statement relates to the establishment of a series of shares, a copy of the resolution establishing and designating the series and setting and determining the designations, preferences, limitations, and relative rights of the series;
- (3) if the statement relates to an increase or decrease in the number of shares of a series, a copy of the resolution setting and determining the new number of shares of each series in which the number of shares is increased or decreased;
- (4) if the statement relates to the deletion of a series of shares and all references to the series from the certificate of formation, a copy of the resolution deleting the series and all references to the series from the certificate of formation;
- (5) if the statement relates to the amendment of designations, preferences, limitations, or relative rights of shares of a series that was previously established by resolution of the board of directors, a copy of the resolution in which the amendment is specified;
- (6) the date of the adoption of the resolution; and
- (7) a statement that the resolution was adopted by all necessary action on the part of the corporation.

(b) On the filing of a statement described by Subsection (a), the following resolutions will become an amendment of the certificate of formation, as appropriate:

- (1) the resolution establishing and designating the series and setting and determining the designations, preferences, limitations, and relative rights of the series;

(2) the resolution setting the new number of shares of each series in which the number of shares is increased or decreased;

(3) the resolution deleting a series and all references to the series from the certificate of formation; or

(4) the resolution amending the designations, preferences, limitations, and relative rights of a series.

(c) An amendment of the certificate of formation under this section is not subject to the procedure to amend the certificate of formation contained in Subchapter B. (TBCA 2.13.D, F; New.)

Source Law

D. Prior to the issuance of any shares of a series established by resolution adopted by the board of directors, and prior to the issuance of any shares of a series in which the number of shares has been increased or decreased by resolution adopted by the board of directors, if such issuance is the first issuance of shares of such series since such resolution was adopted, and in order to eliminate from the articles of incorporation a series of shares and all references to such series contained therein, the corporation shall file with the Secretary of State a statement setting forth:

(1) The name of the corporation.

(2) If the statement relates to the establishment of a series of shares, a copy of the resolution establishing and designating the series and fixing and determining the preferences, limitations, and relative rights thereof.

(3) If the statement relates to an increase or decrease in the number of shares of any series, a copy of the resolution fixing and determining the new number of shares of each series in which the number of shares is increased or decreased.

(4) If the statement relates to the elimination of a series of shares and all references thereto from the articles of incorporation, a copy of the resolution eliminating such series and all references to such series from the articles of incorporation.

(5) The date of adoption of such resolution.

(6) That such resolution was duly adopted by all necessary action on the part of the corporation.

. . . .

F. Upon the filing of such statement by the Secretary of State, the resolution establishing and designating the series and fixing and determining the preferences, limitations, and relative rights thereof, the resolution fixing the new number of shares of each series in which the number of shares is increased or decreased, or the resolution eliminating a series and all references to such series from the articles of incorporation, as appropriate, shall become an amendment of the articles of incorporation. An amendment of the articles of incorporation effected pursuant to this Article 2.13 is not subject to the procedure to amend the articles of incorporation contained in Article 4.02 of this Act.

Revisor's Note

No substantive change is intended. Subsections (a)(5) and (b)(4) have been added in the revised law to conform with the addition of Section 21.155(f), which allows the board of directors to amend the terms of the statement designating a new series if no shares of that series are outstanding.

Revised Law

Sec. 21.157. ISSUANCE OF SHARES. (a) Except as provided by Section 21.158, a corporation may issue shares for consideration if authorized by the board of directors of the corporation.

(b) Shares may not be issued until the consideration, determined in accordance with this subchapter, has been paid or delivered as required in connection with the authorization of the shares. When the consideration is paid or delivered:

- (1) the shares are considered to be issued;
- (2) the subscriber or other person entitled to receive the shares is a shareholder with respect to the shares; and
- (3) the shares are considered fully paid and nonassessable. (TBCA 2.16.A (part).)

Source Law

A. The board of directors or . . . may authorize shares to be issued for consideration Shares may not be

issued until the full amount of the consideration, fixed as provided by law, has been paid or delivered as required in connection with the authorization of the shares. When such consideration shall have been so paid or delivered, the shares shall be deemed to have been issued and the subscriber or shareholder entitled to receive such issue shall be a shareholder with respect to such shares, and the shares shall be considered fully paid and non-assessable.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.158. ISSUANCE OF SHARES UNDER PLAN OF MERGER OR CONVERSION. (a) A converted corporation under a plan of conversion or a corporation created by a plan of merger may issue shares for consideration if authorized by the plan of conversion or plan of merger, as appropriate.

(b) A corporation may issue shares in the manner provided by and for consideration specified under a plan of merger or plan of conversion. (TBCA 2.16.A (part).)

Source Law

A. . . . in the case of shares to be issued pursuant to a plan of conversion by a corporation that is a converted entity, the plan of conversion, or, in the case of shares to be issued pursuant to a plan of merger by a corporation created pursuant to the plan of merger, the plan of merger may authorize shares to be issued for consideration In addition, shares may be issued pursuant to a plan of conversion or plan of merger in the manner and for such consideration as may be provided for in the plan of conversion or plan of merger. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.159. TYPES OF CONSIDERATION FOR SHARES. Shares with or without par value may be issued for the following types of consideration:

- (1) a tangible or intangible benefit to the corporation;
- (2) cash;

- (3) a promissory note;
- (4) services performed or a contract for services to be performed;
- (5) a security of the corporation or any other organization; and
- (6) any other property of any kind or nature. (TBCA 2.16.A (part).)

Source Law

A. . . . may authorize shares to be issued for consideration consisting of any tangible or intangible benefit to the corporation or other property of any kind or nature, including cash, promissory notes, services performed, contracts for services to be performed, other securities of the corporation, or securities of any other corporation, domestic or foreign, or other entity. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.160. DETERMINATION OF CONSIDERATION FOR SHARES. (a) Subject to Subsection (b), consideration to be received for shares must be determined:

- (1) by the board of directors;
- (2) by a plan of conversion, if the shares are to be issued by a converted corporation under the plan; or
- (3) by a plan of merger, if the shares are to be issued under the plan by a corporation created under the plan.

(b) If the corporation's certificate of formation reserves to the shareholders the right to determine the consideration to be received for shares without par value, the shareholders shall determine the consideration for those shares before the shares are issued. The board of directors may not determine the consideration for shares under this subsection.

(c) A corporation may dispose of treasury shares for consideration that may be determined by the board of directors. (TBCA 2.15.A (part), B (part), C.)

Source Law

A. Shares having a par value may be issued for such consideration, . . . as shall be fixed from time to time by the board of directors or, in the case of shares issued by a converted entity, in the plan of conversion or, in the case of a corporation created by a

merger, in the plan of merger.

B. Shares without par value may be issued for such consideration, as may be fixed:

(1) by the board of directors from time to time, unless the articles of incorporation reserve to the shareholders the right to fix the consideration, in which case, prior to the issuance of such shares, the shareholders shall fix the consideration to be received for such shares, . . .

(2) by a plan of conversion, in the case of shares to be issued pursuant to the plan of conversion by a corporation that is a converted entity; or

(3) by a plan of merger, in the case of shares to be issued pursuant to the plan of merger by a corporation created pursuant to the plan of merger.

C. Treasury shares may be disposed of by the corporation for such consideration as may be fixed from time to time by the board of directors.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.161. AMOUNT OF CONSIDERATION FOR ISSUANCE OF CERTAIN SHARES. (a) Consideration to be received by a corporation for the issuance of shares with par value may not be less than the par value of the shares.

(b) The part of the surplus of a corporation that is transferred to stated capital on the issuance of shares as a share distribution is considered to be the consideration for the issuance of those shares.

(c) The consideration received by a corporation for the issuance of shares on the conversion or exchange of its indebtedness or shares is:

(1) the principal of, and accrued interest on, the indebtedness exchanged or converted, or the stated capital on the issuance of the shares;

(2) the part of surplus, if any, transferred to stated capital on the issuance of the shares; and

(3) any additional consideration paid to the corporation on the issuance of the shares.

(d) The consideration received by a corporation for the issuance of shares on the exercise of rights or options is:

(1) any consideration received by the corporation for

the rights or options; and

(2) any consideration received by the corporation for the issuance of shares on the exercise of the rights or options. (TBCA 2.15.A (part), D, E, F.)

Source Law

A. Shares having a par value may be issued for such consideration, not less than the par value thereof

D. That part of the surplus of a corporation which is transferred to stated capital upon the issuance of shares as a share dividend shall be deemed to be the consideration for the issuance of such shares.

E. In the event of the issuance of shares by a corporation upon the conversion or exchange of its indebtedness or shares, the consideration for the shares so issued shall be:

(1) The principal sum of, and accrued interest on, the indebtedness so exchanged or converted, or the stated capital then represented by the shares so exchanged or converted, and

(2) That part of surplus, if any, transferred to stated capital upon the issuance of shares for the shares so exchanged or converted, and

(3) Any additional consideration paid to the corporation upon the issuance of shares for the indebtedness or shares so exchanged or converted.

F. In the event of the issuance of shares by a corporation upon the exercise of rights or options entitling the holders thereof to purchase or receive from the corporation any of its shares, the consideration for the shares so issued shall be:

(1) The consideration, if any, received by the corporation for such rights or options, and

(2) The consideration, if any, received by the corporation for the issuance of shares upon the exercise of such rights or options.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.162. VALUE AND SUFFICIENCY OF CONSIDERATION. In the absence of fraud in the transaction, the judgment of the board of directors, the shareholders, or the party approving the plan of conversion or the plan of merger, as appropriate, is conclusive in determining the value and sufficiency of the consideration received for the shares. (TBCA 2.16.B.)

Source Law

B. In the absence of fraud in the transaction, the judgment of the board of directors or the shareholders or the party or parties approving the plan of conversion or the plan of merger, as the case may be, as to the value and sufficiency of the consideration received for shares shall be conclusive.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.163. ISSUANCE AND DISPOSITION OF FRACTIONAL SHARES OR SCRIP. (a) A corporation may:

(1) issue fractions of a share, either certificated or uncertificated;

(2) arrange for the disposition of fractional interests by persons entitled to the interests;

(3) pay cash for the fair value of fractions of a share determined when the shareholders entitled to receive the fractions are determined; or

(4) subject to Subsection (b), issue scrip in registered or bearer form that entitles the holder to receive a certificate for a full share or an uncertificated full share on the surrender of the scrip aggregating a full share.

(b) The board of directors may issue scrip:

(1) on the condition that the scrip will become void if not exchanged for certificated or uncertificated full shares before a specified date;

(2) on the condition that the shares for which the scrip is exchangeable may be sold by the corporation and the proceeds from the sale of the shares may be distributed to the holders of scrip; or

(3) subject to any other condition the board of directors may determine advisable. (TBCA 2.20 (part).)

Source Law

2.20.A. A corporation may (1) issue fractions of a share, either represented by a certificate or uncertificated, (2) arrange for the disposition of fractional interests by those entitled thereto, (3) pay in cash the fair value of fractions of a share as of the time when those entitled to receive such fractions are determined, or (4) issue scrip in registered or bearer form which shall entitle the holder to receive a certificate for a full share or an uncertificated full share upon the surrender of such scrip aggregating a full share. . . . The board of directors may cause scrip to be issued subject to the condition that it shall become void if not exchanged for certificates representing full shares or uncertificated full shares before a specified date, or subject to the condition that the shares for which such scrip is exchangeable may be sold by the corporation and the proceeds thereof distributed to the holders of scrip, or subject to any other conditions which the board of directors may determine advisable.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.164. RIGHTS OF HOLDERS OF FRACTIONAL SHARES OR SCRIP. (a) A holder of a certificated or uncertificated fractional share is entitled to exercise voting rights, receive distributions, and make a claim with respect to the assets of the corporation in the event of winding up and termination.

(b) A holder of a certificate for scrip is not entitled to exercise voting rights, receive distributions, or make a claim with respect to the assets of the corporation in the event of winding up and termination unless the scrip provides for those rights. (TBCA 2.20 (part).)

Source Law

2.20.A. . . . A certificate for a fractional share or an uncertificated fractional share shall, but scrip shall not unless otherwise provided therein, entitle the holder to exercise voting rights, to receive dividends thereon, and to participate

in any of the assets of the corporation in the event of liquidation. . . .

Revisor's Note

No substantive change is intended. The revised law uses the term "winding up and termination" instead of the term "liquidation."

Revised Law

Sec. 21.165. SUBSCRIPTIONS. (a) A corporation may accept a subscription by notifying the subscriber in writing.

(b) A subscription to purchase shares in a corporation in the process of being formed is irrevocable for six months if the subscription is in writing and signed by the subscriber, unless the subscription provides for a longer or shorter period or all of the other subscribers agree to the revocation of the subscription.

(c) A written subscription entered into after the corporation is formed is a contract between the subscriber and the corporation. (TBCA 2.14.)

Source Law

2.14.A. Unless otherwise provided therein, a subscription for shares of a corporation to be organized may not be revoked within six (6) months, except with the consent of all other subscribers.

B. In the case of a corporation to be organized, the filing of the articles of incorporation by the Secretary of State shall constitute acceptance by the corporation of all subscriptions which are contained in a list of subscriptions filed with the articles of incorporation. Such list of subscriptions shall contain the name, post office address, number of shares, and amount paid by each subscriber. Failure to include a subscription in the list of subscriptions shall constitute a rejection of the offer.

C. In the case of an existing corporation, acceptance shall be effected by a resolution of acceptance by the board of directors or by a written memorandum of acceptance executed by one authorized by the board of directors and delivered to the subscriber or his assignee.

D. Subscriptions for shares, whether made before or after the organization of a

corporation, shall be paid in full at such time, or in such installments and at such times, as shall be determined by the board of directors. Any call made by the board of directors for payment on subscriptions shall be uniform as to all shares of the same class or as to all shares of the same series, as the case may be. In case of default in the payment of any installment or call when such payment is due, the corporation may proceed to collect the amount due in the same manner as any debt due the corporation. The bylaws may prescribe other penalties for failure to pay installments or calls that may become due, but no penalty working a forfeiture of a subscription, or of the amounts paid thereon, shall be declared against any subscriber unless the amount due thereon shall remain unpaid for a period of twenty (20) days after written demand has been made therefor. If mailed, such written demand shall be deemed to be made when deposited in the United States mail in a sealed envelope addressed to the subscriber at his last post office address known to the corporation, with postage thereon prepaid. If the demand remains unsatisfied for a period of twenty (20) days, and if the corporation is solvent, the corporation may declare the subscription to be forfeited. The effect of such declaration of forfeiture shall be to terminate all the rights and obligations of the subscriber as such.

Revisor's Note

The subscription provisions of Article 2.14, Texas Business Corporation Act, are antiquated and are rarely invoked. Sections 21.165-21.167 contain revised provisions that modernize the law relating to subscriptions and are based primarily on the subscription provisions of the Model Business Corporation Act. The revised law omits the arcane provisions of existing law that provide that any subscriptions submitted with the articles of incorporation are deemed accepted by the corporation and any subscriptions not submitted are deemed rejected, regardless of

the parties' intent.

Revised Law

Sec. 21.166. PREFORMATION SUBSCRIPTION. (a) The corporation may determine the payment terms of a preformation subscription unless the payment terms are specified by the subscription. The payment terms may authorize payment in full on acceptance or by installments.

(b) Unless the subscription provides otherwise, a corporation shall make calls placed to all subscribers of similar interests for payment on preformation subscriptions uniform as far as practicable.

(c) After the corporation is formed, if a subscriber fails to pay any installment or call when due, a corporation may:

(1) collect in the same manner as any other debt the amount due on any unpaid preformation subscription; or

(2) forfeit the subscription if the installment or call remains unpaid for 20 days after written notice to the subscriber.

(d) Although the forfeiture of a subscription terminates all the rights and obligations of the subscriber, the corporation may retain any amount previously paid on the subscription. (TBCA 2.14.D (part).)

Source Law

D. Subscriptions for shares, whether made before or after the organization of a corporation, shall be paid in full at such time, or in such installments and at such times, as shall be determined by the board of directors. Any call made by the board of directors for payment on subscriptions shall be uniform as to all shares of the same class or as to all shares of the same series, as the case may be. In case of default in the payment of any installment or call when such payment is due, the corporation may proceed to collect the amount due in the same manner as any debt due the corporation. The bylaws may prescribe other penalties for failure to pay installments or calls that may become due, but no penalty working a forfeiture of a subscription, or of the amounts paid thereon, shall be declared against any subscriber unless the amount due thereon shall remain unpaid for a period of twenty (20) days after written demand has been made therefor. . . . If the demand remains unsatisfied for a period of twenty (20) days, and if the

corporation is solvent, the corporation may declare the subscription to be forfeited. The effect of such declaration of forfeiture shall be to terminate all the rights and obligations of the subscriber as such.

Revisor's Note

Article 2.14, Texas Business Corporation Act, requires the shares to be paid for in full before they can be issued. Section 21.166 allows installment payments and allows the corporation to keep any part of the subscription already paid on a forfeiture for failure of a subscriber to pay an installment or called subscription when due.

Revised Law

Sec. 21.167. COMMITMENT TO PURCHASE SHARES. (a) A person who contemplates the acquisition of shares in a corporation may commit to act in a specified manner with respect to the shares after the acquisition, including the voting of the shares or the retention or disposition of the shares. To be binding, the commitment must be in writing and be signed by the person acquiring the shares.

(b) A written commitment entered into under Subsection (a) is a contract between the shareholder and the corporation.
(New.)

Revisor's Note

Section 21.167 provides that a written commitment to acquire shares of a corporation may bind the person making the commitment to act in a specified manner following the acquisition. This provision does not have a predecessor in the Texas Business Corporation Act.

Revised Law

Sec. 21.168. STOCK RIGHTS, OPTIONS, AND CONVERTIBLE INDEBTEDNESS. (a) Except as provided by the corporation's certificate of formation and regardless of whether done in connection with the issuance and sale of any other share or security of the corporation, a corporation may create and issue:

(1) rights or options that entitle the holders to purchase or receive from the corporation shares of any class or series or other securities; and

(2) indebtedness convertible into shares of any class or series of the corporation or other securities of the corporation.

(b) A right, option, or indebtedness described by this section shall be evidenced in the manner approved by the board of

directors.

(c) Subject to the certificate of formation, a right or option described by this section must state the terms on which, the time within which, and any consideration for which the shares may be purchased or received from the corporation on the exercise of the right or option.

(d) Subject to the certificate of formation, convertible indebtedness described by this section must state the terms and conditions on which, the time within which, and the conversion ratio at which the indebtedness may be converted into shares.
(TBCA 2.14-1 (part).)

Source Law

2.14-1.A. Subject to any limitations in its articles of incorporation, a corporation may create and issue, whether or not in connection with the issuance and sale of any of its shares or other securities,
(1) rights or options entitling the holders thereof to purchase or receive from the corporation any of its shares of any class, classes or series or other securities and
(2) indebtedness convertible into any of its shares of any class, classes or series or other securities. Such rights, options or indebtedness shall be evidenced in such manner as the board of directors shall approve and, subject to the provisions of the articles of incorporation, shall set forth
(a) in the case of rights or options, the terms upon which, the time or times within which, and the consideration, if any, for which, such shares may be purchased or received from the corporation upon the exercise of any such right or option, or (b) in the case of convertible indebtedness, the terms and conditions upon which, the time or times within which, and the conversion ratio or ratios at which, such indebtedness may be converted into such shares. . . .

Revisor's Note

No substantive change is intended. The reference in the source law to "classes" was eliminated because it is redundant with "any class."

Revised Law

Sec. 21.169. TERMS AND CONDITIONS OF RIGHTS AND OPTIONS.

(a) The terms and conditions of rights or options may include restrictions or conditions that:

(1) prohibit or limit the exercise, transfer, or receipt of the rights or options by certain persons or classes of persons, including:

(A) a person who beneficially owns or offers to acquire a specified number or percentage of the outstanding common shares, voting power, or other securities of the corporation; or

(B) a transferee of a person described by Paragraph (A); or

(2) invalidate or void the rights or options held by a person or transferee described by Subdivision (1).

(b) Rights or options created or issued before the effective date of this code that comply with this section and are not in conflict with other provisions of this code are ratified.

(c) Unless otherwise provided under the terms of rights or options or the agreement or plan under which the rights or options are issued, the authority to grant, amend, redeem, extend, or replace the rights or options on behalf of a corporation is vested exclusively in the board of directors of the corporation. A bylaw may not require the board to grant, amend, redeem, extend, or replace the rights or options. (New.)

Revisor's Note

The provisions of Section 21.169 are new and validate restrictions, conditions, and limitations on the exercise, transfer, or receipt of rights and options by certain persons or classes of persons. The provisions also make it clear that the board of directors has the exclusive right to grant, amend, redeem, extend, or replace any options or rights, unless otherwise provided in such option or right or plan under which the option or right was granted, and that a bylaw provision cannot require the board of directors to take any such action.

Revised Law

Sec. 21.170. CONSIDERATION FOR RIGHTS, OPTIONS, AND CONVERTIBLE INDEBTEDNESS. (a) In the absence of fraud in the transaction, the judgment of the board of directors of a corporation as to the adequacy of the consideration received for rights, options, or convertible indebtedness is conclusive.

(b) A corporation may issue rights or options to its shareholders, officers, consultants, independent contractors, employees, or directors without consideration if, in the judgment

of the board of directors, the issuance of the rights or options is in the interests of the corporation.

(c) The consideration for shares having a par value, other than treasury shares, and issued on the exercise of the rights or options may not be less than the par value of the shares.

(d) A privilege of conversion may not be conferred on, or altered with respect to, any indebtedness that would result in the corporation receiving less than the minimum consideration required to be received on issuance of the shares.

(e) The consideration for shares issued on the exercise of rights, options, or convertible indebtedness shall be determined as provided by Section 21.161. (TBCA 2.14-1 (part).)

Source Law

2.14-1.A. . . . In the absence of fraud in the transaction, the judgment of the board of directors as to the adequacy of the consideration received for such rights, options, or indebtedness shall be conclusive; provided that rights or options may be issued by a corporation to its shareholders, employees, or directors without consideration if, in the judgment of the board of directors, the issuance of those rights or options is in the interests of the corporation. The consideration to be received for any shares having a par value, other than treasury shares, to be issued upon the exercise of such rights or options shall not be less than the par value thereof. No privilege of conversion shall be conferred upon, or altered in respect to, any indebtedness that would result in receipt by the corporation of less than the minimum consideration required to be received upon issuance of the shares. The consideration for shares issued upon the exercise of convertible indebtedness shall be that provided in Section E of Article 2.15 of this Act. The consideration for shares issued upon the exercise of rights or options shall be that provided in Section F of Article 2.15 of this Act.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.171. TREASURY SHARES. (a) Treasury shares are

considered to be issued shares and not outstanding shares.

(b) Treasury shares may not be included in the total assets of a corporation for purposes of determining the net assets of a corporation. (TBCA 1.02.A(28) (part).)

Source Law

(28) . . . Treasury shares shall be deemed to be "issued" shares but not "outstanding" shares, and shall not be included in the total assets of a corporation for purposes of determining its "net assets."

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.172. EXPENSES OF ORGANIZATION, REORGANIZATION, AND FINANCING OF CORPORATION. A corporation may pay or authorize to be paid from the consideration received by the corporation as payment for the corporation's shares the reasonable charges and expenses of the organization or reorganization of the corporation and the sale or underwriting of the shares without rendering the shares not fully paid and nonassessable. (TBCA 2.18.)

Source Law

2.18.A. The reasonable charges and expenses of organization or reorganization of a corporation, and the reasonable expenses of and compensation for the sale or underwriting of its shares, may be paid or allowed by such corporation out of the consideration received by it in payment for its shares without thereby rendering such shares not fully paid and non-assessable.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.173. SUPPLEMENTAL REQUIRED RECORDS. In addition to the books and records required to be kept under Section 3.151, a corporation shall keep at its registered office or principal place of business, or at the office of its transfer agent or registrar, a record of:

(1) the original issuance of shares issued by the corporation;

(2) each transfer of those shares that have been presented to the corporation for registration of transfer;

(3) the names and addresses of all past shareholders of the corporation; and

(4) the number and class or series of shares issued by the corporation held by each current and past shareholder. (TBCA 2.44.A (part).)

Source Law

A. . . . Each corporation shall keep at its registered office or principal place of business, or at the office of its transfer agent or registrar, a record of the original issuance of shares issued by the corporation and a record of each transfer of those shares that have been presented to the corporation for registration of transfer. Such records shall contain the names and addresses of all past and current shareholders of the corporation and the number and class or series of shares issued by the corporation held by each of them. . . .

Revisor's Note

No substantive change is intended.

[Sections 21.174-21.200 reserved for expansion]

SUBCHAPTER E. SHAREHOLDER RIGHTS AND RESTRICTIONS

Revised Law

Sec. 21.201. REGISTERED HOLDERS AS OWNERS. Except as otherwise provided by this code and subject to Chapter 8, Business & Commerce Code, a corporation may consider the person registered as the owner of a share in the share transfer records of the corporation at a particular time, including a record date set under Section 6.101 or 6.102 or Subchapter H, as the owner of that share at that time for purposes of:

- (1) voting the share;
- (2) receiving distributions on the share;
- (3) transferring the share;
- (4) receiving notice, exercising rights of dissent, exercising or waiving a preemptive right, or giving proxies with respect to that share;
- (5) entering into agreements with respect to that share in accordance with Section 6.251, 6.252, or 21.210; or
- (6) any other shareholder action. (TBCA 2.26.A (part).)

Source Law

A. Registered Holders as Owners.
Unless otherwise provided in this Act, and subject to the provisions of Chapter 8-Investment Securities of the Business & Commerce Code:

(1) A corporation may regard the person in whose name any shares issued by the corporation are registered in the share transfer records of the corporation at any particular time (including, without limitation, as of a record date fixed pursuant to Section B or C of this Article) as the owner of those shares at that time for purposes of voting those shares, receiving distributions thereon or notices in respect thereof, transferring those shares, exercising rights of dissent with respect to those shares, exercising or waiving any preemptive right with respect to those shares, entering into agreements with respect to those shares in accordance with Article 2.22 or 2.30 of this Act, or giving proxies with respect to those shares; and

. . .

Revisor's Note

No substantive change is intended. The revised law clarifies that the corporation may look to the record holder for the purposes of any other shareholder action.

Revised Law

Sec. 21.202. DEFINITION OF SHARES. In Sections 21.203-21.208, "shares" includes a security:

- (1) that is convertible into shares; or
- (2) that carries a right to subscribe for or acquire shares. (TBCA 2.22-1.A (part).)

Source Law

A. The shareholders of a corporation shall have a preemptive right to acquire additional, unissued, or treasury shares of the corporation, or securities of the corporation convertible into or carrying a right to subscribe to or acquire shares

. . . .

Revisor's Note

No substantive change is intended. The revised law includes in the definition of "shares" the same concepts that were included within the statutory provisions of the source law.

Revised Law

Sec. 21.203. NO STATUTORY PREEMPTIVE RIGHT UNLESS PROVIDED BY CERTIFICATE OF FORMATION. (a) Except as provided by Section 21.208, a shareholder of a corporation does not have a preemptive right under this subchapter to acquire the corporation's unissued or treasury shares except to the extent provided by the corporation's certificate of formation.

(b) If the certificate of formation includes a statement that the corporation "elects to have a preemptive right" or a similar statement, Section 21.204 applies to a shareholder except to the extent the certificate of formation expressly provides otherwise. (New.)

Revisor's Note

In 1973, Article 2.22-1, comprising Sections A and B, was added to the Texas Business Corporation Act to spell out the nature of the preemptive right that shareholders of a Texas corporation had to purchase pro rata shares of its additional, unissued or treasury shares when sold by the corporation unless the right was limited or denied by the articles of incorporation. The article was based on an alternative provision of the Model Business Corporation Act that conferred the preemptive right unless otherwise limited or denied in the articles of incorporation (i.e., an "opt-out" statute) rather than adopt the other Model Act alternative under which the right had to be expressly granted in the articles of incorporation (i.e., an "opt-in" statute). But even under the choice that was made, the right was defined as being only the fair and reasonable opportunity for its exercise under such terms and conditions as the board of directors may fix. Moreover, unless otherwise provided in the articles of incorporation, the right applied only to sales of stock for cash and even then not if sold for cash under an employees' stock purchase plan. Nor could the right be exercised by preferred shareholders at all or by common shareholders as to nonconvertible preferred shares unless otherwise provided. In 1989, Texas Business Corporation Act Article 2.22-1 was amended to further restrict the preemptive right by adding Sections C and D to limit the time within

which actions for violations of the right could be brought and to require specific assignment of the preemptive right for a transferee to bring such actions.

Since 1973, there has been a major shift in modern corporate laws on preemptive rights as reflected by the Revised Model Business Corporation Act and the corporate laws of a majority of the states, including Delaware. All have adopted the "opt-in" approach that Section 21.203(a) of the revised law prescribes to conform to what is now the prevailing view. Shareholders of corporations formed under the Code will not have preemptive rights except as set forth in the certificate of formation. Under the Texas Business Corporation Act provisions, most Texas attorneys denied preemptive rights in the corporations they formed although sometimes such rights were retained to protect proportionate ownership in closely held corporations. Nevertheless, not all attorneys (or uninformed laypersons) may have considered the preemptive right issue in drafting articles of incorporation with the result that if their articles were silent on the matter, whether by choice or oversight, shareholders of their corporations continued to have preemptive rights under Article 2.22-1. Section 21.208 adds special grandfathering rules to preserve shareholders' preemptive rights in those existing corporations.

Under Section 21.203(b), a corporation desiring to "opt in" to provide preemptive rights for its shareholders need only include in its certificate of formation the simple phrase that it "elects to have a preemptive right," or a similar statement. If so, the extent to which the right can be exercised will be as delineated in Section 21.204, unless otherwise modified in the certificate of formation. One purpose in permitting use of that phrase is to simplify the drafting of the certificate of formation while at the same time allowing Section 21.204 to be employed as a checklist of business considerations to bear in mind in deciding

how extensive or limited the preemptive right should be.

Revised Law

Sec. 21.204. STATUTORY PREEMPTIVE RIGHTS. (a) If the shareholders of a corporation have a preemptive right under this subchapter, the shareholders have a preemptive right to acquire proportional amounts of the corporation's unissued or treasury shares on the decision of the corporation's board of directors to issue the shares. The preemptive right granted under this subsection is subject to uniform terms and conditions prescribed by the board of directors to provide a fair and reasonable opportunity to exercise the preemptive right.

(b) No preemptive right exists with respect to:

(1) shares issued or granted as compensation to a director, officer, agent, or employee of the corporation or a subsidiary or affiliate of the corporation;

(2) shares issued or granted to satisfy conversion or option rights created to provide compensation to a director, officer, agent, or employee of the corporation or a subsidiary or affiliate of the corporation;

(3) shares authorized in the corporation's certificate of formation that are issued not later than the 180th day after the effective date of the corporation's formation; or

(4) shares sold, issued, or granted by the corporation for consideration other than money.

(c) A holder of a share of a class without general voting rights but with a preferential right to distributions of profits, income, or assets does not have a preemptive right with respect to shares of any class.

(d) A holder of a share of a class with general voting rights but without preferential rights to distributions of profits, income, or assets does not have a preemptive right with respect to shares of any class with preferential rights to distributions of profits, income, or assets unless the shares with preferential rights are convertible into or carry a right to subscribe for or acquire shares without preferential rights.

(e) For a one-year period after the date the shares have been offered to shareholders, shares subject to preemptive rights that are not acquired by a shareholder may be issued to a person at a consideration set by the corporation's board of directors that is not lower than the consideration set for the exercise of preemptive rights. An offer at a lower consideration or after the expiration of the period prescribed by this subsection is subject to the shareholder's preemptive rights. (TBCA 2.22-1.A, B.)

Source Law

A. The shareholders of a corporation shall have a preemptive right to acquire

additional, unissued, or treasury shares of the corporation, or securities of the corporation convertible into or carrying a right to subscribe to or acquire shares, except to the extent limited or denied by this Article or by the articles of incorporation.

B. Unless otherwise provided in the articles of incorporation,

(1) No preemptive right shall exist:

(a) to acquire any shares issued to employees pursuant to approval by the affirmative vote of the holders of a majority of the shares entitled to vote thereon or when authorized by and consistent with a plan theretofore approved by such a vote of shareholders; or

(b) to acquire any shares sold otherwise than for cash.

(2) Holders of shares of any class or series that is preferred or limited as to dividends or assets shall not be entitled to any preemptive right.

(3) Holders of shares of any class or series that is not preferred or limited as to dividends or assets shall not be entitled to any preemptive right to shares of any class or series that is preferred or limited as to dividends or assets or to any obligations, unless convertible into shares of such class or series that is not preferred or limited or carrying a right to subscribe to or acquire shares of such class or series.

(4) Holders of shares without voting power shall have no preemptive right to shares with voting power.

(5) The preemptive right shall be only an opportunity to acquire shares or other securities under such terms and conditions as the board of directors may fix for the purpose of providing a fair and reasonable opportunity for the exercise of such right.

Revisor's Note

See Revisor's Note to Section 21.203.
Section 21.204 of the revised law is based in

large part on Section 6.30 of the Revised Model Business Corporation Act. Subsection 21.204(a) of the revised law clarifies that the preemptive right allows the shareholders to acquire proportional amounts of the shares being issued, which was implicit in the source law by use of the very term "preemptive right." The source law stated the right applied to "additional" as well as unissued or treasury shares, meaning shares created by an increase in the number of authorized shares, but since such shares would of necessity be unissued shares until disposed of, there is no need for the term.

Subsections (b)(1) and (2) provide that no preemptive right exists with respect to shares issued or granted as compensation to a director, officer, agent, or employee of the corporation or subsidiary or affiliate of the corporation or pursuant to conversion or option rights created to provide such compensation. The exemption in the source law was limited to shares issued to employees and only if approved by the shareholders pursuant to a plan or otherwise.

Subsection (b)(3) of the revised law also excludes shares issued not later than 180 days after the effective date of the corporation's formation and thus allows time for the corporation to raise its initial capitalization without violating the preemptive rights of the shareholders. There is no similar exemption in the source law.

Subsection (b)(4) retains the most important limitation on preemptive rights in the source law by providing it does not apply to shares sold for other than "money," substituting that slightly broader term for "cash" in the source law.

Under Subsection (c) of the revised law, a holder of nonvoting preferred shares does not have a preemptive right; however, nonvoting common shares may have a preemptive right, which was not provided by the source law because it excluded all nonvoting shares. Under Subsection (d) of the revised law, a holder of regular common shares does not have a preemptive right to purchase nonconvertible

preferred shares. When drafting a preemptive rights provision for inclusion in the certificate of formation, practitioners should give special attention in dealing with complex capital structures that include multiple classes of shares.

Subsection (e) of the revised law provides for a one-year period after the offer to shareholders within which the shares not acquired by a shareholder may be issued to a person for consideration that is not lower than the consideration set for the exercise of the preemptive rights. The source law does not provide a similar provision.

Revised Law

Sec. 21.205. WAIVER OF PREEMPTIVE RIGHT. (a) A shareholder may waive a preemptive right granted to the shareholder.

(b) A written waiver of a preemptive right is irrevocable regardless of whether the waiver is supported by consideration. (New.)

Revisor's Note

See comment to Section 21.203.

Revised Law

Sec. 21.206. LIMITATION ON ACTION TO ENFORCE PREEMPTIVE RIGHT. (a) An action brought against a corporation, the board of directors or an officer, shareholder, or agent of the corporation, or an owner of a beneficial interest in shares of the corporation for the violation of a preemptive right of a shareholder must be brought not later than the earlier of:

(1) the first anniversary of the date written notice is given to each shareholder whose preemptive right was violated; or

(2) the fourth anniversary of the latest of:

(A) the date the corporation issued the shares, securities, or rights;

(B) the date the corporation sold the shares, securities, or rights; or

(C) the date the corporation otherwise distributed the shares, securities, or rights.

(b) The notice required by Subsection (a)(1) must:

(1) be sent to the holder at the address for the holder as shown on the appropriate records of the corporation; and

(2) inform the holder that the issuance, sale, or other distribution of shares, securities, or rights violated the holder's preemptive right. (TBCA 2.22-1.C.)

Source Law

C. An action may not be brought against the corporation, its directors, officers, or agents, any holder of shares or securities of the corporation, or any owner of any beneficial interest in shares or securities of the corporation on account of any violation of any preemptive right of a shareholder to acquire any shares of the corporation, or any securities of the corporation convertible into or carrying a right to subscribe to or acquire shares, unless such action is brought within the earlier of:

(1) One year after the date on which written notice is given to each shareholder whose preemptive right was violated by the issuance, sale, or other distribution of those shares or securities, which notice shall be mailed to the shareholder at the address of the shareholder as it appears on the share transfer records of the corporation and shall inform the shareholder that the issuance, sale, or other distribution of those shares or securities was in violation of the preemptive right of the shareholder; and

(2) Four years after the date on which the corporation issued, sold, or otherwise distributed those shares or securities or the effective date of this provision, whichever is later.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.207. DISPOSITION OF SHARES HAVING PREEMPTIVE RIGHTS. The transferee or successor of a share that has been transferred or otherwise disposed of by a shareholder of a corporation whose preemptive right to acquire shares in the corporation has been violated does not acquire the preemptive right, or any right or claim based on the violation, unless the previous shareholder has assigned the preemptive right to the transferee or successor. (TBCA 2.22-1.D.)

Source Law

D. In the event of a transfer or other

disposition of shares by any shareholder of a corporation whose preemptive right to acquire shares of the corporation, or securities of the corporation convertible into or carrying a right to subscribe to or acquire shares, shall have been violated, the transferee or successor of the shareholder shall not acquire the preemptive right, or any right or claim based on that violation, unless the shareholder shall have assigned the preemptive right to the transferee or successor.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.208. PREEMPTIVE RIGHT IN EXISTING CORPORATION. Subject to the certificate of formation, a shareholder of a corporation incorporated before the effective date of this code has a preemptive right to acquire unissued or treasury shares of the corporation to the extent provided by Sections 21.204, 21.206, and 21.207. After the effective date of this code, a corporation may limit or deny the preemptive right of the shareholders of the corporation by amending the corporation's certificate of formation. (New.)

Revisor's Note

See Revisor's Note to Sections 21.203 and 21.204.

Revised Law

Sec. 21.209. TRANSFER OF SHARES AND OTHER SECURITIES. Except as otherwise provided by this code, the shares and other securities of a corporation are transferable in accordance with Chapter 8, Business & Commerce Code. (TBCA 2.22.A (part).)

Source Law

A. The shares and other securities of a corporation shall be . . . transferable in accordance with the provisions of Chapter 8--Investment Securities--of the Business & Commerce Code, as amended, [V.T.C.A. Bus. & C. Sec. 8.101 et seq.] except as otherwise provided in this Act.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.210. RESTRICTION ON TRANSFER OF SHARES AND OTHER SECURITIES. (a) A restriction on the transfer or registration of

transfer of a security may be imposed by:

- (1) the corporation's certificate of formation;
 - (2) the corporation's bylaws;
 - (3) a written agreement among two or more holders of the securities; or
 - (4) a written agreement among one or more holders of the securities and the corporation if:
 - (A) the corporation files a copy of the agreement at the principal place of business or registered office of the corporation; and
 - (B) the copy of the agreement is subject to the same right of examination by a shareholder of the corporation, in person or by agent, attorney, or accountant, as the books and records of the corporation.
- (b) A restriction imposed under Subsection (a) is not valid with respect to a security issued before the restriction has been adopted, unless the holder of the security voted in favor of the restriction or is a party to the agreement imposing the restriction. (TBCA 2.22.B.)

Source Law

B. A restriction on the transfer or registration of transfer of a security may be imposed by the articles of incorporation, or by-laws, or a written agreement among any number of the holders of such securities, or a written agreement among any number of the holders and the corporation provided a counterpart of such agreement shall be placed on file by the corporation at its principal place of business or its registered office and shall be subject to the same right of examination by a shareholder of the corporation, in person or by agent, attorney or accountant, as are the books and records of the corporation. No restriction so imposed shall be valid with respect to any security issued prior to the adoption of the restriction unless the holder of the security voted in favor of the restriction or is a party to the agreement imposing it.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.211. VALID RESTRICTIONS ON TRANSFER.
Notwithstanding Sections 21.210 and 21.213, a restriction placed on the transfer or registration of transfer of a security of a

corporation is valid if the restriction reasonably:

(1) obligates the holder of the restricted security to offer a person, including the corporation or other holders of securities of the corporation, an opportunity to acquire the restricted security within a reasonable time before the transfer;

(2) obligates the corporation, to the extent provided by this code, or another person to purchase securities that are the subject of an agreement relating to the purchase and sale of the restricted security;

(3) requires the corporation or the holders of a class of the corporation's securities to consent to a proposed transfer of the restricted security or to approve the proposed transferee of the restricted security for the purpose of preventing a violation of law;

(4) prohibits the transfer of the restricted security to a designated person or group of persons and the designation is not manifestly unreasonable;

(5) maintains the status of the corporation as an electing small business corporation under Subchapter S of the Internal Revenue Code;

(6) maintains a tax advantage to the corporation; or

(7) maintains the status of the corporation as a close corporation under Subchapter O. (TBCA 2.22.D.)

Source Law

D. In particular and without limiting the general power granted in Sections B and C of this Article to impose reasonable restrictions, a restriction on the transfer or registration of transfer of securities of a corporation shall be valid if it reasonably:

(1) Obligates the holders of the restricted securities to offer to the corporation or to any other holders of securities of the corporation or to any other person or to any combination of the foregoing, a prior opportunity, to be exercised within a reasonable time, to acquire the restricted securities; or

(2) Obligates the corporation to the extent permitted by this Act or any holder of securities of the corporation or any other person, or any combination of the foregoing, to purchase the securities which are the subject of an agreement respecting the purchase and sale of the restricted securities; or

(3) Requires the corporation or the holders of any class of securities of the corporation to consent to any proposed transfer of the restricted securities or to approve the proposed transferee of the restricted securities for the purpose of preventing violations of federal or state laws; or

(4) Prohibits the transfer of the restricted securities to designated persons or classes of persons, and such designation is not manifestly unreasonable; or

(5) Maintains the status of the corporation as an electing small business corporation under Subchapter S of the United States Internal Revenue Code, [26 U.S.C.A. Sec. 1371 et seq.] maintains any other tax advantage to the corporation, or maintains the status of the corporation as a close corporation under Part Twelve of this Act.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.212. BYLAW OR AGREEMENT RESTRICTING TRANSFER OF SHARES OR OTHER SECURITIES. (a) A corporation that has adopted a bylaw or is a party to an agreement that restricts the transfer of the shares or other securities of the corporation may file with the secretary of state, in accordance with Chapter 4, a copy of the bylaw or agreement and a statement attached to the copy that:

(1) contains the name of the corporation;

(2) states that the attached copy of the bylaw or agreement is a true and correct copy of the bylaw or agreement; and

(3) states that the filing has been authorized by the board of directors or, in the case of a corporation that is managed in some other manner under a shareholders' agreement, by the person empowered by the agreement to manage the corporation's business and affairs.

(b) After a statement described by Subsection (a) is filed with the secretary of state, the bylaws or agreement restricting the transfer of shares or other securities is a public record, and the fact that the statement has been filed may be stated on a certificate representing the restricted shares or securities if required by Section 3.202.

(c) A corporation that is a party to an agreement restricting the transfer of the shares or other securities of the

corporation may make the agreement part of the corporation's certificate of formation without restating the provisions of the agreement in the certificate of formation by amending the certificate of formation. If the agreement alters any provision of the certificate of formation, the certificate of amendment shall identify the altered provision by reference or description. If the agreement is an addition to the certificate of formation, the certificate of amendment must state that fact.

(d) The certificate of amendment must:

(1) include a copy of the agreement restricting the transfer of shares or other securities;

(2) state that the attached copy of the agreement is a true and correct copy of the agreement; and

(3) state that inclusion of the certificate of amendment as part of the certificate of formation has been authorized in the manner required by this code to amend the certificate of formation. (TBCA 2.22.E (part), F.)

Source Law

E. A corporation that has adopted a bylaw, or is a party to an agreement, restricting the transfer of its shares or other securities may file such bylaw or agreement as a matter of public record with the Secretary of State, as follows:

(1) The corporation shall file a copy of the bylaw or agreement in the office of the Secretary of State together with an attached statement setting forth:

(a) the name of the corporation;

(b) that the copy of the bylaw or agreement is a true and correct copy of the same; and

(c) that such filing has been duly authorized by the board of directors or, in the case of a close corporation that, in conformance with Part Twelve of this Act, is managed in some other manner pursuant to a shareholders' agreement, by the shareholders or by the persons empowered by the agreement to manage its business and affairs.

. . .

(3) After the filing of such statement by the Secretary of State, the bylaw or agreement restricting the transfer of shares or other securities shall become a matter of public record and the fact of such

filing shall be stated on any certificate representing the shares or other securities so restricted if required by Section G, Article 2.19, of this Act.

F. A corporation that is a party to an agreement restricting the transfer of its shares or other securities may make such agreement part of its articles of incorporation without restating the provisions of such agreement therein by complying with the provisions of Part Four of this Act for amendment of the articles of incorporation. If such agreement shall alter any provision of the original or amended articles of incorporation, the articles of amendment shall identify by reference or description the altered provision. If such agreement is to be an addition to the original or amended articles of incorporation, the articles of amendment shall state that fact. The articles of amendment shall have attached thereto a copy of the agreement restricting the transfer of shares or other securities, and shall state that the attached copy of such agreement is a true and correct copy of the same and that its inclusion as part of the articles of incorporation has been duly authorized in the manner required by this Act to amend the articles of incorporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.213. ENFORCEABILITY OF RESTRICTION ON TRANSFER OF CERTAIN SECURITIES. (a) A restriction placed on the transfer or registration of the transfer of a security of a corporation is specifically enforceable against the holder, or a successor or transferee of the holder, if:

(1) the restriction is reasonable and noted conspicuously on the certificate or other instrument representing the security; or

(2) with respect to an uncertificated security, the restriction is reasonable and a notation of the restriction is contained in the notice sent with respect to the security under Section 3.205.

(b) Unless noted in the manner specified by Subsection (a) with respect to a certificate or other instrument or an

uncertificated security, an otherwise enforceable restriction is ineffective against a transferee for value without actual knowledge of the restriction at the time of the transfer or against a subsequent transferee, regardless of whether the transfer is for value. A restriction is specifically enforceable against a person other than a transferee for value from the time the person acquires actual knowledge of the restriction's existence. (TBCA 2.22.C.)

Source Law

C. Any restriction on the transfer or registration of transfer of a security of a corporation, if reasonable and noted conspicuously on the certificate or other instrument representing the security or, in the case of an uncertificated security, if reasonable and if notation of the restriction is contained in the notice sent pursuant to Section D of Article 2.19 of this Act with respect to the security, shall be specifically enforceable against the holder of the restricted security or any successor or transferee of the holder. Unless noted conspicuously on the certificate or other instrument representing the security or, in the case of an uncertificated security, unless notation of the restriction is contained in the notice sent pursuant to Section D of Article 2.19 of this Act with respect to the security, a restriction, even though otherwise enforceable, is ineffective against a transferee for value without actual knowledge of the restriction at the time of the transfer or against any subsequent transferee (whether or not for value), but such a restriction shall be specifically enforceable against any other person who is not a transferee for value from and after the time that the person acquires actual knowledge of the existence of the restriction.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.214. JOINT OWNERSHIP OF SHARES. (a) If shares are registered on the books of a corporation in the names of two or more persons as joint owners with the right of survivorship and

one of the owners dies, the corporation may record on its books and effect the transfer of the shares to a person, including the surviving joint owner, and pay any distributions made with respect to the shares, as if the surviving joint owner was the absolute owner of the shares. The recording and distribution authorized by this subsection must be made after the death of a joint owner and before the corporation receives actual written notice that a party other than a surviving joint owner is claiming an interest in the shares or distribution.

(b) The discharge of a corporation from liability under Section 21.216 and the transfer of full legal and equitable title of the shares does not affect, reduce, or limit any cause of action existing in favor of an owner of an interest in the shares or distributions against the surviving owner. (TBCA 2.22.G (part).)

Source Law

G. When shares are registered on the books of a corporation in the names of two or more persons as joint owners with the right of survivorship, after the death of a joint owner and before the time that the corporation receives actual written notice that parties other than the surviving joint owner or owners claim an interest in the shares or any distributions thereon, the corporation may record on its books and otherwise effect the transfer of those shares to any person, firm, or corporation (including that surviving joint owner individually) and pay any distributions made in respect of those shares, in each case as if the surviving joint owner or owners were the absolute owners of the shares. . . . provided, however, that the discharge of the corporation from liability and the transfer of full legal and equitable title of the shares in no way affects, reduces, or limits any cause of action existing in favor of any owner of an interest in those shares or distributions against the surviving owner or owners.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.215. LIABILITY FOR DESIGNATING OWNER OF SHARES. A corporation or an officer, director, employee, or agent of the

corporation may not be held liable for considering the person who is registered as the owner of a share in the share transfer records of the corporation at a particular time to be the owner of the share at that time for a purpose described by Section 21.201, regardless of whether the person possesses a certificate for that share. (TBCA 2.26.A(2).)

Source Law

(2) Neither the corporation nor any of its officers, directors, employees, or agents shall be liable for regarding that person as the owner of those shares at that time for those purposes, regardless of whether that person does not possess a certificate for those shares.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.216. LIABILITY REGARDING JOINT OWNERSHIP OF SHARES. A corporation that transfers shares or makes a distribution to a surviving joint owner under Section 21.214 before the corporation has received a written claim for the shares or distribution from another person is discharged from liability for the transfer or payment. (TBCA 2.22.G (part).)

Source Law

G. . . . A corporation permitting such a transfer by and making any distribution to such a surviving joint owner or owners before the receipt of written notice from other parties claiming an interest in those shares or distributions is discharged from all liability for the transfer or payment so made

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.217. LIABILITY OF ASSIGNEE OR TRANSFEREE. An assignee or transferee of certificated shares, uncertificated shares, or a subscription for shares in good faith and without knowledge that full consideration for the shares or subscription has not been paid may not be held personally liable to the corporation or a creditor of the corporation for an unpaid portion of the consideration. (TBCA 2.21.C.)

Source Law

C. Any person becoming an assignee or transferee of certificated shares or of uncertificated shares or of a subscription for shares in good faith and without knowledge or notice that the full consideration therefor has not been paid shall not be personally liable to the corporation or its creditors for any unpaid portion of such consideration.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.218. EXAMINATION OF RECORDS. (a) In this section, a holder of a beneficial interest in a voting trust entered into under Section 6.251 is a holder of the shares represented by the beneficial interest.

(b) Subject to the governing documents and on written demand stating a proper purpose, a holder of shares of a corporation for at least six months immediately preceding the holder's demand, or a holder of at least five percent of all of the outstanding shares of a corporation, is entitled to examine and copy, at a reasonable time, the corporation's relevant books, records of account, minutes, and share transfer records. The examination may be conducted in person or through an agent, accountant, or attorney.

(c) This section does not impair the power of a court, on the presentation of proof of proper purpose by a beneficial or record holder of shares, to compel the production for examination by the holder of the books and records of accounts, minutes, and share transfer records of a corporation, regardless of the period during which the holder was a beneficial holder or record holder and regardless of the number of shares held by the person. (TBCA 2.44.C, E, G.)

Source Law

C. Any person who shall have been a shareholder for at least six (6) months immediately preceding his demand, or shall be the holder of at least five per cent (5%) of all the outstanding shares of a corporation, upon written demand stating the purpose thereof, shall have the right to examine, in person or by agent, accountant, or attorney, at any reasonable time or times, for any proper purpose, its relevant books and

records of account, minutes, and share transfer records, and to make extracts therefrom.

. . .

E. Nothing herein contained shall impair the power of any court of competent jurisdiction, upon proof of proper purpose by a beneficial or record holder of shares, irrespective of the period of time during which such holder shall have been a beneficial or record holder and irrespective of the number of shares held by him, to compel the production for examination by such holder of the books and records of account, minutes, and share transfer records of a corporation.

. . .

G. A holder of a beneficial interest in a voting trust entered into pursuant to Article 2.30 of this Act shall be regarded as a holder of the shares represented by such beneficial interest for the purposes of this Article.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.219. ANNUAL AND INTERIM STATEMENTS OF CORPORATION.

(a) On written request of a shareholder of the corporation, a corporation shall mail to the shareholder:

(1) the annual statements of the corporation for the last fiscal year that contain in reasonable detail the corporation's assets and liabilities and the results of the corporation's operations; and

(2) the most recent interim statements, if any, that have been filed in a public record or other publication.

(b) The corporation shall be allowed a reasonable time to prepare the annual statements. (TBCA 2.44.F.)

Source Law

F. Upon the written request of any shareholder of a corporation, the corporation shall mail to such shareholder its annual statements for its last fiscal year showing in reasonable detail its assets and liabilities and the results of its operations and the most recent interim statements, if any, which have been filed in a public record

or otherwise published. The corporation shall be allowed a reasonable time to prepare such annual statements.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.220. PENALTY FOR FAILURE TO PREPARE VOTING LIST. An officer or agent of a corporation who is in charge of the corporation's share transfer records and who does not prepare the list of owners, keep the list on file for a 10-day period, or produce and keep the list available for inspection at the annual meeting as required by Sections 21.354 and 21.372 is liable to an owner who suffers damages because of the failure for the damage caused by the failure. (TBCA 2.27.C (part).)

Source Law

C. An officer or agent having charge of the share transfer records who shall fail to prepare the list of shareholders or keep the same on file for a period of ten (10) days, or produce and keep it open for inspection at the meeting, as provided in this Article, shall be liable to any shareholder suffering damage on account of such failure, to the extent of such damage. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.221. PENALTY FOR FAILURE TO PROVIDE NOTICE OF MEETING. If an officer or agent of a corporation is unable to comply with the duties prescribed by Sections 21.354 and 21.372 because the officer or agent did not receive notice of a meeting of owners within a sufficient time before the date of the meeting, the corporation, rather than the officer or agent, is liable to an owner who suffers damages because of the failure for the extent of the damage caused by the failure. (TBCA 2.27.C (part).)

Source Law

C. . . . In the event that such officer or agent does not receive notice of a meeting of shareholders sufficiently in advance of the date of such meeting reasonably to enable him to comply with the duties prescribed by this Article, the corporation, but not such officer or agent, shall be liable to any

shareholder suffering damage on account of such failure, to the extent of such damage.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.222. PENALTY FOR REFUSAL TO PERMIT EXAMINATION OF CERTAIN RECORDS. (a) A corporation that refuses to allow a person to examine and make copies of account records, minutes, and share transfer records under Section 21.218 is liable to the shareholder for any cost or expense, including attorney's fees, incurred in enforcing the shareholder's rights under Section 21.218. The liability imposed on a corporation under this subsection is in addition to any other damages or remedy afforded to the shareholder by law.

(b) It is a defense to an action brought under this section that the person suing:

(1) has, within the two years preceding the date the action is brought, sold or offered for sale a list of shareholders or of holders of voting trust certificates in consideration for shares of the corporation or any other corporation;

(2) has aided or abetted a person in procuring a list of shareholders or of holders of voting trust certificates for the purpose described by Subdivision (1);

(3) has improperly used information obtained through a prior examination of the books and account records, minutes, or share transfer records of the corporation or any other corporation; or

(4) was not acting in good faith or for a proper purpose in making the person's request for examination. (TBCA 2.44.D.)

Source Law

D. Any corporation which shall refuse to allow any such shareholder or his agent, accountant or attorney, so to examine and make extracts from its books and records of account, minutes, and share transfer records, for any proper purpose, shall be liable to such shareholder for all costs and expenses, including attorneys' fees, incurred in enforcing his rights under this Article in addition to any other damages or remedy afforded him by law. It shall be a defense to any action for penalties under this section that the person suing therefor has within two (2) years sold or offered for sale any list

of shareholders or of holders of voting trust certificates for shares of such corporation or any other corporation or has aided or abetted any person in procuring any list of shareholders or of holders of voting trust certificates for any such purpose, or has improperly used any information secured through any prior examination of the books and records of account, minutes, or share transfer records of such corporation or any other corporation, or was not acting in good faith or for a proper purpose in making his demand.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.223. LIMITATION OF LIABILITY FOR OBLIGATIONS. (a) A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate of such a holder, owner, or subscriber of the corporation, may not be held liable to the corporation or its obligees with respect to:

(1) the shares, other than the obligation to pay to the corporation the full amount of consideration, fixed in compliance with Sections 21.157-21.162, for which the shares were or are to be issued;

(2) any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, beneficial owner, subscriber, or affiliate is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory; or

(3) any obligation of the corporation on the basis of the failure of the corporation to observe any corporate formality, including the failure to:

(A) comply with this code or the articles of incorporation or bylaws of the corporation; or

(B) observe any requirement prescribed by this code or the articles of incorporation or bylaws of the corporation for acts to be taken by the corporation or its directors or shareholders.

(b) Subsection (a)(2) does not prevent or limit the liability of a holder, beneficial owner, subscriber, or affiliate if the obligee demonstrates that the holder, beneficial owner, subscriber, or affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the

holder, beneficial owner, subscriber, or affiliate. (TBCA 2.21.A.)

Source Law

A. A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate thereof or of the corporation, shall be under no obligation to the corporation or to its obligees with respect to:

(1) such shares other than the obligation, if any, of such person to pay to the corporation the full amount of the consideration, fixed in compliance with Article 2.15 of this Act, for which such shares were or are to be issued;

(2) any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, owner, subscriber, or affiliate is or was the alter ego of the corporation, or on the basis of actual fraud or constructive fraud, a sham to perpetrate a fraud, or other similar theory, unless the obligee demonstrates that the holder, owner, subscriber, or affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, owner, subscriber, or affiliate; or

(3) any obligation of the corporation on the basis of the failure of the corporation to observe any corporate formality, including without limitation: (a) the failure to comply with any requirement of this Act or of the articles of incorporation or bylaws of the corporation; or (b) the failure to observe any requirement prescribed by this Act or by the articles of incorporation or bylaws for acts to be taken by the corporation, its board of directors, or its shareholders.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.224. PREEMPTION OF LIABILITY. The liability of a holder, beneficial owner, or subscriber of shares of a corporation, or any affiliate of such a holder, owner, or subscriber of the corporation, for an obligation that is limited by Section 21.223 is exclusive and preempts any other liability imposed for that obligation under common law or otherwise. (TBCA 2.21.B (part).)

Source Law

B. The liability of a holder, owner, or subscriber of shares of a corporation or any affiliate thereof or of the corporation for an obligation that is limited by Section A of this article is exclusive and preempts any other liability imposed on a holder, owner, or subscriber of shares of a corporation or any affiliate thereof or of the corporation for that obligation under common law or otherwise,

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.225. EXCEPTIONS TO LIMITATIONS. Section 21.223 or 21.224 does not limit the obligation of a holder, beneficial owner, subscriber, or affiliate to the obligee of the corporation if that person:

- (1) expressly assumes, guarantees, or agrees to be personally liable to the obligee for the obligation; or
- (2) is otherwise liable to the obligee for the obligation under this code or other applicable statute. (TBCA 2.21.B (part).)

Source Law

B. . . . except that nothing contained in this article shall limit the obligation of a holder, owner, subscriber, or affiliate to an obligee of the corporation when:

- (1) the holder, owner, subscriber, or affiliate has expressly assumed, guaranteed, or agreed to be personally liable to the obligee for the obligation; or
- (2) the holder, owner, subscriber, or affiliate is otherwise liable to the obligee for the obligation under this Act or another applicable statute.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.226. PLEDGEES AND TRUST ADMINISTRATORS. (a) A pledgee or other holder of shares as collateral security is not personally liable as a shareholder.

(b) An executor, administrator, conservator, guardian, trustee, assignee for the benefit of creditors, or receiver is not personally liable as a holder of or subscriber to shares of a corporation.

(c) The estate and funds administered by a trustee, executor, administrator, guardian, trustee, assignee for the benefit of creditors, or receiver are liable for the full amount of the consideration for which the shares were or are to be issued. (TBCA 2.21.D, E.)

Source Law

D. An executor, administrator, conservator, guardian, trustee, assignee for the benefit of creditors, or receiver shall not be personally liable as a holder of or subscriber to shares of a corporation, but the estate and funds in his hands shall be so liable.

E. No pledgee or other holder of shares as collateral security shall be personally liable as a shareholder.

Revisor's Note

No substantive change is intended.

[Sections 21.227-21.250 reserved for expansion]

SUBCHAPTER F. REDUCTIONS IN STATED CAPITAL;

CANCELLATION OF TREASURY SHARES

Revised Law

Sec. 21.251. REDUCTION OF STATED CAPITAL BY REDEMPTION OR PURCHASE OF REDEEMABLE SHARES. (a) At the time a corporation redeems or purchases the redeemable shares of the corporation, the redemption or purchase has the effect of:

(1) canceling the shares; and

(2) restoring the shares to the status of authorized but unissued shares, unless the corporation's certificate of formation provides that shares may not be reissued after the shares are redeemed or purchased by the corporation.

(b) If the corporation is prohibited from reissuing the shares by the certificate of formation following a redemption or purchase under Subsection (a), the number of shares of the class that the corporation is authorized to issue is reduced by the number of shares canceled.

(c) If shares redeemed or purchased by a corporation under Subsection (a) constitute all of the outstanding shares of a particular class of shares and the certificate of formation provides that the shares of the class, when redeemed and repurchased, may not be reissued, the corporation may not issue any additional shares of the class of shares.

(d) Upon the redemption or purchase of redeemable shares under this section, the stated capital of the corporation shall be reduced by that part of the stated capital that was, at the time of the redemption or purchase, represented by those redeemable shares. (TBCA 4.10.A, D.)

Source Law

A. When redeemable shares of a corporation are redeemed or purchased by the corporation, the redemption or purchase shall effect a cancellation of such shares, and a statement of cancellation shall be filed as provided in this Article. Thereupon such shares shall be restored to the status of authorized but unissued shares, unless the articles of incorporation provide that such shares when redeemed or purchased shall not be reissued, in which case the filing of the statement of cancellation shall operate as an amendment to the articles of incorporation and shall reduce the number of shares of the class so cancelled which the corporation is authorized to issue by the number of shares so cancelled. If the shares so redeemed and purchased constitute all the outstanding shares of any particular class of shares and if the articles of incorporation provide that the shares of such class when redeemed and repurchased shall not be reissued, the filing of the statement of cancellation shall operate as an amendment to the articles of incorporation by eliminating therefrom all reference to such class of shares and shall reduce the classes of shares which the corporation is authorized to issue accordingly.

. . .

D. The filing of the statement of cancellation shall effect a reduction of the stated capital of the corporation by an amount equal to that part of the stated capital which was, at the time of the

cancellation, represented by the shares so cancelled.

Revisor's Note

The requirements to make a filing with the secretary of state with respect to redemption of shares or actions that reduce the stated capital of a corporation previously found in Articles 4.10, 4.11, and 4.12, Texas Business Corporation Act, have been eliminated as a result of the diminished importance of stated capital under modern corporate laws. Modern corporate laws have generally eliminated public filings relating to redemption of shares or changes in stated capital.

Revised Law

Sec. 21.252. CANCELLATION OF TREASURY SHARES. (a) A corporation, by resolution of the board of directors of the corporation, may cancel all or part of the corporation's treasury shares at any time.

(b) Upon the cancellation of treasury shares, the stated capital of the corporation shall be reduced by that part of the stated capital that was, at the time of the cancellation, represented by the canceled shares, and the canceled shares shall be restored to the status of authorized but unissued shares.

(c) This section does not prohibit a cancellation of shares or a reduction of stated capital in any other manner permitted by law. (TBCA 4.11.)

Source Law

4.11.A. A corporation may, at any time, by resolution of its board of directors, cancel all or any part of its treasury shares, and in such event a statement of cancellation shall be filed as provided in this Article.

B. The statement of cancellation shall be executed on behalf of the corporation by an officer and shall set forth:

(1) The name of the corporation.

(2) A statement that a resolution authorizing the cancellation was duly adopted by all necessary action on the part of the corporation, the date of adoption of such resolution, and a summary of its contents, including a statement of the number of treasury shares to be cancelled, itemized by

classes and series, and the amount of stated capital represented by the shares to be cancelled.

(3) The aggregate number of shares, itemized by classes and series and par value, if any, which are to retain the status of issued shares after the cancellation becomes effective.

(4) The amount, expressed in dollars, which is to constitute the stated capital of the corporation after the cancellation becomes effective.

C. The original and a copy of such statement shall be delivered to the Secretary of State. If the Secretary of State finds that such statement conforms to law, he shall, when the appropriate filing fee is paid as required by law:

(1) Endorse on the original and the copy the word "Filed," and the month, day, and year of the filing thereof.

(2) File the original in his office.

(3) Return the copy to the corporation or its representative.

D. Upon the filing of such statement of cancellation, the stated capital of the corporation shall be deemed to be reduced by that part of the stated capital which was, at the time of such cancellation, represented by the shares so cancelled, and the shares so cancelled shall be restored to the status of authorized but unissued shares.

E. Nothing contained in this Article shall be construed to forbid a cancellation of shares or a reduction of stated capital in any other manner permitted by law.

Revisor's Note

See comment to Section 21.251.

Revised Law

Sec. 21.253. PROCEDURES FOR REDUCTION OF STATED CAPITAL BY BOARD OF DIRECTORS. (a) If all or part of the stated capital of a corporation is represented by shares without par value, the stated capital of the corporation may be reduced in the manner provided by this section.

(b) The board of directors shall adopt a resolution that:

(1) states the amount of the proposed reduction of the

stated capital and the manner in which the reduction will be effected; and

(2) directs that the proposed reduction be submitted to a vote of the shareholders at an annual or special meeting.

(c) Each shareholder of record entitled to vote on the reduction of stated capital shall be given written notice stating that the purpose or one of the purposes of the meeting is to consider the matter of reducing the stated capital of the corporation in the amount and manner proposed by the board of directors. The notice shall be given in the time and manner provided by this code for giving notice of shareholders' meetings.

(d) The affirmative vote of the holders of at least the majority of the shares entitled to vote on the matter is required for approval of the resolution proposing the reduction of stated capital.

(e) Upon the approval of the resolution by the shareholders, the stated capital of the corporation shall be reduced as provided in the resolution. (TBCA 4.12.A, D.)

Source Law

A. If all or part of the stated capital of a corporation is represented by shares without par value, the stated capital of the corporation may be reduced in the following manner:

(1) The board of directors shall adopt a resolution setting forth the amount of the proposed reduction and the manner in which the reduction shall be effected, and directing that the question of such reduction be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting.

(2) Written or printed notice, stating that the purpose or one of the purposes of such meeting is to consider the question of reducing the stated capital of the corporation in the amount and manner proposed by the board of directors, shall be given to each shareholder of record entitled to vote thereon within the time and in the manner provided in this Act for the giving of notice of meetings of shareholders.

(3) At the meeting for which such notice has been given, the affirmative vote of the holders of at least a majority of the shares entitled to vote on the question shall

be required for approval of the resolution proposing the reduction of stated capital.

. . .

D. Upon the filing of such statement, the stated capital of the corporation shall be reduced as therein set forth.

Revisor's Note

See comment to Section 21.251.

Revised Law

Sec. 21.254. RESTRICTION ON REDUCTION OF STATED CAPITAL. The stated capital of a corporation may not be reduced under this subchapter if the amount of the aggregate stated capital of the corporation would be reduced to an amount equal to or less than the sum of the:

(1) aggregate preferential amounts payable on all issued shares with a preferential right to the assets of the corporation in the event of voluntary winding up and termination; and

(2) aggregate par value of all issued shares with par value but no preferential right to the assets of the corporation in the event of voluntary winding up and termination. (TBCA 4.12.E.)

Source Law

E. No reduction of stated capital shall be made under the provisions of this Article which would reduce the amount of the aggregate stated capital of the corporation to an amount equal to or less than the aggregate preferential amounts payable upon all issued shares having a preferential right in the assets of the corporation in the event of voluntary liquidation, plus the aggregate par value of all issued shares having a par value but no preferential right in the assets of the corporation in the event of voluntary liquidation.

Revisor's Note

No substantive change is intended.

[Sections 21.255-21.300 reserved for expansion]

SUBCHAPTER G. DISTRIBUTIONS AND SHARE DIVIDENDS

Revised Law

Sec. 21.301. DEFINITIONS. In this subchapter:

(1) "Distribution limit," with respect to a distribution made by a corporation, other than a distribution described by Subdivision (2), means:

(A) the net assets of the corporation if the distribution:

(i) is a purchase or redemption of its own shares by a corporation that:

(a) is eliminating fractional shares;

(b) is collecting or compromising indebtedness owed by or to the corporation; or

(c) is paying dissenting shareholders entitled to payment for their shares under this code; or

(ii) is not the purchase or redemption of its own shares by a consuming assets corporation; or

(B) the surplus of the corporation for a distribution not described by Paragraph (A).

(2) "Distribution limit," with respect to a distribution that is a purchase or redemption of its own shares by an investment company the certificate of formation of which provides that the company may purchase the company's own shares out of stated capital, means the net assets of the investment company rather than the surplus of the investment company.

(3) "Investment company" means a corporation registered as an open-end company under the Investment Company Act. (TBCA 2.38.C.)

Source Law

C. Notwithstanding the limitation set forth in Subsection (2) of Section B of this Article, if the net assets of a corporation are not less than the amount of the proposed distribution:

(1) the corporation may make a distribution involving a purchase or redemption of any of its own shares if the corporation is an open-end investment company, registered as such under the Federal Investment Company Act of 1940 (15 U.S.C.A. Sec. 80a-1 (1986)), and its articles of incorporation provide in effect that it may purchase its own shares out of stated capital;

(2) the corporation may make a distribution involving a purchase or redemption of any of its own shares if the purchase or redemption is made by the corporation to:

(a) eliminate fractional shares;

(b) collect or compromise indebtedness owed by or to the corporation;

(c) pay dissenting shareholders entitled to payment for their shares under this Act; or

(d) effect the purchase or redemption of redeemable shares in accordance with this Act; and

(3) the corporation may make a distribution not involving a purchase or redemption of any of its own shares if the corporation is a consuming assets corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.302. AUTHORITY FOR DISTRIBUTIONS. The board of directors of a corporation may authorize a distribution and the corporation may make a distribution, subject to Section 21.303. (TBCA 2.38.A.)

Source Law

A. The board of directors of a corporation may authorize and the corporation may make distributions subject to any restrictions in its articles of incorporation and to the limitations set forth in this Article.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.303. LIMITATIONS ON DISTRIBUTIONS. (a) A corporation may not make a distribution that violates the corporation's certificate of formation.

(b) Unless the distribution is made in compliance with Chapter 11, a corporation may not make a distribution:

(1) if the corporation would be insolvent after the distribution; or

(2) that exceeds the distribution limit. (TBCA 2.38.A, B, D.)

Source Law

A. The board of directors of a corporation may authorize and the corporation may make distributions subject to any restrictions in its articles of incorporation and to the limitations set forth in this Article.

B. A distribution may not be made by a corporation if:

(1) after giving effect to the distribution, the corporation would be insolvent; or

(2) the distribution exceeds the surplus of the corporation.

. . .

D. Notwithstanding the limitations set forth in Section B of this Article, the corporation may make distributions in compliance with Article 6.04, 7.09, or 7.12 of this Act.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.304. REDEMPTIONS. (a) A distribution by a corporation that involves a redemption of outstanding redeemable shares of the corporation subject to redemption may be related to any or all of those shares.

(b) If less than all of the outstanding redeemable shares of a corporation subject to redemption are to be redeemed, the shares to be redeemed shall be selected for redemption:

(1) in accordance with the corporation's certificate of formation; or

(2) ratably or by lot in the manner prescribed by resolution of the corporation's board of directors, if the certificate of formation does not specify how shares are to be selected for redemption.

(c) A redemption of redeemable shares takes effect by call and written notice of the redemption of the shares. (TBCA 4.08.A (part).)

Source Law

A. A corporation may . . . redeem any or all outstanding shares subject to redemption. If less than all such shares are to be redeemed, the shares to be redeemed shall be selected for redemption in accordance with the provisions in the articles of incorporation, or, in the absence of such provisions therein, may be selected ratably or by lot in such manner as may be prescribed by resolution of the board of directors. Such redemption shall be effected by call and written or printed notice

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.305. NOTICE OF REDEMPTION. (a) A notice of redemption of redeemable shares of a corporation must state:

- (1) the class or series of shares or part of the class or series of shares to be redeemed;
- (2) the date set for redemption;
- (3) the redemptive price; and
- (4) the place at which the shareholders may obtain payment of the redemptive price.

(b) The notice of redemption shall 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.

(c) A notice that is mailed is considered to have been sent when the notice is deposited in the United States mail, with postage prepaid, addressed to the shareholder at the shareholder's address as it appears on the share transfer records of the corporation.

(d) A corporation may give the transfer agent described by Section 21.306 irrevocable instructions to send or complete the notice of redemption. (TBCA 4.08.A (part), B.)

Source Law

A. . . .

(1) The notice of redemption of such shares shall set forth:

(a) The class or series of shares or part of any class or series of shares to be redeemed.

(b) The date fixed for redemption.

(c) The redemptive price.

(d) The place at which the shareholders may obtain payment of the redemptive price and, in the case of holders of certificated shares, upon surrender of their respective share certificates.

(2) The notice shall be given to each holder of redeemable shares being called, either personally or by mail, not less than twenty (20) nor more than sixty (60) days before the date fixed for redemption. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the shareholder at his address as it appears on the stock transfer book of the corporation,

with postage thereon prepaid.

B. A corporation may, on or prior to the date fixed for redemption of redeemable shares, deposit with any bank or trust company in this State, or any bank or trust company in the United States duly appointed and acting as transfer agent for such corporation, as a trust fund, a sum sufficient to redeem shares called for redemption, with irrevocable instructions and authority to such bank or trust company to give or complete the notice of redemption thereof

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.306. DEPOSIT OF MONEY FOR REDEMPTION. (a) After the date the notice of redemption required by Section 21.305 is sent and before the day after the date set for redemption of redeemable shares of the corporation, a corporation may deposit with a bank or trust company in this or another state of the United States appointed and acting as transfer agent for the corporation an amount sufficient to redeem the shares called for redemption. The amount must be deposited as a trust fund.

(b) Unless the corporation's certificate of formation provides otherwise, if a corporation deposits money and gives payment instructions in accordance with Subsection (a) and Section 21.307(b):

(1) the shares called for redemption are considered redeemed, and distributions on those shares cease to accrue on and after the date set for redemption; and

(2) the deposit constitutes full payment of the shares called for redemption to the holders of the shares on and after the date set for redemption.

(c) Unless the certificate of formation provides otherwise, after the date a deposit is made and instructions are given under this section and Section 21.307(b), the shares called for redemption are not considered outstanding, and the holders of the shares cease to be shareholders of the shares and have no right with respect to the shares other than:

(1) the right to receive payment of the redemptive price of the shares without interest from the bank or trust company; and

(2) any right to convert those shares.

(d) Unless the certificate of formation provides otherwise, a bank or trust company receiving a deposit under this section shall pay to the corporation on demand the balance of the amount

deposited if one or more holders of the shares called for redemption do not claim for redemption the amount deposited on or before the sixth anniversary of the date of the deposit. After making a payment under this subsection, the bank or trust company is relieved of all responsibility to the holders with respect to the amount deposited. (TBCA 4.08.B (part).)

Source Law

B. A corporation may, on or prior to the date fixed for redemption of redeemable shares, deposit with any bank or trust company in this State, or any bank or trust company in the United States duly appointed and acting as transfer agent for such corporation, as a trust fund, a sum sufficient to redeem shares called for redemption, with irrevocable instructions and authority to such bank or trust company to give or complete the notice of redemption thereof and to pay, on or after the date fixed for such redemption, to the respective holders of shares, as evidenced by a list of holders of such shares certified by an officer of the corporation, the redemptive price upon the surrender of their respective share certificates. From and after the date fixed for redemption, such shares shall be deemed to be redeemed and dividends thereon shall cease to accrue. Such deposit shall be deemed to constitute full payment of such shares to their holders. From and after the date such deposit is made and such instructions are given, such shares shall no longer be deemed to be outstanding, and the holders thereof shall cease to be shareholders with respect to such shares, and shall have no rights with respect thereto except the right to receive from the bank or trust company payment of the redemptive price of such shares without interest and . . . any right to convert such shares which may exist. In case the holders of such shares shall not, within six (6) years after such deposit, claim the amount deposited for redemption thereof, such bank or trust company shall upon demand pay over to the corporation the balance of such amount so deposited to be held in trust and such bank or trust company

shall thereupon be relieved of all responsibility to the holders thereof.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.307. PAYMENT OF REDEEMED SHARES. (a) Payment of a certificated share shall be made only on the surrender of the respective share certificate.

(b) A corporation may give a transfer agent described by Section 21.306 irrevocable instructions to pay, on or after the date set for redemption of redeemable shares, the redemptive price to the respective holders of the shares as evidenced by a list of shareholders certified by an officer of the corporation. (TBCA 4.08.B (part).)

Source Law

B. A corporation may . . . deposit . . . with irrevocable instructions and authority to such bank or trust company . . . to pay, on or after the date fixed for such redemption, to the respective holders of shares, as evidenced by a list of holders of such shares certified by an officer of the corporation, the redemptive price upon the surrender of their respective share certificates. . . . payment of the redemptive price of such shares . . . in the case of holders of certificated shares, upon the surrender of their respective certificates therefor, and

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.308. PRIORITY OF DISTRIBUTIONS. (a) Except as provided by Subsection (b) or (c), a corporation's indebtedness that arises as a result of the declaration of a distribution and a corporation's indebtedness issued in a distribution are at parity with the corporation's indebtedness to its general, unsecured creditors.

(b) The indebtedness described by Subsection (a) shall be subordinated to the extent required by an agreement binding on the corporation on the date the indebtedness arises or if agreed to by the person to whom the indebtedness is owed or, with respect to indebtedness issued in a distribution, as provided by the corporation.

(c) The indebtedness described by Subsection (a) shall be

secured to the extent required by an agreement binding on the corporation. (TBCA 2.38.E.)

Source Law

E. A corporation's indebtedness to a shareholder incurred by reason of a distribution made in accordance with this Article shall be at parity with the corporation's indebtedness to its general, unsecured creditors, except to the extent the indebtedness is subordinated, or payment of that indebtedness is secured, by agreement.

Revisor's Note

No substantive change is intended. The revised law clarifies that the corporation's distribution may include its own indebtedness, which is implicit in the source law.

Revised Law

Sec. 21.309. RESERVES, DESIGNATIONS, AND ALLOCATIONS FROM SURPLUS. (a) A corporation, by resolution of the board of directors of the corporation, may:

(1) create a reserve out of the surplus of the corporation; or

(2) designate or allocate in any manner a part or all of the corporation's surplus for a proper purpose.

(b) A corporation may increase, decrease, or abolish a reserve, designation, or allocation in the manner provided by Subsection (a). (TBCA 4.13.)

Source Law

4.13. A corporation may, by resolution of its board of directors, create a reserve or reserves out of its surplus or designate or allocate any part or all of surplus in any manner for any proper purpose or purposes, and may increase, decrease, or abolish any such reserve, designation, or allocation in the same manner.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.310. AUTHORITY FOR SHARE DIVIDENDS. The board of directors of a corporation may authorize a share dividend and the corporation may pay a share dividend subject to Section 21.311 and any restriction in its certificate of formation. (TBCA

2.38-1.A.)

Source Law

A. The board of directors of a corporation may authorize and the corporation may pay share dividends subject to any restrictions in its articles of incorporation and to the limitations set forth in this Article.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.311. LIMITATIONS ON SHARE DIVIDENDS. A corporation may not pay a share dividend in authorized but unissued shares of any class if:

(1) the surplus of the corporation is less than the amount required by Section 21.313 to be transferred to stated capital at the time the share dividend is made; or

(2) the share dividend will be made to a holder of shares of any other class or series, unless:

(A) the corporation's certificate of formation provides for the dividend; or

(B) the share dividend is authorized by the holders of at least a majority of the outstanding shares of the class or series in which the share dividend is to be made. (TBCA 2.38-1.B, E.)

Source Law

B. A share dividend payable in authorized but unissued shares may not be paid by a corporation if the surplus of the corporation is less than the amount required by this Article to be transferred to stated capital at the time that share dividend is paid.

. . .

E. A share dividend payable in shares of any class may not be paid to the holders of shares of any other class unless the articles of incorporation so provide or unless the payment is authorized by the affirmative vote or the written consent of the holders of at least a majority of the outstanding shares of the class in which the payment is to be made.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.312. VALUE OF SHARES ISSUED AS SHARE DIVIDENDS. (a)
A share dividend payable in authorized but unissued shares with par value shall be issued at the par value of the respective share.

(b) A share dividend payable in authorized but unissued shares without par value shall be issued at the value set by the board of directors when the share dividend is authorized. (TBCA 2.38-1.C (part), D (part).)

Source Law

C. If a share dividend is payable in authorized but unissued shares having a par value, those shares shall be issued at the par value and

D. If a share dividend is payable in authorized but unissued shares without par value, those shares shall be issued at the value fixed by resolution of the board of directors adopted at the time the share dividend is authorized, and

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.313. TRANSFER OF SURPLUS FOR SHARE DIVIDENDS. (a)
When a share dividend payable in authorized but unissued shares with par value is made by a corporation, an amount of surplus designated by the corporation's board of directors that is not less than the aggregate par value of the shares issued as a share dividend shall be transferred to stated capital.

(b) When a share dividend payable in authorized but unissued shares without par value is made by a corporation, an amount of surplus equal to the aggregate value set by the corporation's board of directors with respect to shares under Section 21.312(b) shall be transferred to stated capital. (TBCA 2.38-1.C (part), D (part).)

Source Law

C. If a share dividend is payable in authorized but unissued shares having a par value, . . . at the time that share dividend is paid an amount of surplus designated by the board of directors not less than the aggregate par value of the shares to be issued as a share dividend shall be

transferred to stated capital.

D. If a share dividend is payable in authorized but unissued shares without par value, . . . at the time the share dividend is paid an amount of surplus equal to the aggregate value so fixed in respect of those shares shall be transferred to stated capital.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.314. DETERMINATION OF SOLVENCY, NET ASSETS, STATED CAPITAL, AND SURPLUS. (a) For purposes of this subchapter, the determination of whether a corporation is or would be insolvent and the determination of the value of a corporation's net assets, stated capital, or surplus and each of the components of net assets, stated capital, or surplus may be based on:

(1) financial statements of the corporation, including financial statements that:

(A) include subsidiary corporations or other corporations accounted for on a consolidated basis or on the equity method of accounting; or

(B) present the financial condition of the corporation in accordance with generally accepted accounting principles;

(2) financial statements prepared using the method of accounting used to file the corporation's federal income tax return or using any other accounting practices and principles that are reasonable under the circumstances;

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

(4) projection, forecast, or other forward-looking information relating to the future economic performance, financial condition, or liquidity of the corporation that is reasonable under the circumstances;

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

(6) a combination of a statement, valuation, or information authorized by this section.

(b) Subsection (a) does not apply to the computation of the Texas franchise tax or any other tax imposed on a corporation under the laws of this state. (TBCA 2.38-3.)

Source Law

2.38-3.A. Determinations whether a corporation is insolvent and of the value of

the net assets, and determination of stated capital, and surplus of the corporation, and each of their components, may, but is not required to, be based on:

(1) financial statements of the corporation, including without limitation financial statements that include subsidiary corporations or other corporations accounted for on a consolidated basis or on the equity method of accounting, that present the financial condition of the corporation in accordance with generally accepted accounting principles;

(2) financial statements prepared on the basis of accounting used to file the corporation's federal income tax return or any other accounting practices and principles that are reasonable in the circumstances;

(3) financial information, including without limitation condensed or summary financial statements, that is prepared on a basis consistent with the financial statements referred to in Subsections (1) and (2) of this section;

(4) projection, forecast, or other forward looking information relating to the future economic performance, financial condition, or liquidity of the corporation that is reasonable in the circumstances;

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

(6) any combination of the statements, valuations, or information authorized by this section.

B. Section A of this Article and the determinations made in accordance therewith do not apply to the calculation of the Texas franchise tax or any other tax imposed on corporations under the laws of this state.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.315. DATE OF DETERMINATION OF SOLVENCY, NET ASSETS, STATED CAPITAL, AND SURPLUS. (a) For purposes of this subchapter, a determination of whether a corporation is or would be insolvent after a distribution or share dividend or a

determination of the value of a corporation's net assets, stated capital, or surplus, or each component of net assets, stated capital, or surplus, shall be made:

(1) on the date the distribution or share dividend is authorized by the corporation's board of directors if the distribution or share dividend is made not later than the 120th day after the date of authorization; or

(2) if the distribution or share dividend is made more than 120 days after the date of authorization:

(A) on the date designated by the corporation's board of directors if the date so designated is not earlier than 120 days before the date the distribution or share dividend is made; or

(B) on the date the distribution or share dividend is made if the corporation's board of directors does not designate a date as described in Paragraph (A).

(b) For purposes of this section, a distribution that involves:

(1) the incurrence by a corporation of indebtedness or a deferred payment obligation is considered to have been made on the date the indebtedness or obligation is incurred; or

(2) a requirement in the corporation's certificate of formation or other contract of the corporation to redeem, exchange, or otherwise acquire any of its own shares is considered to have been made either on the date when the provision or other contract is made or takes effect or on the date when the shares to be redeemed, exchanged, or acquired are redeemed, exchanged, or acquired, at the option of the corporation. (TBCA 2.38-4.)

Source Law

2.38-4.A. In the case of a distribution by a corporation or the payment of a share dividend, the surplus of the corporation shall be determined, and the determination whether the corporation would be insolvent after giving effect to the distribution shall be made:

(1) on the date that action is authorized by the board of directors if the action is taken on or before the 120th day after the date of authorization;

(2) if the action is taken after the 120th day after the date of authorization and the board of directors designates a date, within 120 days before the date the action is taken, on which the determination is to be made, on the date so designated by the board

of directors; or

(3) if the action is taken after the 120th day after the date of authorization and the board of directors does not make the designation described by Subsection (2) of this section, on the date the action is taken.

B. For the purposes of this Article, a distribution that involves the incurrence by a corporation of any indebtedness or deferred payment obligation or that involves a requirement in the corporation's articles of incorporation or other contract by the corporation to redeem, exchange, or otherwise acquire any of its own shares is deemed to have been made on the date the indebtedness or obligation is incurred or, in the case of a provision in the articles of incorporation of a corporation or other contract to purchase, redeem, exchange, or otherwise acquire shares, at the option of the corporation, is deemed to have been made on either the date the provision or other contract is made or takes effect or the date on which the shares to be redeemed, exchanged, or acquired are redeemed, exchanged, or acquired.

Revisor's Note

No substantive change is intended. The revised law clarifies that the date of determination applies to the determination of net assets and stated capital, which are components of the calculation of surplus. This is implicit in the source law.

Revised Law

Sec. 21.316. LIABILITY OF DIRECTORS FOR WRONGFUL DISTRIBUTIONS. (a) Subject to Subsection (c), the directors of a corporation who vote for or assent to a distribution by the corporation that is prohibited by Section 21.303 are jointly and severally liable to the corporation for the amount by which the distribution exceeds the amount permitted by that section to be distributed.

(b) A director is not liable for all or part of the excess amount if a distribution of that amount would have been permitted by Section 21.303 after the date the director authorized the distribution.

(c) A director is not jointly and severally liable under

Subsection (a) if, in voting for or assenting to the distribution, the director:

(1) relies in good faith and with ordinary care on:

(A) the statements, valuations, or information described by Section 21.314; or

(B) other information, opinions, reports, or statements, including financial statements and other financial data, concerning the corporation or another person that are prepared or presented by:

(i) one or more officers or employees of the corporation;

(ii) a legal counsel, public accountant, investment banker, or other person relating to a matter the director reasonably believes is within the person's professional or expert competence; or

(iii) a committee of the board of directors of which the director is not a member;

(2) acting in good faith and with ordinary care, considers the assets of the corporation to be valued at least at their book value; or

(3) in determining whether the corporation made adequate provision for payment, satisfaction, or discharge of all of the corporation's liabilities and obligations, as provided by Sections 11.053 and 11.356, relies in good faith and with ordinary care on financial statements of, or other information concerning, a person who was or became contractually obligated to pay, satisfy, or discharge some or all of the corporation's liabilities or obligations.

(d) The liability imposed under Subsection (a) is the only liability of a director to the corporation or its creditors for authorizing a distribution that is prohibited by Section 21.303.

(e) This section and Sections 21.317 and 21.318 do not limit any liability imposed under Chapter 24, Business & Commerce Code, or the United States Bankruptcy Code. (TBCA 2.41.A(1), C, G (part).)

Source Law

(1) Directors of a corporation who vote for or assent to a distribution by the corporation that is not permitted by Article 2.38 of this Act shall be jointly and severally liable to the corporation for the amount by which the distributed amount exceeds the amount permitted by Article 2.38 of this Act to be distributed; provided that a director shall have no liability for the excess amount, or any part of that excess, if on any date after the date of the vote or

assent authorizing the distribution, a distribution of that excess or that part would have been permitted by Article 2.38.

. . .

C. A director shall not be liable under Subsection (1) of Section A of this Article if, in voting for or assenting to the distribution, the director:

(1) relied in good faith and with ordinary care upon the statements, valuations, or information referred to in Article 2.38-3 of this Act, or upon other information, opinions, reports, or statements, including financial statements and other financial data, concerning the corporation or another person, that were prepared or presented by:

(a) one or more officers or employees of the corporation;

(b) legal counsel, public accountants, investment bankers, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or

(c) a committee of the board of directors of which the director is not a member;

(2) acting in good faith and with ordinary care, considered the assets of the corporation to be at least of their book value; or

(3) in determining whether the corporation made adequate provision for payment, satisfaction or discharge of all of its liabilities and obligations as provided in Articles 6.04 and 7.12 of this Act, relied in good faith and with ordinary care upon financial statements of, or other information concerning, any person who was or became contractually obligated to pay, satisfy, or discharge some or all of those liabilities or obligations.

. . .

G. The liability provided in Subsection (1) of Section A of this Article shall be the only liability of directors to a corporation or its creditors for authorizing a distribution by the corporation that is not

permitted by Article 2.38 of this Act. . . . provided, however, that this Section does not limit any liability under the Uniform Fraudulent Transfer Act or the United States Bankruptcy Code.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.317. STATUTE OF LIMITATIONS ON ACTION FOR WRONGFUL DISTRIBUTION. An action may not be brought against a director of a corporation under Section 21.316 after the second anniversary of the date the alleged act giving rise to the liability occurred. (TBCA 2.41.A(3).)

Source Law

(3) An action may not be brought against a director for liability imposed by this section after two years after the date on which the act alleged to give rise to the liability occurred.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.318. CONTRIBUTION FROM CERTAIN SHAREHOLDERS AND DIRECTORS. (a) A director who is held liable for a claim asserted under Section 21.316 is entitled to receive contributions from shareholders who accepted or received the wrongful distribution knowing that it was prohibited by Section 21.303 in proportion to the amounts received by the shareholders.

(b) A director who is liable for a claim asserted under Section 21.316 is entitled to receive contributions from each of the other directors who are liable with respect to that claim in an amount appropriate to achieve equity.

(c) The liability provided by Subsection (a) is the only liability of a shareholder to the corporation or a creditor of the corporation for accepting or receiving a distribution by the corporation that is prohibited by Section 21.303, except for any liability under Chapter 24, Business & Commerce Code, or the United States Bankruptcy Code. (TBCA 2.41.E, F, G (part).)

Source Law

E. A director against whom a claim shall be asserted under this Article for a distribution made by the corporation, and who shall be held liable thereon, shall be entitled to contribution from the

shareholders who accepted or received such distribution knowing that such distribution was not permitted by Article 2.38, in proportion to the amounts received by them, respectively.

F. A director found liable with respect to a claim shall be entitled to contribution as appropriate to achieve equity from each of the other directors who are liable with respect to that claim.

G. . . . The liability provided in Section E of this Article shall be the only liability of shareholders to a corporation or its creditors for accepting or receiving a distribution by the corporation that is not permitted by Article 2.38 of this Act; provided, however, that this Section does not limit any liability under the Uniform Fraudulent Transfer Act or the United States Bankruptcy Code.

Revisor's Note

No substantive change is intended.

[Sections 21.319-21.350 reserved for expansion]

SUBCHAPTER H. SHAREHOLDERS' MEETINGS; VOTING AND QUORUM

Revised Law

Sec. 21.351. ANNUAL MEETING. (a) An annual meeting of the shareholders of a corporation shall be held at a time that is stated in or set in accordance with the corporation's bylaws.

(b) On the application of a shareholder who has previously submitted a written request to the corporation that an annual meeting be held, a court in the county in which the principal executive office of the corporation is located may order a meeting to be held if the annual meeting is not held or written consent instead of the annual meeting is not executed within any 13-month period, unless the meeting is not required to be held under Section 21.655.

(c) The failure to hold an annual meeting at the designated time does not result in the winding up or termination of the corporation. (TBCA 2.24.B.)

Source Law

B. An annual meeting of the shareholders shall be held at such time as may be stated in or fixed in accordance with the bylaws. If the annual meeting is not held within any 13-month period, any court of competent jurisdiction in the county in which

the principal office of the corporation is located may, on the application of any shareholder, summarily order a meeting to be held. Failure to hold the annual meeting at the designated time shall not work a dissolution of the corporation.

Revisor's Note

Subsection (b) adds a cross-reference to Section 21.655, relating to investment companies, and clarifies that if an annual meeting has been effectively held by written consent, no annual meeting may be ordered to be held. A shareholder must first request that an annual meeting be held before attempting to obtain a court order requiring a meeting. This requirement has been added to prevent unnecessary court proceedings in cases where the corporation holds the meeting on a request by the shareholder.

Revised Law

Sec. 21.352. SPECIAL MEETINGS. (a) A special meeting of the shareholders of a corporation may be called by:

(1) the president, the board of directors, or any other person authorized to call special meetings by the certificate of formation or bylaws of the corporation; or

(2) the holders of the percentage of shares specified in the certificate of formation, not to exceed 50 percent of the shares entitled to vote or, if no percentage is specified, at least 10 percent of all of the shares of the corporation entitled to vote at the proposed special meeting.

(b) Unless stated in or set in accordance with the bylaws, the record date for determining which shareholders of the corporation are entitled to call a special meeting is the date the first shareholder signs the notice of that meeting.

(c) Other than procedural matters, the only business that may be conducted at a special meeting of the shareholders is business that is within the purposes described in the notice required by Section 21.353. (TBCA 2.24.C.)

Source Law

C. Special meetings of the shareholders may be called (1) by the president, the board of directors, or such other person or persons as may be authorized in the articles of incorporation or the bylaws or (2) by the holders of at least ten (10) percent of all the shares entitled to vote at the proposed

special meeting, unless the articles of incorporation provide for a number of shares greater than or less than ten (10) percent, in which event special meetings of the shareholders may be called by the holders of at least the percentage of shares so specified in the articles of incorporation, but in no event shall the articles of incorporation provide for a number of shares greater than fifty (50) percent. If not otherwise stated in or fixed in accordance with the bylaws of the corporation, the record date for determining shareholders entitled to call a special meeting is the date the first shareholder signs the notice of that meeting. Only business within the purpose or purposes described in the notice required by Article 2.25 of this Act may be conducted at a special meeting of the shareholders.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.353. NOTICE OF MEETING. (a) Except as provided by Section 21.456, written notice of a meeting in accordance with Section 6.051 shall be given to each shareholder entitled to vote at the meeting not later than the 10th day and not earlier than the 60th day before the date of the meeting. Notice shall be given at the direction of the president, secretary, or other person calling the meeting.

(b) The notice of a special meeting must contain a statement regarding the purpose or purposes of the meeting. (TBCA 2.25.A.)

Source Law

A. Written or printed notice stating the place, day and hour of the meeting and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than ten (10) nor more than sixty (60) days before the date of the meeting, either personally or by mail, by or at the direction of the president, the secretary, or the officer or person calling the meeting, to each shareholder entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered when

deposited in the United States mail addressed to the shareholder at his address as it appears on the share transfer records of the corporation, with postage thereon prepaid.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.354. INSPECTION OF VOTING LIST. (a) The list of shareholders entitled to vote at the meeting prepared under Section 21.372 shall be:

(1) subject to inspection by a shareholder during regular business hours; and

(2) produced and kept open at the meeting.

(b) The original share transfer records are prima facie evidence of which shareholders are entitled to inspect the list. (TBCA 2.27.A (part).)

Source Law

A. . . . a complete list of the shareholders entitled to vote at such meeting or . . . shall be subject to inspection by any shareholder at any time during usual business hours. Such list shall also be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any shareholder during the whole time of the meeting. The original share transfer records shall be prima-facie evidence as to who are the shareholders entitled to examine such list or

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.355. CLOSING OF SHARE TRANSFER RECORDS. Share transfer records that are closed in accordance with Section 6.101 for the purpose of determining which shareholders are entitled to receive notice of a meeting of shareholders shall remain closed for at least 10 days immediately preceding the date of the meeting. (TBCA 2.26.B (part).)

Source Law

B. . . . If the share transfer records shall be closed for the purpose of determining shareholders entitled to notice of or to vote at a meeting of shareholders, such records shall be closed for at least ten

(10) days immediately preceding such meeting. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.356. RECORD DATE FOR WRITTEN CONSENT TO ACTION. The record date provided in accordance with Section 6.102(a) may not be more than 10 days after the date on which the board of directors adopts the resolution setting the record date. (TBCA 2.26.C (part).)

Source Law

C. . . . the board of directors may fix a record date for the purpose of determining shareholders entitled to consent to that action, which record date shall not precede, and shall not be more than ten (10) days after, the date upon which the resolution fixing the record date is adopted by the board of directors. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.357. RECORD DATE FOR PURPOSE OTHER THAN WRITTEN CONSENT TO ACTION. The record date provided by the directors in accordance with Section 6.101 must be at least 10 days before the date on which the particular action requiring the determination of shareholders is to be taken. (TBCA 2.26.B (part).)

Source Law

B. . . . the record date for any such determination of shareholders, such date in any case to be . . . not less than ten (10) days, prior to the date on which the particular action requiring such determination of shareholders is to be taken. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.358. QUORUM. (a) Subject to Subsection (b), the holders of the majority of the shares entitled to vote at a meeting of the shareholders of a corporation that are present or represented by proxy at the meeting are a quorum for the consideration of a matter to be presented at that meeting.

(b) The certificate of formation of a corporation may provide that a quorum is present only if:

(1) the holders of a specified portion of the shares that is greater than the majority of the shares entitled to vote are represented at the meeting in person or by proxy; or

(2) the holders of a specified portion of the shares that is less than the majority but not less than one-third of the shares entitled to vote are represented at the meeting in person or by proxy.

(c) Unless provided by the certificate of formation or bylaws of the corporation, after a quorum is present at a meeting of shareholders, the shareholders may conduct business properly brought before the meeting until the meeting is adjourned. The subsequent withdrawal from the meeting of a shareholder or the refusal of a shareholder present at or represented by proxy at the meeting to vote does not negate the presence of a quorum at the meeting.

(d) Unless provided by the certificate of formation or bylaws, the shareholders of the corporation at a meeting at which a quorum is not present may adjourn the meeting until the time and to the place as may be determined by a vote of the holders of the majority of the shares who are present or represented by proxy at the meeting. (TBCA 2.28.A.)

Source Law

A. Quorum. With respect to any meeting of shareholders, a quorum shall be present for any matter to be presented at that meeting if the holders of a majority of the shares entitled to vote at the meeting are represented at the meeting in person or by proxy, unless otherwise provided in the articles of incorporation in accordance with this section. The articles of incorporation may provide:

(1) That a quorum shall be present at a meeting of shareholders only if the holders of a specified greater portion of the shares entitled to vote are represented at the meeting in person or by proxy; or

(2) That a quorum shall be present at a meeting of shareholders if the holders of a specified lesser portion, but not less than one-third (1/3), of the shares entitled to vote are represented at the meeting in person or by proxy.

Unless otherwise provided in the articles of incorporation or the bylaws, once

a quorum is present at a meeting of shareholders, the shareholders represented in person or by proxy at the meeting may conduct such business as may be properly brought before the meeting until it is adjourned, and the subsequent withdrawal from the meeting of any shareholder or the refusal of any shareholder represented in person or by proxy to vote shall not affect the presence of a quorum at the meeting. Unless otherwise provided in the articles of incorporation or the bylaws, the shareholders represented in person or by proxy at a meeting of shareholders at which a quorum is not present may adjourn the meeting until such time and to such place as may be determined by a vote of the holders of a majority of the shares represented in person or by proxy at that meeting.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.359. VOTING IN ELECTION OF DIRECTORS. (a) Subject to Subsection (b), directors of a corporation shall be elected by a plurality of the votes cast by the holders of shares entitled to vote in the election of directors at a meeting of shareholders at which a quorum is present.

(b) The certificate of formation or bylaws of a corporation may provide that a director of a corporation shall be elected only if the director receives:

(1) the vote of the holders of a specified portion, but not less than the majority, of the shares entitled to vote in the election of directors;

(2) the vote of the holders of a specified portion, but not less than the majority, of the shares entitled to vote in the election of directors and represented in person or by proxy at a meeting of shareholders at which a quorum is present; or

(3) the vote of the holders of a specified portion, but not less than the majority, of the votes cast by the holders of shares entitled to vote in the election of directors at a meeting of shareholders at which a quorum is present. (TBCA 2.28.C.)

Source Law

C. Voting in the Election of Directors. Unless otherwise provided in the articles of incorporation or the bylaws in accordance

with this section, directors shall be elected by a plurality of the votes cast by the holders of shares entitled to vote in the election of directors at a meeting of shareholders at which a quorum is present. The articles of incorporation or the bylaws may provide:

(1) That a director shall be elected only if the director receives the vote of the holders of a specified portion, but not less than a majority, of the shares entitled to vote in the election of directors;

(2) That a director shall be elected only if the director receives the vote of the holders of a specified portion, but not less than a majority, of the shares entitled to vote in the election of directors and represented in person or by proxy at a meeting of shareholders at which a quorum is present; or

(3) That a director shall be elected only if the director receives a specified portion, but not less than a majority, of the votes cast by the holders of shares entitled to vote in the election of directors at a meeting of shareholders at which a quorum is present.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.360. NO CUMULATIVE VOTING RIGHT UNLESS AUTHORIZED. Except as provided by Section 21.361 or 21.362, a shareholder does not have the right to cumulate the shareholder's vote in the election of directors. (New.)

Revisor's Note

Texas corporate law currently provides shareholders with the right to cumulate their votes in the election of directors. This right may be eliminated by provisions in the corporation's articles of incorporation. As a routine matter, most practitioners deny cumulative voting rights in all new Texas corporations they form. The code provides that, for corporations formed after the effective date of the code, shareholders may have cumulative voting rights, but only if

the rights are provided by the certificate of formation. This change is consistent with developments in modern corporate law and is intended to make Texas law consistent with the Revised Model Business Corporation Act and the majority of other states, including Delaware. Special grandfathering rules are added by Section 21.362 to preserve shareholders' cumulative voting rights in existing corporations.

Revised Law

Sec. 21.361. CUMULATIVE VOTING IN ELECTION OF DIRECTORS.

(a) If expressly authorized by a corporation's certificate of formation in general or with respect to a specified class or series of shares or group of classes or series of shares and subject to Subsections (b) and (c), at each election of directors of the corporation each shareholder entitled to vote at the election is entitled to:

(1) vote the number of shares owned by the shareholder for as many candidates as there are directors to be elected and for whose election the shareholder is entitled to vote; or

(2) cumulate votes by:

(A) giving one candidate as many votes as the total of the number of the directors to be elected multiplied by the shareholder's shares; or

(B) distributing the votes among one or more candidates using the same principle.

(b) Cumulative voting permitted by the certificate of formation is permitted only in an election of directors in which a shareholder who intends to cumulate votes has given written notice of that intention to the secretary of the corporation on or before the day preceding the date of the election at which the shareholder intends to cumulate votes.

(c) All shareholders entitled to vote cumulatively may cumulate their votes if a shareholder gives the notice required by Subsection (b). (TBCA 2.29.D.)

Source Law

D. (1) At each election for directors every shareholder entitled to vote at such election shall have the right (a) to vote the number of shares owned by him for as many persons as there are directors to be elected and for whose election he has a right to vote or (b) unless expressly prohibited by the articles of incorporation (in general or with respect to a specified class or series of shares or group of classes or series of

shares) and subject to subsection (2) of this Section D, to cumulate his votes by giving one candidate as many votes as the number of such directors multiplied by his shares shall equal, or by distributing such votes on the same principle among any number of such candidates.

(2) Cumulative voting shall not be allowed in an election of directors unless a shareholder who intends to cumulate his votes as herein authorized shall have given written notice of such intention to the secretary of the corporation on or before the day preceding the election at which such shareholder intends to cumulate his votes. All shareholders entitled to vote cumulatively may cumulate their votes if any shareholder gives the written notice provided for herein.

Revisor's Note

No substantive change is intended other than the reversal of the default rule where the articles of incorporation are silent from the grant of cumulative voting rights to the denial of cumulative voting rights.

Revised Law

Sec. 21.362. CUMULATIVE VOTING RIGHT IN CERTAIN CORPORATIONS. Except as provided by the corporation's certificate of formation, a shareholder of a corporation incorporated before the effective date of this code has the right to cumulatively vote the number of shares the shareholder owns in the election of directors to the extent permitted and in the manner provided by Section 21.361. A corporation may limit or deny a shareholder's right to cumulatively vote shares at any time after the effective date of this code by amending its certificate of formation.
(New.)

Revisor's Note

This new section grandfathers existing corporations with respect to shareholders' cumulative voting rights.

Revised Law

Sec. 21.363. VOTING ON MATTERS OTHER THAN ELECTION OF DIRECTORS. (a) Subject to Subsection (b), with respect to a matter other than the election of directors or a matter for which the affirmative vote of the holders of a specified portion of the shares entitled to vote is required by this code, the affirmative vote of the holders of the majority of the shares entitled to

vote on, and who voted for, against, or expressly abstained with respect to, the matter at a shareholders' meeting of a corporation at which a quorum is present is the act of the shareholders.

(b) With respect to a matter other than the election of directors or a matter for which the affirmative vote of the holders of a specified portion of the shares entitled to vote is required by this code, the certificate of formation or bylaws of a corporation may provide that the act of the shareholders of the corporation is:

(1) the affirmative vote of the holders of a specified portion, but not less than the majority, of the shares entitled to vote on that matter;

(2) the affirmative vote of the holders of a specified portion, but not less than the majority, of the shares entitled to vote on that matter and represented in person or by proxy at a shareholders' meeting at which a quorum is present;

(3) the affirmative vote of the holders of a specified portion, but not less than the majority, of the shares entitled to vote on, and who voted for or against, the matter at a shareholders' meeting at which a quorum is present; or

(4) the affirmative vote of the holders of a specified portion, but not less than the majority, of the shares entitled to vote on, and who voted for, against, or expressly abstained with respect to, the matter at a shareholders' meeting at which a quorum is present. (TBCA 2.28.B.)

Source Law

B. Voting on Matters Other Than the Election of Directors. With respect to any matter, other than the election of directors or a matter for which the affirmative vote of the holders of a specified portion of the shares entitled to vote is required by this Act, the affirmative vote of the holders of a majority of the shares entitled to vote on, and that voted for or against or expressly abstained with respect to, that matter at a meeting of shareholders at which a quorum is present shall be the act of the shareholders, unless otherwise provided in the articles of incorporation or the bylaws in accordance with this section. With respect to any matter, other than the election of directors or a matter for which the affirmative vote of the holders of a specified portion of the shares entitled to vote is required by this Act, the articles of incorporation or the

bylaws may provide:

(1) That the act of the shareholders shall be the affirmative vote of the holders of a specified portion, but not less than a majority, of the shares entitled to vote on that matter;

(2) That the act of the shareholders shall be the affirmative vote of the holders of a specified portion, but not less than a majority, of the shares entitled to vote on that matter and represented in person or by proxy at a meeting of shareholders at which a quorum is present;

(3) That the act of the shareholders shall be the affirmative vote of the holders of a specified portion, but not less than a majority, of the shares entitled to vote on, and voted for or against, that matter at a meeting of shareholders at which a quorum is present; or

(4) That the act of the shareholders shall be the affirmative vote of the holders of a specified portion, but not less than a majority, of the shares entitled to vote on, and that voted for or against or expressly abstained with respect to, that matter at a meeting of shareholders at which a quorum is present.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.364. VOTE REQUIRED TO APPROVE FUNDAMENTAL ACTION.

(a) In this section, a "fundamental action" means:

- (1) an amendment of a certificate of formation;
- (2) a voluntary winding up under Chapter 11;
- (3) a revocation of a voluntary decision to wind up under Section 11.151;
- (4) a cancellation of an event requiring winding up under Section 11.152; or
- (5) a reinstatement under Section 11.202.

(b) Except as otherwise provided by this code or the certificate of formation or bylaws of a corporation in accordance with Section 21.363, the vote required for approval of a fundamental action by the shareholders is the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote on the fundamental action.

(c) If a class or series of shares is entitled to vote as a

class or series on a fundamental action, the vote required for approval of the action by the shareholders is the affirmative vote of the holders of at least two-thirds of the outstanding shares in each class or series of shares entitled to vote on the action as a class or series and at least two-thirds of the outstanding shares otherwise entitled to vote on the action. Shares entitled to vote as a class or series shall be entitled to vote only as a class or series unless otherwise entitled to vote on each matter submitted to the shareholders generally or otherwise provided by the certificate of formation.

(d) Unless an amendment to the certificate of formation is undertaken by the board of directors under Section 21.155, separate voting by a class or series of shares of a corporation is required for approval of an amendment to the certificate of formation that would result in:

(1) the increase or decrease of the aggregate number of authorized shares of the class or series;

(2) the increase or decrease of the par value of the shares of the class or series, including changing shares with par value into shares without par value or changing shares without par value into shares with par value;

(3) effecting an exchange, reclassification, or cancellation of all or part of the shares of the class or series;

(4) effecting an exchange or creating a right of exchange of all or part of the shares of another class or series into the shares of the class or series;

(5) the change of the designations, preferences, limitations, or relative rights of the shares of the class or series;

(6) the change of the shares of the class or series, with or without par value, into the same or a different number of shares, with or without par value, of the same class or series or another class or series;

(7) the creation of a new class or series of shares with rights and preferences equal, prior, or superior to the shares of the class or series;

(8) increasing the rights and preferences of a class or series with rights and preferences equal, prior, or superior to the shares of the class or series;

(9) increasing the rights and preferences of a class or series with rights or preferences later or inferior to the shares of the class or series in such a manner that the rights or preferences will be equal, prior, or superior to the shares of the class or series;

(10) dividing the shares of the class into series and setting and determining the designation of the series and the variations in the relative rights and preferences between the shares of the series;

(11) the limitation or denial of existing preemptive rights or cumulative voting rights of the shares of the class or series;

(12) canceling or otherwise affecting the dividends on the shares of the class or series that have accrued but have not been declared; or

(13) the inclusion or deletion from the certificate of formation of provisions required or permitted to be included in the certificate of formation of a close corporation under Subchapter O.

(e) The vote required under Subsection (d) by a class or series of shares of a corporation is required notwithstanding that shares of that class or series do not otherwise have a right to vote under the certificate of formation.

(f) Unless otherwise provided by the certificate of formation, if the holders of the outstanding shares of a class that is divided into series are entitled to vote as a class on a proposed amendment that would affect equally all series of the class, other than a series in which no shares are outstanding or a series that is not affected by the amendment, the holders of the separate series are not entitled to separate class votes.

(g) Unless otherwise provided by the certificate of formation, a proposed amendment to the certificate of formation that would solely effect changes in the designations, preferences, limitations, or relative rights, including voting rights, of one or more series of shares of the corporation that have been established under the authority granted to the board of directors in the certificate of formation in accordance with Section 21.155 does not require the approval of the holders of the outstanding shares of a class or series other than the affected series if, after giving effect to the amendment:

(1) the preferences, limitations, or relative rights of the affected series may be set and determined by the board of directors with respect to the establishment of a new series of shares under the authority granted to the board of directors in the certificate of formation in accordance with Section 21.155; or

(2) any new series established as a result of a reclassification of the affected series are within the preferences, limitations, and relative rights that are described by Subdivision (1). (TBCA 4.02.A (part), 4.03, 6.03.A (part), 6.05.A (part).)

Source Law

[4.02]

A. The articles of incorporation may be amended in the following manner:

. . .

(3) . . . The proposed amendment shall be adopted upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote thereon, unless any class or series of shares is entitled to vote thereon as a class, in which event the proposed amendment shall be adopted upon receiving the affirmative vote of the holders of at least two-thirds of the shares within each class or series of outstanding shares entitled to vote thereon as a class and of at least two-thirds of the total outstanding shares entitled to vote thereon.

[4.03]

A. The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, and the holders of the outstanding shares of a series shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the provisions of the articles of incorporation, if the amendment would accomplish any of the following, unless the amendment is undertaken pursuant to authority granted to the board of directors in the articles of incorporation in accordance with Article 2.13 of this Act:

(1) Increase or decrease the aggregate number of authorized shares of such class or series.

(2) Increase or decrease the par value of the shares of such class, including changing shares having a par value into shares without par value, or shares without par value into shares with par value.

(3) Effect an exchange, reclassification, or cancellation of all or part of the shares of such class or series.

(4) Effect an exchange, or create a right of exchange, of all or any part of the shares of another class into the shares of such class or series.

(5) Change the designations, preferences, limitations, or relative rights of the shares of such class or series.

(6) Change the shares of such

class or series, whether with or without par value, into the same or a different number of shares, either with or without par value, of the same class or series or another class or series.

(7) Create a new class or series of shares having rights and preferences equal, prior, or superior to the shares of such class or series, or increase the rights and preferences of any class or series having rights and preferences equal, prior, or superior to the shares of such class or series, or increase the rights and preferences of any class or series having rights or preferences later or inferior to the shares of such class or series in such a manner as to become equal, prior, or superior to the shares of such class or series.

(8) Divide the shares of such class into series and fix and determine the designation of such series and the variations in the relative rights and preferences between the shares of such series.

(9) Limit or deny the existing preemptive rights of the shares of such class or series.

(10) Cancel or otherwise affect dividends on the shares of such class or series which had accrued but had not been declared.

(11) Include in or delete from the articles of incorporation any provisions required or permitted to be included in the articles of incorporation of a close corporation in conformance with Part Twelve of this Act.

B. Unless otherwise provided in a corporation's articles of incorporation, if the holders of the outstanding shares of a class that is divided into series are entitled to vote as a class on a proposed amendment and the amendment would affect all series of such class (other than any series of which no shares are outstanding or any series that is not affected by the amendment) equally, then the holders of the separate series shall not be entitled to separate class votes.

C. Unless otherwise provided in a corporation's articles of incorporation, the approval of a proposed amendment to the corporation's articles of incorporation that would solely effect changes in the designations, preferences, limitations, and relative rights, including voting rights, of one or more series of shares of the corporation that have been established pursuant to the authority granted the board of directors in the articles of incorporation in accordance with Article 2.13 of this Act shall not require the approval of the holders of the outstanding shares of any class or series other than such series if the preferences, limitations and relative rights of such series after giving effect to such amendment and of any series that may be established as a result of a reclassification of such series are, in each case, within those permitted to be fixed and determined by the board of directors with respect to the establishment of any new series of shares pursuant to the authority granted the board of directors in the articles of incorporation in accordance with Article 2.13 of this Act.

[6.03]

A. A corporation may be dissolved by the act of the corporation when authorized in the following manner:

. . .

(3) . . . Such resolution shall be adopted on receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares of the corporation entitled to vote thereon unless any class or series of shares is entitled to vote as a class thereon, in which event the resolution shall require for its adoption the affirmative vote of the holders of at least two-thirds of the outstanding shares within each class or series of shares entitled to vote as a class thereon and at least two-thirds of the outstanding shares otherwise entitled to vote thereon. Shares entitled to vote as a class shall be entitled to vote only as a class unless otherwise

entitled to vote on each matter generally as provided in the articles of incorporation.

[6.05]

A. . . . a corporation may revoke voluntary dissolution proceedings:

. . . .

(2) By the act of the corporation in the following manner:

. . . .

(c) . . . Such resolution shall be adopted upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares of the corporation entitled to vote thereon unless any class or series of shares is entitled to vote as a class thereon, in which event the resolution shall require for its adoption the affirmative vote of the holders of at least two-thirds of the outstanding shares within each class or series of shares entitled to vote as a class thereon and at least two-thirds of the outstanding shares otherwise entitled to vote thereon. Shares entitled to vote as a class shall be entitled to vote only as a class unless otherwise entitled to vote on each matter generally as provided in the articles of incorporation.

Revisor's Note

The term "fundamental action" is new. The effect of the term and the voting procedures set forth in Section 21.364 are not new with respect to an amendment of a certificate of formation, a voluntary winding up under Chapter 11, and a revocation of a voluntary decision to wind up under Section 11.151. These concepts are contained in the source law, although the revised law uses different terminology (e.g., "winding up" instead of "dissolution"). The concept of a cancellation of some of the events requiring winding up under Section 11.152 may be considered new for corporations. The revised law also uses the term "reinstatement" to refer to what the source law calls a revocation of a voluntary dissolution after filing the articles of dissolution. Section

11.202 of the revised law extends this reinstatement right from 120 days to three years after the filing of the certificate of termination, but limits the right so that certain conditions must be satisfied. However, the reinstatement rights provided in Section 11.202 parallel the survival provisions for corporations found in the Texas Business Corporation Act and contained in the revised law in Sections 11.356 and 11.357 and have several similar provisions for applicability. Sections 11.356 and 11.357 are derived from the Texas Business Corporation Act, Texas Non-Profit Corporation Act, and Texas Limited Liability Company Act. These revised provisions regarding winding up and termination of a domestic corporation provide symmetry and consistency with other types of entities.

While the concept of cancellation of certain events requiring winding up under Section 11.152 is new for corporations, one of the events requiring winding up referred to in that section, namely the expiration of the duration of the corporation, is not new and can be found in Texas Business Corporation Act Article 7.12.E. The other events requiring winding up specified in Section 11.152 rarely occur for corporations because they arise from events specified in the governing documents of the corporation that require the winding up or events specified in the Code requiring the winding up of the domestic corporation. See Revisor's Notes to Sections 11.201 and 11.152.

Subsection (c) of the revised law governing class voting is made consistent with the class voting provisions of Section 21.457 relating to approval of fundamental business transactions. The resulting changes are not material.

Revised Law

Sec. 21.365. CHANGES IN VOTE REQUIRED FOR CERTAIN MATTERS.

(a) With respect to a matter for which the affirmative vote of the holders of a specified portion of the shares entitled to vote is required by this code, the certificate of formation of a corporation may provide that the affirmative vote of the holders

of a specified portion, but not less than the majority, of the shares entitled to vote on that matter is required for shareholder action on that matter.

(b) With respect to a matter for which the affirmative vote of the holders of a specified portion of the shares of a class or series is required by this code, the certificate of formation may provide that the affirmative vote of the holders of a specified portion, but not less than the majority, of the shares of that class or series is required for action of the holders of shares of that class or series on that matter.

(c) If a provision of the certificate of formation provides that the affirmative vote of the holders of a specified portion that is greater than the majority of the shares entitled to vote on a matter is required for shareholder action on that matter, the provision may not be amended, directly or indirectly, without the same affirmative vote unless otherwise provided by the certificate of formation.

(d) If a provision of the certificate of formation provides that the affirmative vote of the holders of a specified portion that is greater than the majority of the shares of a class or series is required for shareholder action on a matter, the provision may not be amended, directly or indirectly, without the same affirmative vote unless otherwise provided by the certificate of formation. (TBCA 2.28.D.)

Source Law

D. Changes in the Vote Required for Certain Matters. With respect to any matter for which the affirmative vote of the holders of a specified portion of the shares entitled to vote is required by this Act, the articles of incorporation may provide that the act of the shareholders on that matter shall be the affirmative vote of the holders of a specified portion, but not less than a majority, of the shares entitled to vote on that matter, rather than the affirmative vote otherwise required by this Act. With respect to any matter for which the affirmative vote of the holders of a specified portion of the shares of any class or series is required by this Act, the articles of incorporation also may provide that the act of the holders of shares of that class or series on that matter shall be the affirmative vote of the holders of a specified portion, but not less than a majority, of the shares of that class or series, rather than the affirmative vote of

the holders of shares of that class or series otherwise required by this Act. If any provision of the articles of incorporation provides that the act of the shareholders on any matter shall be the affirmative vote of the holders of a specified portion of the shares entitled to vote on that matter that is greater than a majority of the shares so entitled to vote, that provision of the articles of incorporation may not be amended or modified, directly or indirectly, without the affirmative vote of the holders of that greater portion of the shares entitled to vote on that matter, unless otherwise provided in the articles of incorporation. If any provision of the articles of incorporation provides that the act of the holders of shares of any class or series on any matter shall be the affirmative vote of the holders of a specified portion of the shares of that class or series that is greater than a majority of the shares of that class or series, that provision of the articles of incorporation may not be amended or modified, directly or indirectly, without the affirmative vote of the holders of that greater portion of the shares of that class or series, unless otherwise provided in the articles of incorporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.366. NUMBER OF VOTES PER SHARE. (a) Except as provided by the certificate of formation of a corporation or this code, each outstanding share, regardless of class, shall be entitled to one vote on each matter submitted to a vote at a shareholders' meeting.

(b) If the certificate of formation provides for more or less than one vote per share on a matter for all of the outstanding shares or for the shares of a class or series, each reference in this code or in the certificate of formation or bylaws, unless expressly stated otherwise, to a specified portion of the shares with respect to that matter refers to the portion of the votes entitled to be cast with respect to those shares under the certificate of formation. (TBCA 2.29.A.)

Source Law

A. (1) Each outstanding share, regardless of class, shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders, except:

(a) To the extent that the articles of incorporation provide for more or less than one vote per share or (if and to the extent permitted by this Act) limit or deny voting rights to the holders of the shares of any class or series, or

(b) As otherwise provided by this Act.

(2) If the articles of incorporation provide for more or less than one vote per share for all the outstanding shares or for the shares of any class or any series on any matter, every reference in this Act (or in the articles of incorporation or bylaws, unless expressly stated otherwise therein), in connection with such matter, to a specified portion of such shares shall mean such portion of the votes entitled to be cast in respect of such shares by virtue of the provisions of such articles of incorporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.367. VOTING IN PERSON OR BY PROXY. (a) A shareholder may vote in person or by proxy executed in writing by the shareholder.

(b) A telegram, telex, cablegram, or other form of electronic transmission, including telephonic transmission, by the shareholder, or a photographic, photostatic, facsimile, or similar reproduction of a writing executed by the shareholder, is considered an execution in writing for purposes of this section. Any electronic transmission must contain or be accompanied by information from which it can be determined that the transmission was authorized by the shareholder. (TBCA 2.29.C (part); New.)

Source Law

C. Any shareholder may vote either in person or by proxy executed in writing by the shareholder. A telegram, telex, cablegram, or similar transmission by the shareholder, or a photographic, photostatic, facsimile, or

similar reproduction of a writing executed by the shareholder, shall be treated as an execution in writing for purposes of this Section. . . .

Revisor's Note

In keeping with the goal of modernization of the law and authorization of use of electronic technologies, Section 21.367 authorizes electronic proxies, including telephonic proxies. An electronic transmission must contain or be accompanied by information from which it can be determined that the transmission was authorized by the shareholder. Delaware and most other states that permit electronic proxies have similar provisions requiring or facilitating verification.

Revised Law

Sec. 21.368. TERM OF PROXY. A proxy is not valid after 11 months after the date the proxy is executed unless otherwise provided by the proxy. (TBCA 2.29.C (part).)

Source Law

C. . . . No proxy shall be valid after eleven (11) months from the date of its execution unless otherwise provided in the proxy. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.369. REVOCABILITY OF PROXY. (a) In this section, a "proxy coupled with an interest" includes the appointment as proxy of:

- (1) a pledgee;
- (2) a person who purchased or agreed to purchase the shares subject to the proxy;
- (3) a person who owns or holds an option to purchase the shares subject to the proxy;
- (4) a creditor of the corporation who extended the corporation credit under terms requiring the appointment;
- (5) an employee of the corporation whose employment contract requires the appointment; or
- (6) a party to a voting agreement created under Section 6.252 or a shareholders' agreement created under Section 21.101.

(b) A proxy is revocable unless:

(1) the proxy form conspicuously states that the proxy is irrevocable; and

(2) the proxy is coupled with an interest. (TBCA 2.29.C (part).)

Source Law

C. . . . A proxy shall be revocable unless the proxy form conspicuously states that the proxy is irrevocable and the proxy is coupled with an interest. Proxies coupled with an interest include the appointment as proxy of:

(1) a pledgee;

(2) a person who purchased or agreed to purchase, or owns or holds an option to purchase, the shares;

(3) a creditor of the corporation who extended it credit under terms requiring the appointment;

(4) an employee of the corporation whose employment contract requires the appointment; or

(5) a party to a voting agreement created under Section B, Article 2.30, of this Act.

. . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.370. ENFORCEABILITY OF PROXY. (a) An irrevocable proxy is specifically enforceable against the holder of shares or any successor or transferee of the holder if:

(1) the proxy is noted conspicuously on the certificate representing the shares subject to the proxy; or

(2) in the case of uncertificated shares, notation of the proxy is contained in the notice sent under Section 3.205 with respect to the shares subject to the proxy.

(b) An irrevocable proxy that is otherwise enforceable is ineffective against a transferee for value without actual knowledge of the existence of the irrevocable proxy at the time of the transfer or against a subsequent transferee, regardless of whether the transfer is for value, unless the proxy is:

(1) noted conspicuously on the certificate representing the shares subject to the proxy; or

(2) in the case of uncertificated shares, notation of the proxy is contained in the notice sent under Section 3.205 with respect to the shares subject to the proxy.

(c) An irrevocable proxy shall be specifically enforceable against a person who is not a transferee for value from the time the person acquires actual knowledge of the existence of the irrevocable proxy. (TBCA 2.29.C (part).)

Source Law

C. . . .

An irrevocable proxy, if noted conspicuously on the certificate representing the shares that are subject to the irrevocable proxy or, in the case of uncertificated shares, if notation of the irrevocable proxy is contained in the notice sent pursuant to Section D of Article 2.19 of this Act with respect to the shares that are subject to the irrevocable proxy, shall be specifically enforceable against the holder of those shares or any successor or transferee of the holder. Unless noted conspicuously on the certificate representing the shares that are subject to the irrevocable proxy or, in the case of uncertificated shares, unless notation of the irrevocable proxy is contained in the notice sent pursuant to Section D of Article 2.19 of this Act with respect to the shares that are subject to the irrevocable proxy, an irrevocable proxy, even though otherwise enforceable, is ineffective against a transferee for value without actual knowledge of the existence of the irrevocable proxy at the time of the transfer or against any subsequent transferee (whether or not for value), but such an irrevocable proxy shall be specifically enforceable against any other person who is not a transferee for value from and after the time that the person acquires actual knowledge of the existence of the irrevocable proxy.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.371. PROCEDURES IN BYLAWS RELATING TO PROXIES. A corporation may establish in the corporation's bylaws procedures consistent with this code for determining the validity of proxies and determining whether shares that are held of record by a bank, broker, or other nominee are represented at a meeting of

shareholders. The procedures may incorporate rules of and determinations made by a stock exchange or self-regulatory organization regulating the corporation or that bank, broker, or other nominee. (TBCA 2.28.E.)

Source Law

E. A corporation may establish procedures in its bylaws, not inconsistent with this Act, for determining the validity of proxies and whether shares that are held of record by a bank, broker, or other nominee are represented at a meeting of shareholders with respect to any matter. The procedures may incorporate or look to rules and determinations of any stock exchange or self-regulatory organization regulating the corporation or that bank, broker, or other nominee.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.372. SHAREHOLDER MEETING LIST. (a) Not later than the 11th day before the date of each meeting of the shareholders of a corporation, an officer or agent of the corporation who is in charge of the corporation's shareholder records shall prepare an alphabetical list of the shareholders entitled to vote at the meeting or at any adjournment of the meeting. The list of shareholders must:

(1) state:

(A) the address of each shareholder;

(B) the type of shares held by each shareholder;

(C) the number of shares held by each

shareholder; and

(D) the number of votes that each shareholder is entitled to if the number of votes is different from the number of shares stated under Paragraph (C); and

(2) be kept on file at the registered office or principal executive office of the corporation for at least 10 days before the date of the meeting.

(b) The original share transfer records of the corporation are prima facie evidence of the shareholders of the corporation entitled to vote at the meeting.

(c) Failure to comply with this section does not affect the validity of any action taken at a meeting of the shareholders of the corporation. (TBCA 2.27.A, B.)

Source Law

A. The office or agent having charge of the share transfer records for shares of a corporation shall make, at least ten (10) days before each meeting of shareholders, a complete list of the shareholders entitled to vote at such meeting or any adjournment thereof, arranged in alphabetical order, with the address of and the number of shares held by each, which list, for a period of ten (10) days prior to such meeting, shall be kept on file at the registered office or principal place of business of the corporation and shall be subject to inspection by any shareholder at any time during usual business hours. Such list shall also be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any shareholder during the whole time of the meeting. The original share transfer records shall be prima-facie evidence as to who are the shareholders entitled to examine such list or transfer records or to vote at any meeting of shareholders.

B. Failure to comply with the requirements of this Article shall not affect the validity of any action taken at such meeting.

Revisor's Note

No substantive change is intended. The inspection rights of shareholders from the source law are contained in Section 21.354.

[Sections 21.373-21.400 reserved for expansion]

SUBCHAPTER I. BOARD OF DIRECTORS

Revised Law

Sec. 21.401. MANAGEMENT BY BOARD OF DIRECTORS. (a) Except as provided by Section 21.101 or Subchapter O, the board of directors of a corporation shall:

(1) exercise or authorize the exercise of the powers of the corporation; and

(2) direct the management of the business and affairs of the corporation.

(b) In discharging the duties of director under this code or otherwise and in considering the best interests of the

corporation, a director may consider the long-term and short-term interests of the corporation and the shareholders of the corporation, including the possibility that those interests may be best served by the continued independence of the corporation. (TBCA 2.31 (part), 13.06.)

Source Law

2.31.A. Except as provided by Article 2.30-1 and Part Twelve of this Act, the powers of a corporation shall be exercised by or under the authority of, and the business and affairs of a corporation shall be managed under the direction of, the board of directors of the corporation. . . .

13.06.A. In discharging the duties of director under this Act or otherwise, a director, in considering the best interests of the corporation, may consider the long-term as well as the short-term interests of the corporation and its shareholders, including the possibility that those interests may be best served by the continued independence of the corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.402. BOARD MEMBER ELIGIBILITY REQUIREMENTS. Unless the certificate of formation or bylaws of a corporation provide otherwise, a person is not required to be a resident of this state or a shareholder of the corporation to serve as a director. The certificate of formation or bylaws may prescribe other qualifications for directors. (TBCA 2.31 (part).)

Source Law

2.31.A. . . . Directors need not be residents of this State or shareholders of the corporation unless the articles of incorporation or bylaws so require. The articles of incorporation or bylaws may prescribe other qualifications for directors.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.403. NUMBER OF DIRECTORS. (a) The board of directors of a corporation may consist of one or more directors.

(b) If the corporation is to be managed by a board of directors, the number of directors shall be set by, or in the manner provided by, the certificate of formation or bylaws of the corporation, except that the number of directors on the initial board of directors must be set by the certificate of formation.

(c) The number of directors may be increased or decreased by amendment to, or as provided by, the certificate of formation or bylaws. A decrease in the number of directors may not shorten the term of an incumbent director.

(d) If the certificate of formation or bylaws do not set the number constituting the board of directors or provide for the manner in which the number of directors must be determined, the number of directors is the same as the number constituting the initial board of directors as set by the certificate of formation. (TBCA 2.32.A (part).)

Source Law

A. The board of directors of a corporation shall consist of one or more members. The number of directors shall be fixed by, or in the manner provided in, the articles of incorporation or the bylaws, except as to the number constituting the initial board of directors, which number shall be fixed by the articles of incorporation. The number of directors may be increased or decreased from time to time by amendment to, or in the manner provided in, the articles of incorporation or the bylaws, but no decrease shall have the effect of shortening the term of any incumbent director. In the absence of a bylaw or a provision of the articles of incorporation fixing the number of directors or providing for the manner in which the number of directors shall be fixed, the number of directors shall be the same as the number constituting the initial board of directors as fixed by the articles of incorporation. . . .

Revisor's Note

No substantive change is intended. The revised law in Sections 21.403 and 21.404 clarifies what is implied in the source law, namely, that these provisions do not apply if the corporation is managed by shareholders or other persons pursuant to a shareholders'

agreement.

Revised Law

Sec. 21.404. DESIGNATION OF INITIAL BOARD OF DIRECTORS. If the corporation is to be managed by a board of directors, the certificate of formation of a corporation must state the names and addresses of the persons constituting the initial board of directors of the corporation. (TBCA 2.32.A (part).)

Source Law

A. . . . The names and addresses of the members of the initial board of directors shall be stated in the articles of incorporation. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.405. ELECTION OF BOARD OF DIRECTORS. (a) At the first annual meeting of shareholders of a corporation and at each subsequent annual meeting of shareholders, the holders of shares entitled to vote in the election of directors shall elect directors for the term provided under Section 21.407, except as provided by Section 21.408.

(b) A corporation's certificate of formation may provide that the holders of a class or series of shares or a group of classes or series of shares are entitled to elect one or more directors of the corporation. (TBCA 2.32.A (part), B (part).)

Source Law

A. . . . At the first annual meeting of shareholders and at each annual meeting thereafter, the holders of shares entitled to vote in the election of directors shall elect directors to hold office until the next succeeding annual meeting

B. The articles of incorporation may provide that the holders of any class or series of shares or any group of classes or series of shares shall be entitled to elect one or more directors

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.406. SPECIAL VOTING RIGHTS OF DIRECTORS. (a) The certificate of formation of a corporation may provide that directors elected by the holders of a class or series of shares or by a group of classes or series of shares entitled to elect

one or more directors, as provided by Section 21.405, are entitled to cast more or less than one vote on specified matters.

(b) Unless expressly stated otherwise, each reference in this code or in a corporation's certificate of formation or bylaws to a specified portion of the directors means the portion of the votes entitled to be cast by the directors to which the reference applies. (TBCA 2.32.B (part).)

Source Law

B. . . . The articles of incorporation may provide that any directors elected by the holders of any such class or series of shares or any such group shall be entitled to more or less than one vote on all or any specified matters, in which case every reference in this Act (or in the articles of incorporation or bylaws, unless expressly stated otherwise therein) to a specified portion of the directors shall mean such portion of the votes entitled to be cast by the directors to which such reference is applicable. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.407. TERM OF OFFICE. Unless otherwise provided by this subchapter or removed in accordance with Section 21.409, the term of office of a director extends from the date the director is elected and qualified or named in the corporation's certificate of formation until the next annual meeting of shareholders and until the director's successor is elected and qualified. (TBCA 2.32.A (part), B (part).)

Source Law

A. . . . Unless removed in accordance with the provisions of the bylaws or the articles of incorporation, such persons shall hold office until the first annual meeting of shareholders, and until their successors shall have been elected and qualified. . . .

B. . . . Unless removed in accordance with provisions of the bylaws or the articles of incorporation, each director shall hold office for the term for which he is elected and until his successor shall have been elected and qualified.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.408. SPECIAL TERMS OF OFFICE. (a) The certificate of formation or bylaws of a corporation may provide that all or some of the board of directors may be divided into two or three classes that shall include the same or a similar number of directors as each other class and that have staggered terms of office.

(b) The terms of office of the initial directors constituting the first class expire at the first annual meeting of shareholders after the election of those directors. The terms of office of the initial directors constituting the second class expire at the second annual meeting of shareholders after election of those directors. The terms of office of the initial directors constituting the third class, if any, expire at the third annual meeting of shareholders after election of those directors.

(c) If the certificate of formation or bylaws provide for staggered terms of directors, the shareholders, at each annual meeting, shall elect a number of directors equal to the number of the class of directors whose terms expire at the time of the meeting. The directors elected at an annual meeting shall hold office until the second succeeding annual meeting, if there are two classes, or until the third succeeding annual meeting, if there are three classes.

(d) Unless provided by the certificate of formation or a bylaw adopted by the shareholders, staggered terms for directors must be effected at a meeting of shareholders at which directors are elected. Staggered terms for directors may not be effected if any shareholder has the right to cumulate votes for the election of directors and the board of directors consists of fewer than nine members.

(e) Directors elected by the holders of a class or series of shares or a group of classes or series of shares in accordance with the certificate of formation shall hold office for the terms specified by the certificate of formation. (TBCA 2.32.B (part), 2.33.)

Source Law

[2.32]

B. The articles of incorporation may provide that the holders of any class or series of shares or any group of classes or series of shares shall be entitled to elect one or more directors, who shall hold office for such terms as shall be stated in the articles of incorporation. . . .

[2.33]

A. The bylaws of a corporation may provide that the directors, the directors elected by any class or series of shares or any group of classes or series of shares, or any portion of the directors or of the directors elected by any class or series of shares or any such group shall be divided into either two or three classes, each class to be as nearly equal in number as possible, the terms of office of directors of the first class to expire at the first annual meeting of shareholders after their election, that of the second class to expire at the second annual meeting after their election, and that of the third class, if any, to expire at the third annual meeting after their election. If the bylaws provide for the classification of directors, (1) the whole number of directors of the corporation need not be elected annually, and (2) at each annual meeting after such classification, the number of directors equal to the number of the class whose term expires at the time of such meeting shall be elected to hold office until the second succeeding annual meeting, if there be two classes, or until the third succeeding annual meeting, if there be three classes. No classification of directors shall be effective prior to the next annual meeting of shareholders at which directors are elected unless the classification is effected by a bylaw adopted by the shareholders. No classification of directors shall be effective for any corporation if any shareholder has the right to cumulate his votes for the election of directors of the corporation unless the board of directors of the corporation consists of nine or more members.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.409. REMOVAL OF DIRECTORS. (a) Except as otherwise provided by the certificate of formation or bylaws of a corporation or this subchapter, the shareholders of the corporation may remove a director or the entire board of

directors of the corporation, with or without cause, at a meeting called for that purpose, by a vote of the holders of a specified portion, but not less than the majority, of the shares entitled to vote at an election of directors.

(b) If the certificate of formation entitles the holders of a class or series of shares or a group of classes or series of shares to elect one or more directors, only the holders of shares of that class, series, or group may vote on the removal of a director elected by the holders of shares of that class, series, or group.

(c) If the certificate of formation permits cumulative voting and less than the entire board is to be removed, a director may not be removed if the votes cast against the removal would be sufficient to elect the director if cumulatively voted at an election of the entire board of directors, or if there are classes of directors, at an election of the class of directors of which the director is a part.

(d) In the case of a corporation the directors of which serve staggered terms, a director may not be removed except for cause unless the certificate of formation provides otherwise.

(TBCA 2.32.C.)

Source Law

C. Except as otherwise provided in this Article, the bylaws or the articles of incorporation may provide that at any meeting of shareholders called expressly for that purpose any director or the entire board of directors may be removed, with or without cause, by a vote of the holders of a specified portion, but not less than a majority, of the shares then entitled to vote at an election of directors, subject to any further restrictions on removal that may be contained in the bylaws. Whenever the holders of any class or series of shares or any such group are entitled to elect one or more directors by the provisions of the articles of incorporation, only the holders of shares of that class or series or group shall be entitled to vote for or against the removal of any director elected by the holders of shares of that class or series or group. In the case of a corporation having cumulative voting, if less than the entire board is to be removed, no one of the directors may be removed if the votes cast against his removal would be sufficient to elect him if then

cumulatively voted at an election of the entire board of directors, or if there be classes of directors, at an election of the class of directors of which he is a part. In the case of a corporation whose directors have been classified as permitted by this Act, unless the articles of incorporation otherwise provide, a director may not be removed except for cause.

Revisor's Note

Section 21.409 makes clear the right of the shareholders to remove a director with or without cause absent provision in the certificate of formation or bylaws. Article 2.32, Texas Business Corporation Act, states that the articles of incorporation or bylaws may provide for removal of directors with or without cause but is silent on whether removal can be accomplished without such a provision. This clarification is consistent with the approach taken in the Revised Model Business Corporation Act and in Delaware.

Revised Law

Sec. 21.410. VACANCY. (a) A vacancy occurring in the initial board of directors before the issuance of shares may be filled by the affirmative vote or written consent of the majority of the organizers or by the affirmative vote of the majority of the remaining directors, even if the majority of the remaining directors constitutes less than a quorum of the board of directors.

(b) Except as provided by Subsection (e), a vacancy occurring in the board of directors after the issuance of shares may be filled by election at an annual or special meeting of shareholders called for that purpose or by the affirmative vote of the majority of the remaining directors, even if the majority of directors constitutes less than a quorum of the board of directors.

(c) The term of a director elected to fill a vacancy occurring in the board of directors, including the initial directors, is the unexpired term of the director's predecessor in office.

(d) Except as provided by Subsection (e), a vacancy to be filled because of an increase in the number of directors may be filled by election at an annual or special meeting of shareholders called for that purpose or by the board of directors for a term of office continuing only until the next election of one or more directors by the shareholders. During a period

between two successive annual meetings of shareholders, the board of directors may not fill more than two vacancies created by an increase in the number of directors.

(e) Unless otherwise authorized by a corporation's certificate of formation, a vacancy or a newly created vacancy in a director position that the certificate of formation entitles the holders of a class or series of shares or group of classes or series of shares to elect may be filled only:

(1) by the affirmative vote of the majority of the directors then in office elected by the class, series, or group;

(2) by the sole remaining director elected in that manner; or

(3) by the affirmative vote of the holders of the outstanding shares of the class, series, or group. (TBCA 2.34.)

Source Law

2.34.A. Any vacancy occurring in the initial board of directors before the issuance of shares may be filled by the affirmative vote or written consent of a majority of the incorporators or by the affirmative vote of a majority of the remaining directors though less than a quorum of the board of directors. A director elected to fill a vacancy shall be elected for the unexpired term of the director's predecessor in office.

B. Any vacancy occurring in the board of directors after the issuance of shares may be filled in accordance with Section D of this article or may be filled by the affirmative vote of a majority of the remaining directors though less than a quorum of the board of directors. A director elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office.

C. A directorship to be filled by reason of an increase in the number of directors may be filled in accordance with Section D of this article or may be filled by the board of directors for a term of office continuing only until the next election of one or more directors by the shareholders; provided that the board of directors may not fill more than two such directorships during the period between any two successive annual meetings of shareholders.

D. Any vacancy occurring in the board of directors or any directorship to be filled by reason of an increase in the number of directors may be filled by election at an annual or special meeting of shareholders called for that purpose.

E. Notwithstanding Sections B, C, and D of this article, whenever the holders of any class or series of shares or group of classes or series of shares are entitled to elect one or more directors by the provisions of the articles of incorporation, any vacancies in such directorships and any newly created directorships of such class or series to be filled by reason of an increase in the number of such directors may be filled by the affirmative vote of a majority of the directors elected by such class or series, or by such group, then in office, or by a sole remaining director so elected, or by the vote of the holders of the outstanding shares of such class or series or of such group, and such directorships shall not in any case be filled by the vote of the remaining directors or the holders of the outstanding shares as a whole unless otherwise provided in the articles of incorporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.411. NOTICE OF MEETING. (a) Regular meetings of the board of directors of a corporation may be held with or without notice as prescribed by the corporation's bylaws.

(b) Special meetings of the board of directors shall be held with notice as prescribed by the bylaws.

(c) A notice of a board meeting is not required to specify the business to be transacted at the meeting or the purpose of the meeting, unless required by the bylaws. (TBCA 2.37.B (part).)

Source Law

B. Regular meetings of the board of directors may be held with or without notice as prescribed in the bylaws. Special meetings of the board of directors shall be held upon such notice as is prescribed in the bylaws. . . . Neither the business to be

transacted at, nor the purpose of, any regular or special meeting of the board of directors need be specified in the notice or . . . of such meeting, unless required by the bylaws.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.412. WAIVER OF NOTICE. (a) If the bylaws of a corporation require notice of a meeting to be given to a director, a written waiver of the notice signed by the director entitled to the notice, before or after the meeting, is equivalent to the giving of the notice.

(b) The attendance of a director at a board meeting constitutes a waiver of notice of the meeting, unless the director attends the meeting for the express purpose of objecting to the transaction of business at the meeting because the meeting has not been lawfully called or convened.

(c) A waiver of notice of a board meeting is not required to specify the business to be transacted at the meeting or the purpose of the meeting, unless required by the bylaws. (TBCA 2.37.B (part).)

Source Law

B. . . . Attendance of a director at a meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board of directors need be specified in the . . . waiver of notice of such meeting, unless required by the bylaws.

Revisor's Note

No substantive change is intended.

Subsection (a) of the revised law clarifies what is implicit in the source law, namely that a written waiver of notice of a director meeting is effective. Waivers of meeting notices are common practice in Texas for director meetings.

Revised Law

Sec. 21.413. QUORUM. (a) A quorum of the board of

directors is the majority of the number of directors set or established in the manner provided by the certificate of formation or bylaws of a corporation unless the laws of this state, the certificate of formation, or the bylaws require a different number or portion.

(b) Neither the certificate of formation nor the bylaws may provide that less than one-third of the number of directors constitutes a quorum. (TBCA 2.35 (part).)

Source Law

2.35.A. A majority of the number of directors fixed by, or in the manner provided in, the articles of incorporation or the bylaws shall constitute a quorum for the transaction of business unless a different number or portion is required by law or the articles of incorporation or the bylaws. In no case may the articles of incorporation or bylaws provide that less than one-third of the number of directors so fixed constitute a quorum. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.414. DISSENT TO ACTION. (a) A director of a corporation who is present at a meeting of the board of directors at which action has been taken is presumed to have assented to the action taken unless:

(1) the director's dissent has been entered in the minutes of the meeting;

(2) the director has filed a written dissent to the action with the person acting as the secretary of the meeting before the meeting is adjourned; or

(3) the director has sent a written dissent by registered mail to the secretary of the corporation immediately after the meeting has been adjourned.

(b) A director who voted in favor of an action may not dissent to the action. (TBCA 2.41.B.)

Source Law

B. A director of a corporation who is present at a meeting of its board of directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his dissent shall be entered in the minutes of the meeting or unless he shall file his

written dissent to such action with the person acting as the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the secretary of the corporation immediately after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.415. ACTION BY DIRECTORS. (a) The act of a majority of the directors present at a meeting at which a quorum is present is the act of the board of directors of a corporation, unless the act of a greater number is required by the certificate of formation or bylaws of the corporation or by this code.

(b) Unless otherwise provided by the certificate of formation or bylaws, a written consent stating the action taken and signed by all members of the board of directors is also an act of the board of directors. (TBCA 2.35 (part), 9.10.B (part).)

Source Law

[2.35]

A. . . . The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by law or the articles of incorporation or the bylaws.

[9.10]

B. Unless otherwise restricted by the articles of incorporation or by-laws, any action required or permitted to be taken at a meeting of the board of directors or . . . may be taken without a meeting if a consent in writing, setting forth the action so taken, is signed by all the members of the board of directors or

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.416. COMMITTEES OF BOARD OF DIRECTORS. (a) If authorized by the certificate of formation or bylaws of a corporation, the board of directors of the corporation, by

resolution adopted by the majority of the entire board of directors, may designate:

- (1) committees composed of one or more directors; or
- (2) directors as alternate members of committees to replace absent or disqualified committee members at a committee meeting, subject to any limitations imposed by the board of directors.

(b) To the extent provided by the resolution designating a committee or the certificate of formation or bylaws and subject to Subsection (c), the committee has the authority of the board of directors.

(c) A committee of the board of directors may not:

- (1) amend the certificate of formation, except to:
 - (A) establish series of shares;
 - (B) increase or decrease the number of shares in a series; or
 - (C) eliminate a series of shares as authorized by Section 21.155;
- (2) propose a reduction of stated capital under Sections 21.253 and 21.254;
- (3) approve a plan of merger, share exchange, or conversion of the corporation;
- (4) recommend to shareholders the sale, lease, or exchange of all or substantially all of the property and assets of the corporation not made in the usual and regular course of its business;
- (5) recommend to the shareholders a voluntary winding up and termination or a revocation of a voluntary winding up and termination;
- (6) amend, alter, or repeal the bylaws or adopt new bylaws;
- (7) fill vacancies on the board of directors;
- (8) fill vacancies on or designate alternate members of a committee of the board of directors;
- (9) fill a vacancy to be filled because of an increase in the number of directors;
- (10) elect or remove officers of the corporation or members or alternate members of a committee of the board of directors;
- (11) set the compensation of the members or alternate members of a committee of the board of directors; or
- (12) alter or repeal a resolution of the board of directors that states that it may not be amended or repealed by a committee of the board of directors.

(d) A committee of the board of directors may authorize a distribution or the issuance of shares if authorized by the resolution designating the committee or the certificate of formation or bylaws.

(e) The board of directors may remove a member of a committee appointed by the board if the board determines the removal is in the best interests of the corporation. The removal of the member is without prejudice to any contract rights of the person removed. Appointment of a member of a committee does not create contract rights.

(f) The designation and delegation of authority to a committee of the board of directors does not relieve the board of directors or a director of responsibility imposed by law. (TBCA 2.36, 9.10.B.)

Source Law

[2.36]

A. If the articles of incorporation or the bylaws so provide, the board of directors, by resolution adopted by a majority of the full board of directors, may designate from among its members one or more committees, each of which shall be comprised of one or more of its members, and may designate one or more of its members as alternate members of any committee, who may, subject to any limitations imposed by the board of directors, replace absent or disqualified members at any meeting of that committee. Any such committee, to the extent provided in such resolution or in the articles of incorporation or the bylaws, shall have and may exercise all of the authority of the board of directors, subject to the limitations set forth in Sections B and C of this Article.

B. No committee of the board of directors shall have the authority of the board of directors in reference to:

(1) amending the articles of incorporation, except that a committee may, to the extent provided in the resolution designating that committee or in the articles of incorporation or the bylaws, exercise the authority of the board of directors vested in it in accordance with Article 2.13 of this Act;

(2) proposing a reduction of the stated capital of the corporation in the manner permitted by Article 4.12 of this Act;

(3) approving a plan of merger, share exchange, or conversion of the

corporation;

(4) recommending to the shareholders the sale, lease, or exchange of all or substantially all of the property and assets of the corporation otherwise than in the usual and regular course of its business;

(5) recommending to the shareholders a voluntary dissolution of the corporation or a revocation thereof;

(6) amending, altering, or repealing the bylaws of the corporation or adopting new bylaws of the corporation;

(7) filling vacancies in the board of directors;

(8) filling vacancies in or designating alternate members of any such committee;

(9) filling any directorship to be filled by reason of an increase in the number of directors;

(10) electing or removing officers of the corporation or members or alternate members of any such committee;

(11) fixing the compensation of any member or alternate members of such committee; or

(12) altering or repealing any resolution of the board of directors that by its terms provides that it shall not be so amendable or repealable.

C. Unless the resolution designating a particular committee, the articles of incorporation, or the bylaws expressly so provide, no committee of the board of directors shall have the authority to authorize a distribution or to authorize the issuance of shares of the corporation.

D. The designation of a committee of the board of directors and the delegation thereto of authority shall not operate to relieve the board of directors, or any member thereof, of any responsibility imposed by law.

[9.10]

B. Unless otherwise restricted by the articles of incorporation or by-laws, any action required or permitted to be taken at a

meeting of the board of directors or any committee may be taken without a meeting if a consent in writing, setting forth the action so taken, is signed by all the members of the board of directors or committee, as the case may be. Such consent shall have the same force and effect as a unanimous vote at a meeting, and may be stated as such in any document or instrument filed with the Secretary of State.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.417. ELECTION OF OFFICERS. The board of directors of a corporation shall elect a president and a secretary at the time and in the manner prescribed by the corporation's bylaws. Other officers, including assistant officers and agents as deemed necessary, may be elected in accordance with Section 3.103. (TBCA 2.42.A (part).)

Source Law

A. The officers of a corporation shall consist of a president and a secretary, each of whom shall be elected by the board of directors at such time and in such manner as may be prescribed by the bylaws. Such other officers, including assistant officers, and agents as may be deemed necessary may be elected or appointed by the board of directors or chosen in such other manner as may be prescribed by the bylaws. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.418. CONTRACTS OR TRANSACTIONS INVOLVING INTERESTED DIRECTORS AND OFFICERS. (a) This section applies only to a contract or transaction between a corporation and:

(1) one or more of the corporation's directors or officers; or

(2) an entity or other organization in which one or more of the corporation's directors or officers:

(A) is a managerial official; or

(B) has a financial interest.

(b) An otherwise valid contract or transaction is valid notwithstanding that a director or officer of the corporation is present at or participates in the meeting of the board of

directors, or of a committee of the board that authorizes the contract or transaction, or votes to authorize the contract or transaction, if:

(1) the material facts as to the relationship or interest and as to the contract or transaction are disclosed to or known by:

(A) the corporation's board of directors or a committee of the board of directors and the board of directors or committee in good faith authorizes the contract or transaction by the affirmative vote of the majority of the disinterested directors or committee members, regardless of whether the disinterested directors or committee members constitute a quorum; or

(B) the shareholders entitled to vote on the authorization of the contract or transaction, and the contract or transaction is specifically approved in good faith by a vote of the shareholders; or

(2) the contract or transaction is fair to the corporation when the contract or transaction is authorized, approved, or ratified by the board of directors, a committee of the board of directors, or the shareholders.

(c) Common or interested directors of a corporation may be included in determining the presence of a quorum at a meeting of the corporation's board of directors, or a committee of the board of directors, that authorizes the contract or transaction. (TBCA 2.35-1.)

Source Law

2.35-1.A. An otherwise valid contract or transaction between a corporation and one or more of its directors or officers, or between a corporation and any other domestic or foreign corporation or other entity in which one or more of its directors or officers are directors or officers or have a financial interest, shall be valid notwithstanding whether the director or officer is present at or participates in the meeting of the board or committee thereof which authorizes the contract or transaction, or solely because his or their votes are counted for such purpose, if any one of the following is satisfied:

(1) The material facts as to his relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good

faith authorizes the contract or transaction by the affirmative vote of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; or

(2) The material facts as to his relationship or interest and as to the contract or transaction are disclosed or are known to the shareholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the shareholders; or

(3) The contract or transaction is fair as to the corporation as of the time it is authorized, approved, or ratified by the board of directors, a committee thereof, or the shareholders.

B. Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or of a committee which authorizes the contract or transaction.

Revisor's Note

No substantive change is intended.

[Sections 21.419-21.450 reserved for expansion]

SUBCHAPTER J. FUNDAMENTAL BUSINESS TRANSACTIONS

Revised Law

Sec. 21.451. DEFINITIONS. In this subchapter:

(1) "Participating shares" means shares that entitle the holders of the shares to participate without limitation in distributions.

(2) "Sale of all or substantially all of the assets" means the sale, lease, exchange, or other disposition, other than a pledge, mortgage, deed of trust, or trust indenture unless otherwise provided by the certificate of formation, of all or substantially all of the property and assets of a domestic corporation that is not made in the usual and regular course of the corporation's business without regard to whether the disposition is made with the goodwill of the business. The term does not include a transaction that results in the corporation directly or indirectly:

(A) continuing to engage in one or more businesses; or

(B) applying a portion of the consideration received in connection with the transaction to the conduct of a business that the corporation engages in after the transaction.

(3) "Shares" includes a receipt or other instrument

issued by a depository representing an interest in one or more shares or fractions of shares of a domestic or foreign corporation that are deposited with the depository.

(4) "Voting shares" means shares that entitle the holders of the shares to vote unconditionally in elections of directors. (TBCA 5.03.I(3), (5), (6), 5.09.A (part), B.)

Source Law

[5.03]

I. . . .

(3) "Participating shares" means shares that entitle the holders thereof to participate without limitation in distributions.

. . . .

(5) "Voting shares" means shares that entitle the holders thereof to vote unconditionally in elections of directors.

(6) "Shares" means, without limitation, a receipt or other instrument issued by a depository representing an interest in one or more shares of stock, or fractions thereof, solely of a domestic or foreign corporation, which stock is deposited with a depository.

[5.09]

A. Except as otherwise provided in the articles of incorporation and except as provided in the next sentence of this section, the sale, lease, exchange or other disposition of all, or substantially all, the property and assets of a corporation, when made in the usual and regular course of the business of the corporation, may be made upon such terms and conditions and for such considerations, which may consist in whole or in part of money or property, real or personal, including shares of any other corporation, domestic or foreign, as shall be authorized by its board of directors, without authorization or consent of the shareholders.

. . . .

B. A transaction referred to in this Article and in Article 5.10 of this Act shall be in the usual and regular course of business if the corporation shall, directly or indirectly, either continue to engage in

one or more businesses or apply a portion of the consideration received in connection with the transaction to the conduct of a business in which it engages following the transaction.

Revisor's Note

No substantive change is intended. The revised law introduces the defined term "sale of all or substantially all of the assets" to replace certain provisions that are found in the operative text of the source law in order to simplify the text of the revised law.

Revised Law

Sec. 21.452. APPROVAL OF MERGER. (a) A corporation that is a party to the merger under Chapter 10 must approve the merger by complying with this section.

(b) The board of directors of the corporation shall adopt a resolution that:

(1) approves the plan of merger; and

(2) if shareholder approval of the merger is required by this subchapter:

(A) recommends that the plan of merger be approved by the shareholders of the corporation; or

(B) directs that the plan of merger be submitted to the shareholders for approval without recommendation if the board of directors determines for any reason not to recommend approval of the plan of merger.

(c) Except as otherwise provided by this subchapter or Chapter 10, the plan of merger shall be submitted to the shareholders of the corporation for approval as provided by this subchapter. The board of directors may place conditions on the submission of the plan of merger to the shareholders.

(d) If the board of directors approves a plan of merger required to be approved by the shareholders of the corporation but does not adopt a resolution recommending that the plan of merger be approved by the shareholders, the board of directors shall communicate to the shareholders the reason for the board's determination to submit the plan of merger without a recommendation.

(e) Except as provided by Chapter 10 or Sections 21.457-21.459, the shareholders of the corporation shall approve the plan of merger as provided by this subchapter. (TBCA 5.03.A (part), B (part), C.)

Source Law

A. Except as provided by Sections G and H of this Article, after acting on a plan of

merger or exchange in the manner prescribed by Subsection (1) of Section B of this Article, the board of directors of each domestic corporation that is a party to the merger, and . . . shall submit the plan of merger or . . . for approval by its shareholders. Unless the articles of incorporation otherwise require, no approval by shareholders of a plan of merger is required under this Article for any corporation that is a party to the plan of merger unless that corporation is also a party to the merger.

B. Except as provided by Sections G and H of this Article, for a plan of merger or . . . to be approved:

(1) the board of directors of the corporation shall adopt a resolution recommending that the plan of merger or . . . be approved by the shareholders of the corporation, unless the board of directors determines that for any reason it should not make that recommendation, in which case the board of directors shall adopt a resolution directing that the plan of merger or . . . be submitted to shareholders for approval without recommendation and, in connection with the submission, communicate the basis for its determination that the plan be submitted to shareholders without any recommendation; and

(2) the shareholders entitled to vote on the plan of merger or . . . must approve the plan.

C. The board of directors may condition its submission to shareholders of a plan of merger or exchange on any basis.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.453. APPROVAL OF CONVERSION. (a) A corporation must approve a conversion under Chapter 10 by complying with this section.

(b) The board of directors of the corporation shall adopt a resolution that approves the plan of conversion and:

(1) recommends that the plan of conversion be approved by the shareholders of the corporation; or

(2) directs that the plan of conversion be submitted to the shareholders for approval without recommendation if the board of directors determines for any reason not to recommend approval of the plan of conversion.

(c) The plan of conversion shall be submitted to the shareholders of the corporation for approval as provided by this subchapter. The board of directors may place conditions on the submission of the plan of conversion to the shareholders.

(d) If the board of directors approves a plan of conversion but does not adopt a resolution recommending that the plan of conversion be approved by the shareholders of the corporation, the board of directors shall communicate to the shareholders the reason for the board's determination to submit the plan of conversion without a recommendation.

(e) Except as provided by Sections 21.457-21.459, the shareholders of the corporation shall approve the plan of conversion as provided by this subchapter. (TBCA 5.03.B, C, 5.17.A (part).)

Source Law

[5.03]

B. Except as provided by Sections G and H of this Article, for a plan of merger or exchange to be approved:

(1) the board of directors of the corporation shall adopt a resolution recommending that the plan of merger or exchange be approved by the shareholders of the corporation, unless the board of directors determines that for any reason it should not make that recommendation, in which case the board of directors shall adopt a resolution directing that the plan of merger or exchange be submitted to shareholders for approval without recommendation and, in connection with the submission, communicate the basis for its determination that the plan be submitted to shareholders without any recommendation; and

(2) the shareholders entitled to vote on the plan of merger or exchange must approve the plan.

C. The board of directors may condition its submission to shareholders of a plan of merger or exchange on any basis.

[5.17]

A. A domestic corporation may adopt a

plan of conversion and convert to a foreign corporation or any other entity if:

(1) the converting entity acts on and its shareholders approve a plan of conversion in the manner prescribed by Article 5.03 of this Act as if the conversion were a merger to which the converting entity were a party and not the survivor;

. . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.454. APPROVAL OF EXCHANGE. (a) A corporation the shares of which are to be acquired in an exchange under Chapter 10 must approve the exchange by complying with this section.

(b) The board of directors shall adopt a resolution that approves the plan of exchange and:

(1) recommends that the plan of exchange be approved by the shareholders of the corporation; or

(2) directs that the plan of exchange be submitted to the shareholders for approval without recommendation if the board of directors determines for any reason not to recommend approval of the plan of exchange.

(c) The plan of exchange shall be submitted to the shareholders of the corporation for approval as provided by this subchapter. The board of directors may place conditions on the submission of the plan of exchange to the shareholders.

(d) If the board of directors approves a plan of exchange but does not adopt a resolution recommending that the plan of exchange be approved by the shareholders of the corporation, the board of directors shall communicate to the shareholders the reason for the board's determination to submit the plan of exchange to shareholders without a recommendation.

(e) Except as provided by Sections 21.457-21.459, the shareholders of the corporation shall approve the plan of exchange as provided by this subchapter. (TBCA 5.02.A (part), 5.03.B (part), C (part).)

Source Law

[5.02]

A. One or more domestic or foreign corporations or other entities may acquire all of the outstanding shares of one or more classes or series of one or more domestic corporations if:

(1) the board of directors of each domestic corporation that is a party to the

plan of exchange acts on a plan of exchange in the manner prescribed by Article 5.03 of this Act and its shareholders (if required by Article 5.03 of this Act) approve the plan of exchange;

. . .

[5.03]

B. Except as provided by Sections G and H of this Article, for a plan of . . . exchange to be approved:

(1) the board of directors of the corporation shall adopt a resolution recommending that the plan of . . . exchange be approved by the shareholders of the corporation, unless the board of directors determines that for any reason it should not make that recommendation, in which case the board of directors shall adopt a resolution directing that the plan of . . . exchange be submitted to shareholders for approval without recommendation and, in connection with the submission, communicate the basis for its determination that the plan be submitted to shareholders without any recommendation; and

(2) the shareholders entitled to vote on the plan of . . . exchange must approve the plan.

C. The board of directors may condition its submission to shareholders of a plan of . . . exchange on any basis.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.455. APPROVAL OF SALE OF ALL OR SUBSTANTIALLY ALL OF ASSETS. (a) Except as provided by the certificate of formation of a domestic corporation, a sale, lease, pledge, mortgage, assignment, transfer, or other conveyance of an interest in real property or other assets of the corporation does not require the approval or consent of the shareholders of the corporation unless the transaction constitutes a sale of all or substantially all of the assets of the corporation.

(b) A corporation must approve the sale of all or substantially all of its assets by complying with this section.

(c) The board of directors of the corporation shall adopt a resolution that approves the sale of all or substantially all of

the assets of the corporation and:

(1) recommends that the sale of all or substantially all of the assets of the corporation be approved by the shareholders of the corporation; or

(2) directs that the sale of all or substantially all of the assets of the corporation be submitted to the shareholders for approval without recommendation if the board of directors determines for any reason not to recommend approval of the sale.

(d) The resolution proposing the sale of all or substantially all of the assets of the corporation shall be submitted to the shareholders of the corporation for approval as provided by this subchapter. The board of directors may place conditions on the submission of the proposed sale to the shareholders.

(e) If the board of directors approves the sale of all or substantially all of the assets of the corporation but does not adopt a resolution recommending that the proposed sale be approved by the shareholders of the corporation, the board of directors shall communicate to the shareholders the reason for the board's determination to submit the proposed sale to shareholders without a recommendation.

(f) The shareholders of the corporation shall approve the sale of all or substantially all of the assets of the corporation as provided by this subchapter. After the approval of the sale by the shareholders, the board of directors may abandon the sale of all or substantially all of the assets of the corporation, subject to the rights of a third party under a contract relating to the assets, without further action or approval by the shareholders. (TBCA 5.09.A (part), 5.10.A (part).)

Source Law

[5.09]

A. Except as otherwise provided in the articles of incorporation and except as provided in the next sentence of this section, the sale, lease, exchange or other disposition of all, or substantially all, the property and assets of a corporation, when made in the usual and regular course of the business of the corporation, may be made upon such terms and conditions and for such considerations, which may consist in whole or in part of money or property, real or personal, including shares of any other corporation, domestic or foreign, as shall be authorized by its board of directors, without authorization or consent of the shareholders.

. . .

[5.10]

A. A sale, lease, exchange, or other disposition (not including any pledge, mortgage, deed of trust or trust indenture unless otherwise provided in the articles of incorporation) of all, or substantially all, the property and assets, . . . may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares of any corporation, domestic or foreign, as may be authorized in the following manner:

(1) The board of directors may adopt a resolution recommending that such sale, lease, exchange, or other disposition be approved by shareholders of the corporation, unless the board of directors determines that for any reason it should not make the recommendation in which case the board of directors may adopt a resolution directing that such sale, lease, exchange, or other disposition be submitted to shareholders without recommendation and, in connection with the submission, communicate the basis for its determination that the sale, lease, exchange or other disposition be submitted without recommendation.

. . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.456. GENERAL PROCEDURE FOR SUBMISSION TO SHAREHOLDERS OF FUNDAMENTAL BUSINESS TRANSACTION. (a) If a fundamental business transaction involving a corporation is required to be submitted to the shareholders of the corporation under this subchapter, the corporation shall notify each shareholder of the corporation that the fundamental business transaction is being submitted to the shareholders for approval at a meeting of shareholders as required by this subchapter, regardless of whether the shareholder is entitled to vote on the matter.

(b) If the fundamental business transaction is a merger, conversion, or interest exchange, the notice required by Subsection (a) shall contain or be accompanied by a copy or summary of the plan of merger, conversion, or interest exchange, as appropriate, and the notice required by Section 10.355.

(c) The notice of the meeting must:

(1) be given not later than the 21st day before the date of the meeting; and

(2) state that the purpose, or one of the purposes, of the meeting is to consider the fundamental business transaction.

(TBCA 5.03.D, 5.10.A(3).)

Source Law

[5.03]

D. The corporation shall notify each shareholder, whether or not entitled to vote, of the meeting of shareholders at which the plan of merger or exchange is to be submitted for approval in accordance with Article 2.25 of this Act. The notice shall be given at least 20 days before the meeting and shall state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger or exchange and shall contain or be accompanied by a copy or summary of the plan.

[5.10.A]

(3) Written or printed notice shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided for in this Act for the giving of notice of meetings of shareholders, and, whether the meeting be an annual or a special meeting shall state that the purpose, or one of the purposes, of such meeting is to consider the proposed sale, lease, exchange, or other disposition.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.457. GENERAL VOTE REQUIREMENT FOR APPROVAL OF FUNDAMENTAL BUSINESS TRANSACTION. (a) Except as provided by this code or the certificate of formation of a corporation in accordance with Section 21.365, the affirmative vote of the holders of at least two-thirds of the outstanding shares of the corporation entitled to vote on a fundamental business transaction is required to approve the transaction.

(b) Unless provided by the certificate of formation or Section 21.458, shares of a class or series that are not otherwise entitled to vote on matters submitted to shareholders generally are not entitled to vote for the approval of a

fundamental business transaction.

(c) Except as provided by this code, if a class or series of shares of a corporation is entitled to vote on a fundamental business transaction as a class or series, in addition to the vote required under Subsection (a), the affirmative vote of the holders of at least two-thirds of the outstanding shares in each class or series of shares entitled to vote on the fundamental business transaction as a class or series is required to approve the transaction. Shares entitled to vote as a class or series shall only be entitled to vote as a class or series on the fundamental business transaction unless that class or series is otherwise entitled to vote on each matter submitted to the shareholders generally or is otherwise entitled to vote under the certificate of formation.

(d) Unless required by the certificate of formation, approval of a merger by shareholders is not required under this code for a corporation that is a party to the plan of merger unless that corporation is also a party to the merger. (TBCA 5.01.A (part), 5.03.E, 5.10.A(4).)

Source Law

[5.01]

A. A domestic corporation may adopt a plan of merger and one or more domestic corporations may merge with one or more domestic or foreign corporations or other entities if:

. . .

[5.03]

E. Unless the board of directors (acting pursuant to Section C of this Article) requires a greater vote or a vote by class or series, the vote of shareholders required for approval of a plan of merger or exchange shall be the affirmative vote of the holders of at least two-thirds of the outstanding shares of each corporation entitled to vote thereon, unless any class or series of shares of any such corporation is entitled to vote as a class thereon, in which event the vote required for approval by the shareholders of such corporation shall be the affirmative vote of the holders of at least two-thirds of the outstanding shares within each class or series of shares entitled to vote thereon as a class and at least two-thirds of the outstanding shares

otherwise entitled to vote thereon. Shares entitled to vote as a class shall be entitled to vote only as a class unless otherwise entitled to vote on each matter submitted to the shareholders generally or provided in the articles of incorporation.

[5.10.A]

(4) At such meeting, the shareholders may authorize such sale, lease, exchange or other disposition and may fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. Such authorization shall require the affirmative vote of the holders of at least two-thirds of the outstanding shares of the corporation entitled to vote thereon, unless any class or series of shares of the corporation is entitled to vote as a class thereon, in which event the vote required for authorization by the shareholders shall be the affirmative vote of the holders of at least two-thirds of the outstanding shares within each such class or series entitled to vote thereon as a class and at least two-thirds of the outstanding shares otherwise entitled to vote thereon. Shares entitled to vote as a class shall be entitled to vote only as a class unless otherwise entitled to vote on each matter submitted to the shareholders generally or provided in the articles of incorporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.458. CLASS VOTING REQUIREMENTS FOR CERTAIN FUNDAMENTAL BUSINESS TRANSACTIONS. (a) Separate voting by a class or series of shares of a corporation is required for approval of a plan of merger or conversion if:

(1) the plan of merger or conversion contains a provision that would require approval by that class or series of shares under Section 21.364 if the provision was contained in a proposed amendment to the corporation's certificate of formation; or

(2) that class or series of shares is entitled under the certificate of formation to vote as a class or series on the

plan of merger or conversion.

(b) Separate voting by a class or series of shares of a corporation is required for approval of a plan of exchange if:

(1) shares of that class or series are to be exchanged under the terms of the plan of exchange; or

(2) that class or series is entitled under the certificate of formation to vote as a class or series on the plan of exchange.

(c) Separate voting by a class or series of shares of a corporation is required for approval of a sale of all or substantially all of the assets of a corporation if that class or series of shares is entitled under the certificate of formation to vote as a class or series on the sale of the corporation's assets. (TBCA 5.03.F, 5.10.A(4) (part).)

Source Law

[5.03]

F. Separate voting by a class or series of shares of a corporation shall be required:

(1) for approval of a plan of merger if (a) the plan contains a provision that if contained in a proposed amendment to the articles of incorporation would require approval by that class or series of shares under Article 4.03 of this Act, or (b) that class or series of shares is entitled under the articles of incorporation to vote as a class thereon; and

(2) on a plan of exchange if (a) shares of that class or series are to be exchanged pursuant to the terms of the plan, or (b) that class or series is entitled under the articles of incorporation to vote as a class thereon.

[5.10.A]

(4) . . . unless any class or series of shares of the corporation is entitled to vote as a class thereon, in which event the vote required for authorization by the shareholders shall be the affirmative vote of the holders of at least two-thirds of the outstanding shares within each such class or series entitled to vote thereon as a class and at least two-thirds of the outstanding shares otherwise entitled to vote thereon. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.459. NO SHAREHOLDER VOTE REQUIREMENT FOR CERTAIN FUNDAMENTAL BUSINESS TRANSACTIONS. (a) Unless required by the corporation's certificate of formation, a plan of merger is not required to be approved by the shareholders of a corporation if:

(1) the corporation is the sole surviving corporation in the merger;

(2) the certificate of formation of the corporation following the merger will not differ from the corporation's certificate of formation before the merger;

(3) immediately after the effective date of the merger, each shareholder of the corporation whose shares were outstanding immediately before the effective date of the merger will hold the same number of shares, with identical designations, preferences, limitations, and relative rights;

(4) the sum of the voting power of the number of voting shares outstanding immediately after the merger and the voting power of securities that may be acquired on the conversion or exercise of securities issued under the merger does not exceed by more than 20 percent the voting power of the total number of voting shares of the corporation that are outstanding immediately before the merger; and

(5) the sum of the number of participating shares that are outstanding immediately after the merger and the number of participating shares that may be acquired on the conversion or exercise of securities issued under the merger does not exceed by more than 20 percent the total number of participating shares of the corporation that are outstanding immediately before the merger.

(b) Unless required by the certificate of formation, a plan of merger effected under Section 10.005 or 10.006 does not require the approval of the shareholders of the corporation.

(TBCA 5.03.G.)

Source Law

G. Unless the articles of incorporation otherwise require, approval by the shareholders of a corporation on a plan of merger shall not be required and the provisions of Sections A, B, C, D, E, and F of this Article do not apply if:

(1) the corporation is the sole surviving corporation in the merger;

(2) the articles of incorporation of the corporation will not differ from its articles of incorporation before the merger;

(3) each shareholder of the corporation whose shares were outstanding immediately before the effective date of the merger will hold the same number of shares, with identical designations, preferences, limitations, and relative rights, immediately after the effective date of the merger;

(4) the voting power of the number of voting shares outstanding immediately after the merger, plus the voting power of the number of voting shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights to purchase securities issued pursuant to the merger), will not exceed by more than 20 percent the voting power of the total number of voting shares of the corporation outstanding immediately before the merger;

(5) the number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights to purchase securities issued pursuant to the merger), will not exceed by more than 20 percent the total number of participating shares of the corporation outstanding immediately before the merger; and

(6) the board of directors of the corporation adopts a resolution approving the plan of merger.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.460. RIGHTS OF DISSENT AND APPRAISAL. A shareholder of a domestic corporation has the rights of dissent and appraisal under Subchapter H, Chapter 10, with respect to a fundamental business transaction. (TBCA 5.11.A.)

Source Law

A. Any shareholder of a domestic corporation shall have the right to dissent from any of the following corporate actions:

(1) Any plan of merger to which

the corporation is a party if shareholder approval is required by Article 5.03 or 5.16 of this Act and the shareholder holds shares of a class or series that was entitled to vote thereon as a class or otherwise;

(2) Any sale, lease, exchange or other disposition (not including any pledge, mortgage, deed of trust or trust indenture unless otherwise provided in the articles of incorporation) of all, or substantially all, the property and assets, with or without good will, of a corporation if special authorization of the shareholders is required by this Act and the shareholders hold shares of a class or series that was entitled to vote thereon as a class or otherwise;

(3) Any plan of exchange pursuant to Article 5.02 of this Act in which the shares of the corporation of the class or series held by the shareholder are to be acquired.

Revisor's Note

Section 21.460 cross-references to Subchapter H, Chapter 10, for a shareholder's rights of dissent and appraisal in relation to a fundamental business transaction.

Revised Law

Sec. 21.461. PLEDGE, MORTGAGE, DEED OF TRUST, OR TRUST INDENTURE. Except as provided by the corporation's certificate of formation:

(1) the board of directors of a corporation may authorize a pledge, mortgage, deed of trust, or trust indenture; and

(2) an authorization or consent of shareholders is not required for the validity of the transaction or for any sale under the terms of the transaction. (TBCA 5.09.A (part).)

Source Law

A. . . . Except as otherwise provided in the articles of incorporation, the board of directors may authorize any pledge, mortgage, deed of trust or trust indenture and no authorization or consent of the shareholders shall be required for the validity thereof or for any sale pursuant to the terms thereof.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.462. CONVEYANCE BY CORPORATION. A corporation may convey real property of the corporation when authorized by appropriate resolution of the board of directors. (TBCA 5.09.A (part).)

Source Law

A. . . . the sale, lease, exchange or other disposition of all, or substantially all, the property and assets of a corporation, . . . real or personal, including shares of any other corporation, domestic or foreign, as shall be authorized by its board of directors, without authorization or consent of the shareholders.
. . . .

Revisor's Note

No substantive change is intended.

[Sections 21.463-21.500 reserved for expansion]

SUBCHAPTER K. WINDING UP AND TERMINATION

Revised Law

Sec. 21.501. APPROVAL OF VOLUNTARY WINDING UP, REINSTATEMENT, OR REVOCATION OF VOLUNTARY WINDING UP. A corporation must approve a voluntary winding up in accordance with Chapter 11, a reinstatement in accordance with Section 11.202, a cancellation of an event requiring winding up under Section 11.152, or revocation of a voluntary decision to wind up in accordance with Section 11.151 by complying with one of the procedures prescribed by this subchapter. (TBCA 6.01 (part), 6.03.A (part), 6.05.A (part).)

Source Law

[6.01]

A. A corporation which has not commenced business and which has not issued any shares, may be voluntarily dissolved by its incorporators or its directors at any time in the following manner:

. . . .

[6.03]

A. A corporation may be dissolved by the act of the corporation when authorized in the following manner:

. . . .

[6.05]

A. At any time prior to the issuance of a certificate of dissolution by the Secretary of State, or within 120 days thereafter, a corporation may revoke voluntary dissolution proceedings:

. . .

Revisor's Note

Section 21.501 cross-references to Chapter 11 for various provisions relating to winding up and termination of a domestic corporation. See the Revisor's Note to Section 21.364. These revised provisions regarding winding up and termination of the domestic corporation provide symmetry and consistency with other types of entities.

Revised Law

Sec. 21.502. CERTAIN PROCEDURES RELATING TO WINDING UP. To approve a voluntary winding up, a reinstatement, a cancellation of an event requiring winding up, or a revocation of a voluntary decision to wind up, a corporation must follow one of the following procedures:

(1) all shareholders of the corporation must consent in writing to the winding up, the reinstatement, the cancellation of an event requiring winding up, or the revocation of a voluntary decision to wind up the corporation;

(2) if the corporation has not commenced business and has not issued any shares, a majority of the organizers or the board of directors of the corporation must adopt a resolution to wind up, to reinstate, to cancel an event requiring winding up, or to revoke a voluntary decision to wind up; or

(3)(A) the board of directors of the corporation must adopt a resolution:

(i) recommending the winding up, reinstatement, cancellation of an event requiring winding up, or revocation of a voluntary decision to wind up the corporation; and

(ii) directing that the winding up, reinstatement, cancellation of an event requiring winding up, or revocation of a voluntary decision to wind up the corporation be submitted to the shareholders for approval at an annual or special meeting of shareholders; and

(B) the shareholders must approve the action described by Paragraph (A) in accordance with Section 21.503. (TBCA 6.01 (part), 6.02.A, 6.03.A (part), 6.05.A (part).)

Source Law

[6.01]

A. A corporation which has not commenced business and which has not issued any shares, may be voluntarily dissolved by its incorporators or its directors at any time

[6.02]

A. A corporation may be voluntarily dissolved by the written consent of all of its shareholders.

[6.03]

A. A corporation may be dissolved by the act of the corporation when authorized in the following manner:

(1) The board of directors shall adopt a resolution recommending that the corporation be dissolved, and directing that the question of such dissolution be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting.

. . . .

(3) At such meeting a vote of shareholders entitled to vote thereat shall be taken on a resolution to dissolve the corporation. . . .

[6.05]

A. At any time prior to the issuance of a certificate of dissolution by the Secretary of State, or within 120 days thereafter, a corporation may revoke voluntary dissolution proceedings:

(1) By the written consent of all of its shareholders.

(2) By the act of the corporation in the following manner:

(a) The board of directors shall adopt a resolution recommending that the question of such revocation be submitted to a vote at a special meeting of shareholders.

. . . .

(c) At such meeting a vote of the shareholders entitled to vote thereat

shall be taken on a resolution to revoke the voluntary dissolution proceedings. . . .

Revisor's Note

No substantive change is intended, except as described in the Revisor's Notes to Sections 21.501 and 21.364.

Revised Law

Sec. 21.503. MEETING OF SHAREHOLDERS; NOTICE. (a) Each shareholder of record entitled to vote at a meeting described by Section 21.502(3)(A)(ii) must be given written notice stating that the purpose or one of the purposes of the meeting is to consider the winding up, reinstatement, cancellation of the event requiring winding up, or revocation of the voluntary decision to wind up the corporation. The notice must be given in the time and manner provided by Chapter 6 and this chapter for the giving of notice of shareholders' meetings.

(b) A vote of shareholders entitled to vote at the meeting shall be taken on the resolution to wind up, reinstate, cancel the event requiring winding up, or revoke the voluntary decision to wind up the corporation. The shareholders must approve the resolution by the affirmative vote required by Section 21.364. (TBCA 6.03.A (part), 6.05.A (part).)

Source Law

[6.03]

A. A corporation may be dissolved by the act of the corporation when authorized in the following manner:

. . .

(2) Written or printed notice shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided in this Act for the giving of notice of meetings of shareholders, and, whether the meeting be an annual or special meeting, shall state that the purpose, or one of the purposes, of such meeting is to consider the advisability of dissolving the corporation.

(3) At such meeting a vote of shareholders entitled to vote thereat shall be taken on a resolution to dissolve the corporation. Such resolution shall be adopted on receiving the affirmative vote of the holders of

[6.05]

A. . . . a corporation may revoke
voluntary dissolution proceedings:

. . . .

(2) By the act of the corporation
in the following manner:

. . . .

(b) Written or printed
notice, stating that the purpose or one of
the purposes of such meeting is to consider
the advisability of revoking the voluntary
dissolution proceedings, shall be given to
each shareholder of record entitled to vote
at such meeting within the time and in the
manner provided in this Act for the giving of
notice of special meetings of shareholders.

(c) At such meeting a vote of
the shareholders entitled to vote thereat
shall be taken on a resolution to revoke the
voluntary dissolution proceedings. Such
resolution shall be adopted upon receiving
the affirmative vote of the holders of

. . . .

Revisor's Note

No substantive change is intended,
except as described in the Revisor's Notes to
Sections 21.501 and 21.364.

Revised Law

Sec. 21.504. RESPONSIBILITY FOR WINDING UP. If a
corporation determines or is required to wind up, the directors
of the corporation shall manage the process of winding up the
business or affairs of the corporation. (New.)

Revisor's Note

The Texas Business Corporation Act is
not clear as to who has the responsibility to
wind up the corporation's business or
affairs. Section 21.504 clarifies that the
board of directors has that responsibility.

[Sections 21.505-21.550 reserved for expansion]

SUBCHAPTER L. DERIVATIVE PROCEEDINGS

Revised Law

Sec. 21.551. DEFINITIONS. In this subchapter:

(1) "Derivative proceeding" means a civil suit in the
right of a domestic corporation or, to the extent provided by
Section 21.562, in the right of a foreign corporation.

(2) "Shareholder" includes a beneficial owner whose
shares are held in a voting trust or by a nominee on the
beneficial owner's behalf. (TBCA 5.14.A.)

Source Law

A. Certain Definitions. For purposes of this Article:

(1) "Derivative proceeding" means a civil suit in the right of a domestic corporation or, to the extent provided in Section K of this Article, in the right of a foreign corporation.

(2) "Shareholder" includes a beneficial owner whose shares are held in a voting trust or by a nominee on the beneficial owner's behalf.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.552. STANDING TO BRING PROCEEDING. A shareholder may not institute or maintain a derivative proceeding unless:

(1) the shareholder:

(A) was a shareholder of the corporation at the time of the act or omission complained of; or

(B) became a shareholder by operation of law from a person that was a shareholder at the time of the act or omission complained of; and

(2) the shareholder fairly and adequately represents the interests of the corporation in enforcing the right of the corporation. (TBCA 5.14.B.)

Source Law

B. Standing. A shareholder may not commence or maintain a derivative proceeding unless the shareholder:

(1) was a shareholder of the corporation at the time of the act or omission complained of or became a shareholder by operation of law from a person that was a shareholder at that time; and

(2) fairly and adequately represents the interests of the corporation in enforcing the right of the corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.553. DEMAND. (a) A shareholder may not institute a derivative proceeding until the 91st day after the date a written demand is filed with the corporation stating with particularity

the act, omission, or other matter that is the subject of the claim or challenge and requesting that the corporation take suitable action.

(b) The waiting period required by Subsection (a) before a derivative proceeding may be instituted is not required if:

(1) the shareholder has been previously notified that the demand has been rejected by the corporation;

(2) the corporation is suffering irreparable injury;
or

(3) irreparable injury to the corporation would result by waiting for the expiration of the 90-day period. (TBCA 5.14.C.)

Source Law

C. Demand. No shareholder may commence a derivative proceeding until:

(1) a written demand is filed with the corporation setting forth with particularity the act, omission, or other matter that is the subject of the claim or challenge and requesting that the corporation take suitable action; and

(2) 90 days have expired from the date the demand was made, unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation is being suffered or would result by waiting for the expiration of the 90-day period.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.554. DETERMINATION BY DIRECTORS OR INDEPENDENT PERSONS. (a) A determination of how to proceed on allegations made in a demand or petition relating to a derivative proceeding must be made by an affirmative vote of the majority of:

(1) the independent and disinterested directors of the corporation present at a meeting of the board of directors of the corporation at which interested directors are not present at the time of the vote if the independent and disinterested directors constitute a quorum of the board of directors;

(2) a committee consisting of two or more independent and disinterested directors appointed by an affirmative vote of the majority of one or more independent and disinterested directors present at a meeting of the board of directors, regardless of whether the independent and disinterested directors

constitute a quorum of the board of directors; or

(3) a panel of one or more independent and disinterested persons appointed by the court on a motion by the corporation listing the names of the persons to be appointed and stating that, to the best of the corporation's knowledge, the persons to be appointed are disinterested and qualified to make the determinations contemplated by Section 21.558.

(b) The court shall appoint a panel under Subsection (a)(3) if the court finds that the persons recommended by the corporation are independent and disinterested and are otherwise qualified with respect to expertise, experience, independent judgment, and other factors considered appropriate by the court under the circumstances to make the determinations. A person appointed by the court to a panel under this section may not be held liable to the corporation or the corporation's shareholders for an action taken or omission made by the person in that capacity, except for an act or omission constituting fraud or wilful misconduct. (TBCA 5.14.H.)

Source Law

H. Determination by Directors or Independent Persons. The determination described in Section F of this Article must be made by:

(1) a majority vote of independent and disinterested directors present at a meeting of the board of directors at which interested directors are not present (at the time of the vote) if the independent and disinterested directors constitute a quorum of the board of directors;

(2) a majority vote of a committee consisting of two or more independent and disinterested directors appointed by a majority vote of one or more independent and disinterested directors present at a meeting of the board of directors, whether or not the independent and disinterested directors so acting constitute a quorum of the board of directors; or

(3) a panel of one or more independent and disinterested persons appointed by the court on a motion by the corporation setting forth the names of the persons to be so appointed together with a statement that to the best of its knowledge the persons so proposed are disinterested persons and qualified to make the

determinations contemplated by Section F of this Article. Such panel shall be appointed if the court finds that such persons are independent and disinterested persons and are otherwise qualified in regard to expertise, experience, independent judgment, and other factors deemed appropriate by the court under the circumstances to make such determinations. Persons appointed by the court shall have no liability to the corporation or its shareholders for any action or omission taken by them in that capacity, absent fraud or wilful misconduct.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.555. STAY OF PROCEEDING. (a) If the domestic or foreign corporation that is the subject of a derivative proceeding commences an inquiry into the allegations made in a demand or petition and the person or group of persons described by Section 21.554 is conducting an active review of the allegations in good faith, the court shall stay a derivative proceeding until the review is completed and a determination is made by the person or group regarding what further action, if any, should be taken.

(b) To obtain a stay, the domestic or foreign corporation shall provide the court with a written statement agreeing to advise the court and the shareholder making the demand of the determination promptly on the completion of the review of the matter. A stay, on application, may be reviewed every 60 days for the continued necessity of the stay.

(c) If the review and determination made by the person or group is not completed before the 61st day after the stay is ordered by the court, the stay may be renewed for one or more additional 60-day periods if the domestic or foreign corporation provides the court and the shareholder with a written statement of the status of the review and the reasons why a continued extension of the stay is necessary. (TBCA 5.14.D(1).)

Source Law

(1) If the domestic or foreign corporation commences an inquiry into the allegations made in a demand or petition and the person or group described in Section H of this Article is conducting an active review of the allegations in good faith, the court shall stay a derivative proceeding until the

review is completed and a determination is made by the person or group as to what further action, if any, should be taken. To obtain a stay, the domestic or foreign corporation must provide the court with a written statement containing an undertaking to advise the court and the shareholder making the demand of the determination promptly on the completion of the review of the matter. A stay shall, on motion, be reviewed as to its continued necessity every 60 days thereafter. If the review and determination by the person or group described in Section H of this Article is not completed within 60 days, the stay may be renewed for one or more additional 60-day periods on the domestic or foreign corporation providing the court and the shareholder making the demand with a written statement of the status of the review and the reasons a continued extension of the stay is necessary.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.556. DISCOVERY. (a) If a domestic or foreign corporation proposes to dismiss a derivative proceeding under Section 21.558, discovery by a shareholder after the filing of the derivative proceeding in accordance with this subchapter shall be limited to:

(1) facts relating to whether the person or group of persons described by Section 21.558 is independent and disinterested;

(2) the good faith of the inquiry and review by the person or group; and

(3) the reasonableness of the procedures followed by the person or group in conducting the review.

(b) Discovery described by Subsection (a) may not be expanded to include a fact or substantive matter regarding the act, omission, or other matter that is the subject matter of the derivative proceeding. The scope of discovery may be expanded if the court determines after notice and hearing that a good faith review of the allegations for purposes of Section 21.558 has not been made by an independent and disinterested person or group in accordance with that section. (TBCA 5.14.D(2).)

Source Law

(2) If a domestic or foreign corporation proposes to dismiss a derivative proceeding pursuant to Section F of this Article, discovery by a shareholder following the filing of the derivative proceeding in accordance with the provisions of this Article shall be limited to facts relating to whether the person or group described in Section H of this Article is independent and disinterested, the good faith of the inquiry and review by such person or group, and the reasonableness of the procedures followed by such person or group in conducting its review and will not extend to any facts or substantive matters with respect to the act, omission, or other matter that is the subject matter of the action in the derivative proceeding. The scope of discovery may be expanded if the court determines after notice and hearing that a good faith review of the allegations for purposes of Section F of this Article has not been made by an independent and disinterested person or group in accordance with Section F of this Article.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.557. TOLLING OF STATUTE OF LIMITATIONS. A written demand filed with the corporation under Section 21.553 tolls the statute of limitations on the claim on which demand is made until the earlier of:

- (1) the 91st day after the date of the demand; or
- (2) the 31st day after the date the corporation advises the shareholder that the demand has been rejected or the review has been completed. (TBCA 5.14.E.)

Source Law

E. Tolling of the Statute of Limitations. A written demand filed with the corporation under Section C of this Article tolls the statute of limitations on the claim on which demand is made until the earlier of (1) 90 days or (2) 30 days after the corporation advises the shareholder that the demand has been rejected or the review has

been completed.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.558. DISMISSAL OF DERIVATIVE PROCEEDING. (a) A court shall dismiss a derivative proceeding on a motion by the corporation if the person or group of persons described by Section 21.554 determines in good faith, after conducting a reasonable inquiry and based on factors the person or group considers appropriate under the circumstances, that continuation of the derivative proceeding is not in the best interests of the corporation.

(b) In determining whether the requirements of Subsection (a) have been met, the burden of proof shall be on:

(1) the plaintiff shareholder if:

(A) the majority of the board of directors consists of independent and disinterested directors at the time the determination is made;

(B) the determination is made by a panel of one or more independent and disinterested persons appointed under Section 21.554(a)(3); or

(C) the corporation presents prima facie evidence that demonstrates that the directors appointed under Section 21.554(a)(2) are independent and disinterested; or

(2) the corporation in any other circumstance. (TBCA 5.14.F.)

Source Law

F. Dismissal of Derivative Proceeding. A court shall dismiss a derivative proceeding on a motion by the corporation if the person or group described in Section H of this Article determines in good faith, after conducting a reasonable inquiry and based on the factors as the person or group deems appropriate under the circumstances, that the continuation of the derivative proceeding is not in the best interests of the corporation. In determining whether the requirements of the previous sentence have been met, the burden of proof shall be on:

(1) the plaintiff shareholder, if a majority of the board of directors consists of independent and disinterested directors at the time the determination is made or if the determination is made by a panel of one or more independent and disinterested persons

appointed under Section H(3) of this Article; or

(2) the corporation, in all other circumstances; provided that if the corporation presents prima facie evidence that demonstrates that the directors appointed pursuant to Section H(2) of this Article are independent and disinterested, the burden of proof is on the plaintiff shareholder.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.559. PROCEEDING INSTITUTED AFTER DEMAND REJECTED. If a derivative proceeding is instituted after a demand is rejected, the petition must allege with particularity facts that establish that the rejection was not made in accordance with the requirements of Sections 21.554 and 21.558. (TBCA 5.14.G.)

Source Law

G. Commencement of Proceeding After Rejection of Demand. If a derivative proceeding is commenced after a demand is rejected, the petition must allege with particularity facts that establish that the rejection was not made in accordance with the requirements of Sections F and H of this Article.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.560. DISCONTINUANCE OR SETTLEMENT. (a) A derivative proceeding may not be discontinued or settled without court approval.

(b) The court shall direct that notice be given to the affected shareholders if the court determines that a proposed discontinuance or settlement may substantially affect the interests of other shareholders. (TBCA 5.14.I.)

Source Law

I. Discontinuance or Settlement. A derivative proceeding may not be discontinued or settled without the approval of the court. If the court determines that a proposed discontinuance or settlement may substantially affect the interest of other

shareholders, it shall direct that notice be given to the affected shareholders.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.561. PAYMENT OF EXPENSES. (a) In this section, "expenses" means reasonable expenses incurred by a party in a derivative proceeding, including:

- (1) attorney's fees;
- (2) costs in pursuing an investigation of the matter that was the subject of the derivative proceeding; or
- (3) expenses for which the domestic or foreign corporation or a corporate defendant may be required to indemnify another person.

(b) On termination of a derivative proceeding, the court may order:

(1) the domestic or foreign corporation to pay the expenses the plaintiff incurred in the proceeding if the court finds the proceeding has resulted in a substantial benefit to the domestic or foreign corporation;

(2) the plaintiff to pay the expenses the domestic or foreign corporation or other defendant incurred in investigating and defending the proceeding if the court finds the proceeding has been instituted or maintained without reasonable cause or for an improper purpose; or

(3) a party to pay the expenses incurred by another party relating to the filing of a pleading, motion, or other paper if the court finds the pleading, motion, or other paper:

(A) was not well grounded in fact after reasonable inquiry;

(B) was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; or

(C) was interposed for an improper purpose, such as to harass, cause unnecessary delay, or cause a needless increase in the cost of litigation. (TBCA 5.14.J.)

Source Law

J. Payment of Expenses. (1) On termination of a derivative proceeding, the court may order:

(a) the domestic or foreign corporation to pay the expenses of the plaintiff incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the domestic or foreign corporation;

(b) the plaintiff to pay the expenses of the domestic or foreign corporation or any defendant incurred in investigating and defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose; or

(c) a party to pay the expenses incurred by another party (including the domestic or foreign corporation) because of the filing of a pleading, motion, or other paper, if it finds that the pleading, motion, or other paper (i) was not well grounded in fact after reasonable inquiry, (ii) was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, or (iii) was interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) For purposes of this section, "expenses" mean reasonable expenses incurred in the defense of a derivative proceeding, including without limitation:

(a) attorney's fees;

(b) costs in pursuing an investigation of the matter that was the subject of the derivative proceeding; and

(c) expenses for which the domestic or foreign corporation or a corporate defendant may be required to indemnify another person.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.562. APPLICATION TO FOREIGN CORPORATIONS. (a) In a derivative proceeding brought in the right of a foreign corporation, the matters covered by this subchapter are governed by the laws of the jurisdiction of incorporation of the foreign corporation, except for Sections 21.555, 21.560, and 21.561, which are procedural provisions and do not relate to the internal affairs of the foreign corporation.

(b) In the case of matters relating to a foreign corporation under Section 21.554, a reference to a person or group of persons described by that section refers to a person or group entitled under the laws of the jurisdiction of incorporation of the foreign corporation to review and dispose of

a derivative proceeding. The standard of review of a decision made by the person or group to dismiss the derivative proceeding shall be governed by the laws of the jurisdiction of incorporation of the foreign corporation. (TBCA 5.14.K.)

Source Law

K. Application to Foreign Corporations. In any derivative proceeding brought in the right of a foreign corporation, the matters covered by this Article are governed by the laws of the jurisdiction of incorporation of the foreign corporation, except for Sections D, I, and J of this Article, which are procedural and not matters relating to the internal affairs of the foreign corporation. In the case of matters relating to a foreign corporation under Section D of this Article, references to a person or group described in Section H of this Article are to be deemed to refer to a person or group entitled under the laws of the jurisdiction of incorporation of the foreign corporation to review and dispose of a derivative proceeding, and the standard of review of a decision by the person or group to dismiss the derivative proceeding is to be governed by the laws of the jurisdiction of incorporation of the foreign corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.563. CLOSELY HELD CORPORATION. (a) In this section, "closely held corporation" means a corporation that has:

- (1) fewer than 35 shareholders; and
- (2) no shares listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national securities association.

(b) Subject to Subsection (c), Sections 21.552-21.559 do not apply to a closely held corporation.

(c) If justice requires:

- (1) a derivative proceeding brought by a shareholder of a closely held corporation may be treated by a court as a direct action brought by the shareholder for the shareholder's own benefit; and

- (2) a recovery in a direct or derivative proceeding by a shareholder may be paid directly to the plaintiff or to the corporation if necessary to protect the interests of creditors or

other shareholders of the corporation. (TBCA 5.14.L.)

Source Law

L. Closely Held Corporations. (1) The provisions of Sections B through H of this Article are not applicable to a closely held corporation. If justice requires:

(a) a derivative proceeding brought by a shareholder of a closely held corporation may be treated by a court as a direct action brought by the shareholder for his own benefit; and

(b) a recovery in a direct or derivative proceeding by a shareholder may be paid either directly to the plaintiff or to the corporation if necessary to protect the interests of creditors or other shareholders of the corporation.

(2) For purposes of this section, a "closely held corporation" means a corporation:

(a) with less than 35 shareholders; and

(b) that has no shares listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national securities association.

Revisor's Note

No substantive change is intended.

[Sections 21.564-21.600 reserved for expansion]

SUBCHAPTER M. AFFILIATED BUSINESS COMBINATIONS

Revised Law

Sec. 21.601. DEFINITIONS. In this subchapter:

(1) "Issuing public corporation" means a domestic corporation that has:

(A) 100 or more shareholders of record as shown by the share transfer records of the corporation;

(B) a class or series of the corporation's voting shares registered under the Securities Exchange Act of 1934 (15 U.S.C. Section 77b et seq.), as amended; or

(C) a class or series of the corporation's voting shares qualified for trading in a national market system.

(2) "Person" includes two or more persons acting as a partnership, limited partnership, syndicate, or other group under an agreement, arrangement, or understanding, regardless of whether in writing, to acquire, hold, vote, or dispose of a

corporation's shares.

(3) "Share acquisition date" means the date a person initially becomes an affiliated shareholder of an issuing public corporation.

(4) "Subsidiary" means a domestic or foreign corporation or other entity of which a majority of the outstanding voting shares are owned, directly or indirectly, by an issuing public corporation.

(5) "Voting share" means a share of capital stock of a corporation that entitles the holder of the share to vote generally in the election of directors. (TBCA 13.02.A(6), (7), (8), (9), (10).)

Source Law

(6) "Issuing public corporation" means a domestic corporation that has: (a) 100 or more shareholders, (b) any class or series of its voting shares registered under the Securities Exchange Act of 1934, as amended, or similar or successor statute, or (c) any class or series of its voting shares qualified for trading in a national market system. For the purposes of this definition of issuing public corporation, a shareholder is a shareholder of record as shown by the share transfer records of the corporation.

(7) "Person" means an individual, trust, domestic or foreign corporation or other entity, or a government, or a political subdivision, agency, or instrumentality of a government. If two or more persons act as a partnership, limited partnership, syndicate, or other group under an agreement, arrangement, or other understanding, whether or not in writing, to acquire, hold, vote, or dispose of shares of a corporation, all members of the partnership, limited partnership, syndicate, or other group are considered to be a person.

(8) "Share acquisition date" means the date that a person first becomes an affiliated shareholder of an issuing public corporation.

(9) "Subsidiary" means a domestic or foreign corporation or other entity of which a majority of the outstanding voting shares are owned, directly or indirectly, by an issuing public corporation.

(10) "Voting share" means a share of capital stock of a corporation entitled to vote generally in the election of directors.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.602. AFFILIATED SHAREHOLDER. (a) For purposes of this subchapter, a person, other than the issuing public corporation or a wholly owned subsidiary of the issuing public corporation, is an affiliated shareholder if the person:

(1) is the beneficial owner of 20 percent or more of the outstanding voting shares of the issuing public corporation; or

(2) during the preceding three-year period, was the beneficial owner of 20 percent or more of the outstanding voting shares of the issuing public corporation.

(b) To determine whether a person is an affiliated shareholder, the number of voting shares of the issuing public corporation considered outstanding includes shares considered beneficially owned by that person under Section 21.603, but does not include other unissued voting shares of the issuing public corporation that may be issuable under an agreement, arrangement, or understanding, or on exercise of conversion rights, warrants, or options. (TBCA 13.02.A(2).)

Source Law

(2) "Affiliated shareholder" means a person, other than the issuing public corporation or a wholly owned subsidiary of the issuing public corporation, that is the beneficial owner of 20 percent or more of the outstanding voting shares of the issuing public corporation or that, within the preceding three-year period, was the beneficial owner of 20 percent or more of the then outstanding voting shares of the issuing public corporation. For the purpose of determining whether a person is an affiliated shareholder, the number of voting shares of the issuing public corporation considered outstanding includes shares considered beneficially owned by that person under Subdivision (3) of this Article, but does not include other unissued voting shares of the issuing public corporation that may be issuable pursuant to an agreement, arrangement, or understanding, or on exercise

of conversion rights, warrants, or options,
or otherwise.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.603. BENEFICIAL OWNER OF SHARES OR SIMILAR SECURITIES. (a) For purposes of this chapter, a person is a beneficial owner of shares or similar securities if the person individually, or through an affiliate or associate, beneficially owns, directly or indirectly, shares or similar securities.

(b) A beneficial owner of shares or similar securities is entitled, individually or through an affiliate or associate, to:

(1) acquire shares or similar securities that may be exercised immediately or after the passage of a certain amount of time according to an oral or written agreement, arrangement, or understanding, or on the exercise of conversion rights, exchange rights, warrants, or options;

(2) vote the shares or similar securities according to an oral or written agreement, arrangement, or understanding; or

(3) subject to Subsection (c), acquire, hold or dispose of, or vote shares or similar securities with another person who individually, or through an affiliate or associate, beneficially owns, directly or indirectly, the shares or similar securities.

(c) A person is not considered a beneficial owner of shares or similar securities if:

(1) the shares or similar securities are:

(A) tendered under a tender or exchange offer made by the person or an affiliate or associate of the person before the tendered shares or securities are accepted for purchase or exchange; or

(B) subject to an agreement, arrangement, or understanding that expressly conditions the acquisition or purchase of shares or securities on the approval of the acquisition or purchase under Section 21.606 if the person has no direct or indirect rights of ownership or voting with respect to the shares or securities until the time the approval is obtained; or

(2) the agreement, arrangement, or understanding to vote the shares:

(A) arises solely from an immediately revocable proxy that authorizes the person named in the proxy to vote at a meeting of the shareholders that has been called when the proxy is delivered or at an adjournment of the meeting; and

(B) is not reportable on a Schedule 13D under the Securities Exchange Act of 1934 (15 U.S.C. Section 77b et seq.), as amended, or a comparable or successor report. (TBCA

Source Law

(3) "Beneficial owner" means a person who:

(a) individually, or with or through an affiliate or associate, beneficially owns shares or similar securities, directly or indirectly;

(b) individually, or with or through an affiliate or associate, has the right to:

(i) acquire shares or similar securities, whether the right may be exercised immediately or only after the passage of time, pursuant to an agreement, arrangement, or understanding, whether or not in writing, or on the exercise of conversion rights, exchange rights, warrants, or options, or otherwise, except that a person is not considered the beneficial owner of shares or similar securities (A) tendered pursuant to a tender or exchange offer made by the person or an affiliate or associate until the tendered shares or similar securities are accepted for purchase or exchange, or (B) that may be subject to an agreement, arrangement, or understanding that expressly conditions the acquisition or purchase on the approval of the acquisition or purchase pursuant to Article 13.03 of this Act as long as such person has no direct or indirect rights of ownership or voting with respect to such shares until such time that such approval is obtained, at which time such person shall be considered the beneficial owner of such shares; or

(ii) vote the shares or similar securities pursuant to an agreement, arrangement, or understanding, whether or not in writing, except that a person is not considered the beneficial owner of shares or similar securities for purposes of this subparagraph if the agreement, arrangement, or understanding to vote the shares: (A) arises solely from an immediately revocable proxy that authorizes the person named in the proxy to vote at a meeting of shareholders

that has been called when the proxy is delivered or at any adjournment of the meeting, and (B) is not then reportable on a Schedule 13D under the Securities Exchange Act of 1934 (15 U.S.C. Section 78a et seq.) or a comparable or successor report; or

(c) has an agreement, arrangement, or understanding, whether or not in writing, to acquire, hold, or dispose (except pursuant to an agreement, arrangement, or understanding permitted by Paragraph (b)(i) of this subdivision) or to vote (except under an immediately revocable proxy under Paragraph (b)(ii) of this subdivision) shares or similar securities with another person who beneficially owns, or whose affiliate or associate beneficially owns, directly or indirectly, the shares or similar securities.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.604. BUSINESS COMBINATION. A business combination is:

(1) a merger, share exchange, or conversion of an issuing public corporation or a subsidiary with:

(A) an affiliated shareholder;

(B) a foreign or domestic corporation or other entity that is, or after the merger, share exchange, or conversion would be, an affiliate or associate of the affiliated shareholder; or

(C) another domestic or foreign corporation or other entity, if the merger, share exchange, or conversion is caused by an affiliated shareholder, or an affiliate or associate of an affiliated shareholder, and as a result of the merger, share exchange, or conversion this subchapter does not apply to the surviving corporation or other entity;

(2) a sale, lease, exchange, mortgage, pledge, transfer, or other disposition, in one transaction or a series of transactions, including an allocation of assets under a merger, to or with the affiliated shareholder, or an affiliate or associate of the affiliated shareholder, of assets of the issuing public corporation or a subsidiary that:

(A) has an aggregate market value equal to 10 percent or more of the aggregate market value of all of the assets, determined on a consolidated basis, of the issuing public corporation;

(B) has an aggregate market value equal to 10 percent or more of the aggregate market value of all of the outstanding common stock of the issuing public corporation; or

(C) represents 10 percent or more of the earning power or net income, determined on a consolidated basis, of the issuing public corporation;

(3) the issuance or transfer by an issuing public corporation or a subsidiary to an affiliated shareholder or an affiliate or associate of the affiliated shareholder, in one transaction or a series of transactions, of shares of the issuing public corporation or a subsidiary, except by the exercise of warrants or rights to purchase shares of the issuing public corporation offered, or a share dividend paid, pro rata to all shareholders of the issuing public corporation after the affiliated shareholder's share acquisition date;

(4) the adoption of a plan or proposal for the liquidation or dissolution of an issuing public corporation proposed by or under any agreement, arrangement, or understanding, regardless of whether in writing, with an affiliated shareholder or an affiliate or associate of the affiliated shareholder;

(5) a reclassification of securities, including a reverse share split or a share split-up, share dividend, or other distribution of shares, a recapitalization of the issuing public corporation, a merger of the issuing public corporation with a subsidiary or pursuant to which the assets and liabilities of the issuing public corporation are allocated among two or more surviving or new domestic or foreign corporations or other entities, or any other transaction proposed by or under an agreement, arrangement, or understanding, regardless of whether in writing, with an affiliated shareholder or an affiliate or associate of the affiliated shareholder that has the effect, directly or indirectly, of increasing the proportionate ownership percentage of the outstanding shares of a class or series of voting shares or securities convertible into voting shares of the issuing public corporation that is beneficially owned by the affiliated shareholder or an affiliate or associate of the affiliated shareholder, except as a result of immaterial changes due to fractional share adjustments; or

(6) the direct or indirect receipt by an affiliated shareholder or an affiliate or associate of the affiliated shareholder of the benefit of a loan, advance, guarantee, pledge, or other financial assistance or a tax credit or other tax advantage provided by or through the issuing public corporation, except proportionately as a shareholder of the issuing public corporation. (TBCA 13.02.A(4).)

Source Law

(4) "Business combination" means:

(a) any merger, share exchange, or conversion of an issuing public corporation or a subsidiary with:

(i) an affiliated shareholder;

(ii) a foreign or domestic corporation or other entity that is, or after the merger, share exchange, or conversion would be, an affiliate or associate of the affiliated shareholder; or

(iii) another domestic or foreign corporation or other entity, if the merger, share exchange, or conversion is caused by an affiliated shareholder, or an affiliate or associate of an affiliated shareholder, and as a result of the merger, share exchange, or conversion this part does not apply to the surviving corporation or other entity;

(b) a sale, lease, exchange, mortgage, pledge, transfer, or other disposition, in one transaction or a series of transactions, including an allocation of assets pursuant to a merger, to or with the affiliated shareholder, or an affiliate or associate of the affiliated shareholder, of assets of the issuing public corporation or any subsidiary that:

(i) have an aggregate market value equal to 10 percent or more of the aggregate market value of all the assets, determined on a consolidated basis, of the issuing public corporation;

(ii) have an aggregate market value equal to 10 percent or more of the aggregate market value of all the outstanding common stock of the issuing public corporation; or

(iii) represent 10 percent or more of the earning power or net income, determined on a consolidated basis, of the issuing public corporation;

(c) the issuance or transfer by an issuing public corporation or a subsidiary to an affiliated shareholder or an

affiliate or associate of the affiliated shareholder, in one transaction or a series of transactions, of shares of the issuing public corporation or a subsidiary, except by the exercise of warrants or rights to purchase shares of the issuing public corporation offered, or a share dividend paid, pro rata to all shareholders of the issuing public corporation after the affiliated shareholder's share acquisition date;

(d) the adoption of a plan or proposal for the liquidation or dissolution of an issuing public corporation proposed by, or pursuant to any agreement, arrangement, or understanding, whether or not in writing, with an affiliated shareholder or an affiliate or associate of the affiliated shareholder;

(e) a reclassification of securities, including a reverse share split or a share split-up, share dividend, or other distribution of shares, a recapitalization of the issuing public corporation, a merger of the issuing public corporation with a subsidiary or pursuant to which the assets and liabilities of the issuing public corporation are allocated among two or more surviving or new domestic or foreign corporations or other entities, or any other transaction, whether or not with, into, or otherwise involving the affiliated shareholder, proposed by, or pursuant to an agreement, arrangement, or understanding, whether or not in writing, with an affiliated shareholder or an affiliate or associate of the affiliated shareholder that has the effect, directly or indirectly, of increasing the proportionate ownership percentage of the outstanding shares of a class or series of voting shares or securities convertible into voting shares of the issuing public corporation that is beneficially owned by the affiliated shareholder or an affiliate or associate of the affiliated shareholder, except as a result of immaterial changes due to fractional share adjustments; or

(f) the direct or indirect

receipt by an affiliated shareholder or an affiliate or associate of the affiliated shareholder of the benefit of a loan, advance, guarantee, pledge, or other financial assistance or a tax credit or other tax advantage provided by or through the issuing public corporation, except proportionately as a shareholder of the issuing public corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.605. CONTROL. (a) For purposes of this subchapter, a person has control of another person if the person has possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the other person, through the ownership of equity securities, by contract, or in another manner.

(b) A person's beneficial ownership of 10 percent or more of a person's outstanding voting shares or similar interests creates a presumption that the person has control of the other person, but a person is not considered to have control of another person who holds the voting shares or similar interests in good faith and not to circumvent this part, as an agent, bank, broker, nominee, custodian, or trustee for one or more beneficial owners who do not individually or as a group have control of the person. (TBCA 13.02.A(5).)

Source Law

(5) "Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of equity securities, by contract, or otherwise. A person's beneficial ownership of 10 percent or more of a person's outstanding voting shares or similar interests creates a presumption that the person has control of such other person, but a person is not considered to have control of another person if the person holds such voting shares or similar interests in good faith and not for the purpose of circumventing this part, as an agent, bank, broker, nominee, custodian, or trustee for one or more beneficial owners who do not individually or as a group have control of

the person.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.606. THREE-YEAR MORATORIUM ON CERTAIN BUSINESS COMBINATIONS. An issuing public corporation may not, directly or indirectly, enter into or engage in a business combination with an affiliated shareholder, or any affiliate or associate of the affiliated shareholder, during the three-year period immediately following the affiliated shareholder's share acquisition date unless:

(1) the business combination or the purchase or acquisition of shares made by the affiliated shareholder on the affiliated shareholder's share acquisition date is approved by the board of directors of the issuing public corporation before the affiliated shareholder's share acquisition date; or

(2) the business combination is approved, by the affirmative vote of the holders of at least two-thirds of the outstanding voting shares of the issuing public corporation not beneficially owned by the affiliated shareholder or an affiliate or associate of the affiliated shareholder, at a meeting of shareholders called for that purpose not less than six months after the affiliated shareholder's share acquisition date. Approval may not be by written consent. (TBCA 13.03.)

Source Law

13.03.A. An issuing public corporation shall not, directly or indirectly, enter into or engage in a business combination with an affiliated shareholder, or any affiliate or associate of the affiliated shareholder, during the three-year period immediately following the affiliated shareholder's share acquisition date unless:

(1) the business combination or the purchase or acquisition of shares made by the affiliated shareholder on the affiliated shareholder's share acquisition date is approved by the board of directors of the issuing public corporation before the affiliated shareholder's share acquisition date; or

(2) the business combination is approved, by the affirmative vote of the holders of at least two-thirds of the outstanding voting shares of the issuing public corporation not beneficially owned by

the affiliated shareholder or an affiliate or associate of the affiliated shareholder, at a meeting of shareholders and not by written consent, duly called for that purpose not less than six months after the affiliated shareholder's share acquisition date.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.607. APPLICATION OF MORATORIUM. Section 21.606 does not apply to:

(1) a business combination of an issuing public corporation if:

(A) the original articles of incorporation or original bylaws of the corporation contain a provision expressly electing not to be governed by this subchapter;

(B) before December 31, 1997, the corporation adopted an amendment to the articles of incorporation or bylaws of the corporation expressly electing not to be governed by this subchapter; or

(C) after December 31, 1997, the corporation adopts an amendment to the articles of incorporation or bylaws of the corporation, approved by the affirmative vote of the holders, other than an affiliated shareholder or an affiliate or associate of the affiliated shareholder, of at least two-thirds of the outstanding voting shares of the issuing public corporation, expressly electing not to be governed by this subchapter, except that the amendment to the articles of incorporation or bylaws takes effect 18 months after the date of the vote and does not apply to a business combination of the issuing public corporation with an affiliated shareholder whose share acquisition date is on or before the effective date of the amendment;

(2) a business combination of an issuing public corporation with an affiliated shareholder who became an affiliated shareholder inadvertently, if the affiliated shareholder:

(A) as soon as practicable divests itself of a sufficient number of the voting shares of the issuing public corporation so that the affiliated shareholder no longer is the beneficial owner, directly or indirectly, of 20 percent or more of the outstanding voting shares of the issuing public corporation; and

(B) would not at any time within the three-year period preceding the announcement date of the business combination have been an affiliated shareholder except for the inadvertent acquisition;

(3) a business combination with an affiliated

shareholder who was the beneficial owner of 20 percent or more of the outstanding voting shares of the issuing public corporation on December 31, 1996, and continuously until the announcement date of the business combination;

(4) a business combination with an affiliated shareholder who became an affiliated shareholder through a transfer of shares of the issuing public corporation by will or intestate succession and continuously was an affiliated shareholder until the announcement date of the business combination; or

(5) a business combination of an issuing public corporation with a domestic wholly owned subsidiary if the domestic subsidiary is not an affiliate or associate of the affiliated shareholder for a reason other than the affiliated shareholder's beneficial ownership of voting shares in the issuing public corporation. (TBCA 13.04.)

Source Law

13.04.A. Article 13.03 of this Act does not apply to:

(1) a business combination of an issuing public corporation:

(a) the original articles of incorporation or original bylaws of which contain a provision expressly electing not to be governed by this part;

(b) that adopts an amendment to its articles of incorporation or bylaws before December 31, 1997, expressly electing not to be governed by this part; or

(c) that after December 31, 1997, adopts an amendment to its articles of incorporation or bylaws, approved by the affirmative vote of the shareholders, other than affiliated shareholders and their affiliates and associates, of at least two-thirds of the outstanding voting shares of the issuing public corporation, expressly electing not to be governed by this part, except that the amendment to the articles of incorporation or bylaws takes effect 18 months after the date of the vote and does not apply to a business combination of the issuing public corporation with an affiliated shareholder whose share acquisition date is on or before the effective date of the amendment;

(2) a business combination of an

issuing public corporation with an affiliated shareholder that became an affiliated shareholder inadvertently, if the affiliated shareholder:

(a) as soon as practicable divests itself of a sufficient number of the voting shares of the issuing public corporation so that it no longer is the beneficial owner, directly or indirectly, of 20 percent or more of the outstanding voting shares of the issuing public corporation; and

(b) would not at any time within the three-year period preceding the announcement date of the business combination have been an affiliated shareholder but for the inadvertent acquisition;

(3) a business combination with an affiliated shareholder that was the beneficial owner of 20 percent or more of the outstanding voting shares of the issuing public corporation on December 31, 1996, and continuously until the announcement date of the business combination;

(4) a business combination with an affiliated shareholder who became an affiliated shareholder through a transfer of shares of the issuing public corporation by will or intestate succession and continuously was such an affiliated shareholder until the announcement date of the business combination; or

(5) a business combination of an issuing public corporation with a domestic wholly owned subsidiary if the domestic subsidiary is not an affiliate or associate of the affiliated shareholder other than by reason of the affiliated shareholder's beneficial ownership of voting shares in the issuing public corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.608. EFFECT ON OTHER ACTIONS. (a) This subchapter does not affect, directly or indirectly, the validity of another action by the board of directors of an issuing public corporation.

(b) This subchapter does not preclude the board of

directors of an issuing public corporation from taking other action in accordance with law.

(c) The board of directors of an issuing public corporation does not incur liability for an election made or not made under this subchapter. (TBCA 13.05.)

Source Law

13.05.A. This part does not affect, directly or indirectly, the validity of another action by the board of directors of an issuing public corporation, nor does it preclude the board of directors from taking other action in accordance with law, nor does the board of directors incur liability for elections made or not made under this part.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.609. CONFLICTING PROVISIONS. If this subchapter conflicts with another provision of this code, this subchapter controls. (TBCA 13.07.A.)

Source Law

A. If a provision of this part conflicts with another provision of this Act, the provision of this part controls.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.610. CHANGE IN VOTING REQUIREMENTS. The affirmative vote or concurrence of shareholders required for approval of an action that is required to be submitted to a vote of the shareholders under this subchapter may be increased but not decreased under Section 21.365. (TBCA 13.07.B.)

Source Law

B. The affirmative vote or concurrence of shareholders required for approval of an action required or permitted to be submitted for shareholder vote may be increased, but not decreased, under Article 2.28 of this Act.

Revisor's Note

No substantive change is intended.

[Sections 21.611-21.650 reserved for expansion]

SUBCHAPTER N. PROVISIONS RELATING TO INVESTMENT COMPANIES

Revised Law

Sec. 21.651. DEFINITION. In this subchapter, "investment company" means a corporation registered as an open-end company under the Investment Company Act. (TBCA 2.12.C(1) (part).)

Source Law

(1) The board of directors of a corporation registered as an open-end company under the Investment Company Act may:

. . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.652. ESTABLISHING CLASS OR SERIES OF SHARES; CHANGE IN NUMBER OF SHARES. (a) In addition to the actions the board may undertake under Subchapters D, E, and F, the board of directors of an investment company may:

(1) establish classes of shares and series of unissued shares of a class by setting and determining the designations, preferences, limitations, and relative rights, including voting rights, of the shares of the class or series established under this subdivision to the same extent that the designations, preferences, limitations, and relative rights could be stated if fully stated in the certificate of formation; and

(2) increase or decrease the aggregate number of shares or the number of shares of, or delete from the investment company's certificate of formation, a class or series of shares the corporation has authority to issue, unless a provision has been included in the certificate of formation of the corporation after September 1, 1993, expressly prohibiting those actions by the board of directors.

(b) The board of directors of an investment company may not:

(1) decrease the number of shares in a class or series to a number that is less than the number of shares of that class or series that are outstanding at the time; or

(2) delete from the certificate of formation a reference to a class or series that has shares outstanding at the time.

(c) To establish a class or series under this section, the board of directors must adopt a resolution stating the designation of the class or series and setting and determining the designations, preferences, limitations, and relative rights, including voting rights, of the class or series.

(d) To increase or decrease the number of shares of a class or series of shares or to delete from the certificate of

formation a reference to a class or series of shares, the board of directors of an investment company must adopt a resolution setting and determining the new number of shares of each class or series in which the number of shares is increased or decreased or deleting the class or series and any reference to the class or series from the certificate of formation. The shares of a series removed from the certificate of formation shall resume the status of authorized but unissued shares of the class of shares from which the series was established unless otherwise provided by the resolution or the certificate of formation of the investment company. (TBCA 2.12.C(1).)

Source Law

(1) The board of directors of a corporation registered as an open-end company under the Investment Company Act may:

(a) establish classes of shares and series of unissued shares of any class by fixing and determining the designations, preferences, limitations, and relative rights, including voting rights, of the shares of any class or series so established to the same extent that the designations, preferences, limitations, and relative rights could be stated if fully set forth in the articles of incorporation; and

(b) increase or decrease the aggregate number of shares or the number of shares of, or eliminate and remove from the articles of incorporation, a class or series of shares that the corporation has authority to issue, unless a provision has been included in the articles of incorporation of the corporation after September 1, 1993, expressly prohibiting those actions by the board of directors. The board of directors may not:

(i) decrease the number of shares within a class or series to less than the number of shares of that class or series that are then outstanding; or

(ii) eliminate or remove from the articles of incorporation any reference to any class or series of which shares are then outstanding.

To establish a class or series, the board of directors shall adopt a resolution setting forth the designation of the class or

series and fixing and determining the designations, preferences, limitations, and relative rights, including voting rights, of the class or series. In order to increase or decrease the number of shares of, or eliminate and remove from the articles of incorporation any reference to, a class or series of shares, the board of directors shall adopt a resolution fixing and determining the new number of shares of each class or series in which the number of shares is increased or decreased or eliminating the class or series and removing references to the class or series from the articles of incorporation. The shares of any eliminated series shall resume the status of authorized but unissued shares of the class of shares from which the series was established unless otherwise provided in the resolution or the articles of incorporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.653. REQUIRED STATEMENT RELATING TO SHARES. (a) Before the first issuance of shares of a class or series established or increased or decreased by resolution adopted by the board of directors of an investment company under Section 21.652, and to delete from the investment company's certificate of formation a class or series of shares and all references to the class or series contained in the certificate of formation, the investment company shall file with the secretary of state a statement that contains:

- (1) the name of the investment company;
- (2) if the statement relates to the establishment of a class or series of shares, a copy of the resolution establishing and designating the class or series or establishing and designating the class or series and setting and determining the preferences, limitations, and relative rights of the class or series;
- (3) if the statement relates to an increase or decrease in the number of shares of a class or series, a copy of the resolution setting and determining the new number of shares of each class or series in which the number of shares is increased or decreased;
- (4) if the statement relates to the deletion of a class or series of shares and all references to the class or series from the certificate of formation, a copy of the

resolution deleting the class or series and all references to the class or series from the certificate of formation;

(5) the date of adoption of the resolution; and

(6) a statement that the resolution was adopted by all necessary action on the part of the investment company.

(b) After the statement described by Subsection (a) is filed, a resolution adopted under Section 21.652 becomes an amendment of the certificate of formation. An amendment of the certificate of formation described under this section is not subject to the procedure to amend the certificate of formation contained in Subchapter B. (TBCA 2.12.C(2), (4).)

Source Law

(2) Before the first issuance of any shares of a class or series established or increased or decreased by resolution adopted by the board of directors under Subsection (1) of this section, and in order to eliminate from the articles of incorporation a class or series of shares and all references to the class or series contained in the articles, the corporation shall file with the Secretary of State a statement setting forth:

(a) the name of the corporation;

(b) if the statement relates to the establishment of a class or series of shares, a copy of the resolution establishing and designating the class or series and fixing and determining the preferences, limitations, and relative rights of the class or series;

(c) if the statement relates to an increase or decrease in the number of shares of any class or series, a copy of the resolution fixing and determining the new number of shares of each class or series in which the number of shares is increased or decreased;

(d) if the statement relates to the elimination of a class or series of shares and to the removal of all references to the class or series from the articles of incorporation, a copy of the resolution eliminating the class or series and removing all references to the class or series from the articles of incorporation;

(e) the date of adoption of the resolution; and

(f) that the resolution was duly adopted by all necessary action on the part of the corporation.

. . . .

(4) On the filing of a statement by the Secretary of State, the resolution establishing and designating the class or series and fixing and determining the preferences, limitations, and relative rights of the class or series, the resolution fixing the new number of shares of each class or series in which the number of shares is increased or decreased, or the resolution eliminating a class or series and all references to the class or series from the articles of incorporation, as appropriate, becomes an amendment of the articles of incorporation. An amendment of the articles of incorporation effected as provided by this Article is not subject to the procedure to amend the articles contained in Article 4.02 of this Act.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.654. TERM OF OFFICE OF DIRECTORS. Unless removed in accordance with the certificate of formation or bylaws of the investment company, a director of an investment company shall serve as director for the term for which the director is elected and holds office until a successor is elected and qualifies.

(TBCA 2.32.D.)

Source Law

D. Notwithstanding Section B of this Article, a director of a corporation registered under the Investment Company Act, unless removed in accordance with the provisions of the articles of incorporation or bylaws, holds office for the term for which the director is elected and until the director's successor has been elected and qualified.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.655. MEETINGS OF SHAREHOLDERS. (a) If provided by the certificate of formation or bylaws of an investment company, the investment company is not required to hold an annual meeting of shareholders or elect directors in a year in which an election of directors is not required under the Investment Company Act.

(b) If an investment company is required to hold a meeting of shareholders to elect directors under the Investment Company Act, the meeting shall be designated as the annual meeting of shareholders for that year. (TBCA 2.24.D.)

Source Law

D. If the articles of incorporation or bylaws of a corporation registered under the Investment Company Act so provide, the corporation is not required to hold an annual meeting of shareholders or elect directors in any year that the election of directors is not required to be acted on under the Investment Company Act. If the corporation is required by the Investment Company Act to hold a meeting of shareholders to elect directors, the meeting shall be designated as the annual meeting of shareholders for that year.

Revisor's Note

No substantive change is intended.

[Sections 21.656-21.700 reserved for expansion]

SUBCHAPTER O. CLOSE CORPORATION

Revised Law

Sec. 21.701. DEFINITIONS. In this subchapter:

(1) "Close corporation" means a domestic corporation formed under this subchapter.

(2) "Close corporation provision" means a provision in the certificate of formation of a close corporation or in a shareholders' agreement of a close corporation.

(3) "Ordinary corporation" means a domestic corporation that is not a close corporation.

(4) "Shareholders' agreement" means a written agreement regulating an aspect of the business and affairs of or the relationship among the shareholders of a close corporation that has been executed under this subchapter. (TBCA 12.02.A.)

Source Law

A. In General. In this part, unless the context otherwise requires:

(1) "Close corporation" means a

domestic corporation formed in conformance with the requirements of this part.

(2) "Ordinary corporation" means a domestic corporation that is not a close corporation.

(3) "Shareholders' agreement" means a written agreement regulating any aspect of the business and affairs of a close corporation or the relations among its shareholders that has been executed in conformance with Article 12.33 of this Act.

(4) "Close corporation provision" means a provision in the articles of incorporation of a close corporation or in a shareholders' agreement.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.702. APPLICABILITY OF SUBCHAPTER. (a) This subchapter applies only to a close corporation.

(b) This chapter applies to a close corporation to the extent not inconsistent with this subchapter. (TBCA 12.03.)

Source Law

12.03.A. Part Twelve. This part applies only to a close corporation.

B. Other Parts. To the extent not inconsistent with this part, all other parts of this Act apply to a close corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.703. FORMATION OF CLOSE CORPORATION. A close corporation shall be formed in accordance with Chapter 3. (TBCA 12.12.)

Source Law

12.12.A. In General. A close corporation shall be formed in conformance with Part Three and Article 12.11 of this Act.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.704. BYLAWS OF CLOSE CORPORATION. (a) A close

corporation does not need to adopt bylaws if provisions required by law to be contained in the bylaws are contained in the certificate of formation or a shareholders' agreement.

(b) A close corporation that does not have bylaws when it terminates its status as a close corporation under Section 21.708 shall immediately adopt bylaws that comply with Section 21.057. (TBCA 12.15.)

Source Law

12.15.A. A close corporation need not adopt bylaws if provisions required by law to be contained in the bylaws are contained in either the articles of incorporation or a shareholders' agreement.

B. If a close corporation does not have bylaws when it terminates its status as a close corporation under Article 12.21 of this Act, the corporation shall immediately adopt bylaws in conformance with Article 2.23 of this Act.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.705. ADOPTION OF AMENDMENT FOR CLOSE CORPORATION STATUS. (a) An ordinary corporation may become a close corporation by amending its certificate of formation in accordance with Chapter 3 to conform with Section 3.008.

(b) An amendment adopting close corporation status must be approved by the affirmative vote of the holders of all of the outstanding shares of each class established by the close corporation, regardless of whether a class is entitled to vote on the amendment by the certificate of formation of the ordinary corporation. (TBCA 12.13.A.)

Source Law

A. By Amendment of Articles of Incorporation. An ordinary corporation may become a close corporation by amending its articles of incorporation in conformance with Part Four and Article 12.11 of this Act. An amendment adopting close corporation status must be approved by the affirmative vote of the holders of all the outstanding shares of each class, whether or not entitled to vote on the amendment by the articles of incorporation of the ordinary corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.706. ADOPTION OF CLOSE CORPORATION STATUS THROUGH MERGER, EXCHANGE, OR CONVERSION. (a) A surviving or new corporation resulting from a merger or conversion or a corporation that acquires a corporation under an exchange under Chapter 10 may become a close corporation if, as part of the plan of merger, exchange, or conversion, the certificate of formation conforms with Section 3.008.

(b) A plan of merger, exchange, or conversion adopting close corporation status must be approved by the affirmative vote of the holders of all of the outstanding ownership or membership interests, and of each class or series of ownership or membership interests, of each entity or non-code organization that is party to the merger, exchange, or conversion, regardless of whether a class or series of ownership or membership interests is entitled to vote on the plan by the certificate of formation of the corporation. (TBCA 12.13.B.)

Source Law

B. Through Merger, Conversion, or Share Exchange. A surviving or new corporation resulting from a merger, a corporation incorporated as part of a conversion, or a corporation that acquires a corporation pursuant to a share exchange in conformance with Part Five of this Act may become a close corporation if as part of the plan of merger, conversion, or exchange its articles of incorporation conform with Article 12.11 of this Act. Any plan of merger, conversion, or exchange adopting close corporation status must be approved by the affirmative vote of the holders of all the outstanding shares, and of each class or series of shares, of each corporation that is party to the merger, conversion, or share exchange, whether or not entitled to vote on the plan by the articles of incorporation of the corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.707. EXISTING CLOSE CORPORATION. (a) This section applies to an existing corporation that elected to become a close corporation before the effective date of this code and has not terminated that status.

(b) A close corporation existing before the effective date of this code is considered to be a close corporation under this code.

(c) A provision in the articles of incorporation of a close corporation authorized under former law is valid and enforceable if the corporation's status as a close corporation has not been terminated.

(d) An agreement among the shareholders of a close corporation in conformance with former law and Sections 21.714-21.725 before the effective date of this code is considered to be a shareholders' agreement.

(e) A certificate representing the shares issued or delivered by the close corporation after the effective date of this code, whether in connection with the original issue of shares or a transfer of shares, must conform with Section 21.732. (TBCA 12.14.)

Source Law

12.14.A. In General. If an existing corporation that elected to become a close corporation in conformance with former Article 2.30-1 of this Act has not terminated that status before the effective date of this part:

(1) the corporation is considered to be a close corporation under this part;

(2) a provision in its articles of incorporation authorized by Section G or H of former Article 2.30-1 of this Act or by former Article 2.30-5 of this Act continues to be valid and enforceable so long as its status as a close corporation has not been terminated;

(3) an agreement among its shareholders in conformance with former Article 2.30-2 of this Act is considered to be a shareholders' agreement, if the agreement conforms with Articles 12.32 through 12.37 of this Act; and

(4) any certificate representing its shares issued or delivered after the effective date of this part, whether in connection with an original issue of shares, a transfer of shares, or otherwise, must conform with Article 12.39 of this Act.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.708. TERMINATION OF CLOSE CORPORATION STATUS. A close corporation may terminate its status as a close corporation by:

(1) filing a statement terminating close corporation status under Section 21.709;

(2) amending the close corporation's certificate of formation under Chapter 3 by deleting from the certificate of formation the statement that it is a close corporation;

(3) engaging in a merger, interest exchange, or conversion under Chapter 10, unless the plan of merger, exchange, or conversion provides that the surviving or new corporation will continue as or become a close corporation and the plan has been approved by the affirmative vote or consent of the holders of all of the outstanding shares, and of each class and series of shares, of the close corporation, regardless of whether a class or series of shares is entitled to vote on the plan by the certificate of formation; or

(4) instituting a judicial proceeding to enforce a close corporation provision providing for the termination. (TBCA 12.21.)

Source Law

12.21.A. In General. A close corporation terminates its status as a close corporation:

(1) on filing a statement of termination in conformance with Article 12.22 of this Act;

(2) by amending its articles of incorporation in conformance with Part Four of this Act to delete from its articles the statement that it is a close corporation;

(3) through a merger, conversion, or share exchange in conformance with Part Five of this Act unless the plan of merger, conversion, or exchange provides that the surviving or new corporation will continue as or become a close corporation and the plan has been approved by the affirmative vote or consent of the holders of all the outstanding shares, and of each class and series of shares, of the close corporation, whether or not entitled to vote on the plan by the articles of incorporation; or

(4) when termination is decreed in a judicial proceeding to enforce a close corporation provision providing for the

termination.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.709. STATEMENT TERMINATING CLOSE CORPORATION STATUS; FILING; NOTICE. (a) If a close corporation provision specifies a time or event requiring the termination of close corporation status, regardless of whether the provision is identifiable by a person dealing with the close corporation, the termination of the close corporation status takes effect on the occurrence of the specified time or event and the filing of a statement terminating close corporation status under this section.

(b) Promptly after the time or occurrence of an event requiring termination of close corporation status, a statement terminating close corporation status shall be signed by an officer on behalf of the close corporation. A copy of the applicable close corporation provision must be included in or attached to the statement. The statement and any attachment shall be filed with the secretary of state in accordance with Chapter 4.

(c) The statement terminating close corporation status must contain:

- (1) the name of the corporation;
- (2) a statement that the corporation has terminated its status as a close corporation in accordance with the included or attached close corporation provision; and
- (3) the time or event that caused the termination and, in the case of an event, the approximate date of the event.

(d) After a statement terminating close corporation status has been filed under this section, the certificate of formation of the close corporation is considered to be amended to delete from the certificate the statement that the corporation is a close corporation, and the corporation's status as a close corporation is terminated.

(e) The corporation shall personally deliver or mail a copy of the statement to each shareholder of the corporation. A copy of the statement is considered to have been delivered by mail under this section when the copy is deposited in the United States mail, with postage prepaid, addressed to the shareholder at the shareholder's address as it appears on the share transfer records of the corporation. The failure to deliver the copy of the statement does not affect the validity of the termination. (TBCA 12.22.A, B, D, E.)

Source Law

A. In General. If a close corporation

provision specifies a time or event, whether or not identifiable by persons dealing with the close corporation, that will terminate close corporation status, the termination becomes effective on the occurrence of the specified time or event and the filing of a statement of termination of close corporation status in conformance with this article.

B. Execution, Delivery and Form.

Promptly after the time or event specified in a close corporation provision for termination of close corporation status has occurred, a statement of termination of close corporation status shall be signed on behalf of the close corporation by an officer. A copy of the applicable close corporation provision must be included in or attached to the statement. The original and a copy of the statement and the inclusion or attachment shall be delivered to the Secretary of State. The statement must set forth:

(1) the name of the corporation;

(2) a statement that the corporation has terminated its status as a close corporation in accordance with the included or attached close corporation provision; and

(3) the time or event that caused the termination and, in the case of an event, the approximate date of the event.

. . .

D. Effect of Filing. On the filing of the statement of termination of close corporation status, the articles of incorporation of the close corporation are considered to be amended to delete from the articles the statement that it is a close corporation and the corporation's status as a close corporation terminates.

E. Notice to Shareholders. On receipt of the filed copy of the statement of termination from the Secretary of State as provided by Section C of this article, the corporation shall deliver a copy of the statement to each shareholder of the corporation, either personally or by mail. If mailed, the copy is considered to be delivered when deposited in the United States

mail, postage prepaid, addressed to the shareholder at his address as it appears on the stock transfer books of the corporation. Failure to deliver the notice does not affect the validity of termination of close corporation status.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.710. EFFECT OF TERMINATION OF CLOSE CORPORATION STATUS. (a) A close corporation that terminates its status as a close corporation and becomes an ordinary corporation is subject to this chapter as if the corporation had not elected close corporation status under this subchapter.

(b) The effect of termination of close corporation status on a shareholders' agreement is governed by Section 21.724.

(c) When the termination of close corporation status takes effect, if the close corporation's business and affairs have been managed by an entity other than a board of directors as provided by Section 21.725, governance by a board of directors is instituted or reinstated:

(1) if provided by a shareholders' agreement, in the manner stated in the agreement or by the persons named in the agreement to serve as the interim board of directors; or

(2) if each party to a shareholders' agreement agrees to elect a board of directors at a shareholders' meeting. (TBCA 12.23.A, B, C.)

Source Law

A. In General. A close corporation that terminates its status as a close corporation and becomes an ordinary corporation is subject to the provisions of this Act as if it had not elected close corporation status under this part.

B. Effect on Shareholders' Agreement. The effect of termination of close corporation status on a shareholders' agreement is governed by Section E, Article 12.36 of this Act.

C. Reinstatement of Governance by Board of Directors. If, at the time termination of close corporation status has become effective, the close corporation's business and affairs have been managed other than by a board of directors, as permitted by Article 12.31 of this Act, governance by a board of

directors is instituted or reinstated:

(1) if a shareholders' agreement so provides, in the manner stated therein or by the persons named in the agreement to serve as the interim board of directors; or

(2) regardless of whether or not a shareholders' agreement contains a governing provision if all the parties to the agreement so agree, by a shareholders' meeting, to elect a board of directors.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.711. SHAREHOLDERS' MEETING TO ELECT DIRECTORS. A shareholders' meeting required by Section 21.710(c)(2) shall be promptly called after the termination of close corporation status takes effect. If a meeting is not called before the 31st day after the date the termination takes effect, a shareholder may call a shareholders' meeting on the provision of notice required by Section 21.353, regardless of whether the shareholder is entitled to call a shareholders' meeting or vote at the meeting. At the meeting, the shareholders shall elect the number of directors specified in the certificate of formation or bylaws of the corporation or, in the absence of any specification, three directors. (TBCA 12.23.D.)

Source Law

D. Shareholders' Meeting. A shareholders' meeting required by Section C of this article shall be promptly called after termination of close corporation status has become effective. If a meeting is not called before the 31st day after the day on which termination becomes effective, any shareholder, whether or not entitled to call a shareholders' meeting or vote at such a meeting, has the power to call the meeting on the notice required by Article 2.25 of this Act. At the meeting there shall be elected the number of directors specified in the articles of incorporation or bylaws, or in the absence of such a specification, three directors.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.712. TERM OF OFFICE OF DIRECTORS. A director succeeding to the management of the corporation under Section 21.710(c) shall have a term of office as set forth in Section 21.408. Until a board of directors is elected, the shareholders of the corporation shall act as the corporation's board of directors, and the business and affairs of the corporation shall be conducted under Section 21.726. (TBCA 12.23.E.)

Source Law

E. Term of Service. The directors succeeding to the management of the corporation as provided in Section C of this article shall serve until the next annual meeting of shareholders and until their successors shall have been elected and qualified. Until directors are elected, the shareholders of the corporation shall act as the board of directors and the business and affairs of the corporation shall be conducted in conformance with Article 12.37 of this Act.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.713. MANAGEMENT. A close corporation shall be managed:

- (1) by a board of directors in the same manner an ordinary corporation would be managed under this chapter; or
- (2) in the manner provided by the close corporation's certificate of formation or by a shareholders' agreement of the close corporation. (TBCA 12.31.)

Source Law

12.31.A. Management. A close corporation shall be managed:

- (1) by a board of directors in the same manner an ordinary corporation is managed by its board of directors under this Act; or
- (2) in the manner provided for in its articles of incorporation or in a shareholders' agreement.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.714. SHAREHOLDERS' AGREEMENT. (a) The shareholders of a close corporation may enter into one or more shareholders' agreements.

(b) The business and affairs of a close corporation or the relationships among the shareholders that may be regulated by a shareholders' agreement include:

(1) the management of the business and affairs of the close corporation by its shareholders, with or without a board of directors;

(2) the management of the business and affairs of the close corporation wholly or partly by one or more of its shareholders or other persons;

(3) buy-sell, first option, first refusal, or similar arrangements with respect to the close corporation's shares or other securities, and restrictions on the transfer of the shares or other securities, including more restrictions than those permitted by Section 21.211;

(4) the declaration and payment of dividends or other distributions in amounts authorized by Subchapter G, regardless of whether the distribution is in proportion to ownership of shares;

(5) the manner in which profits or losses shall be apportioned;

(6) restrictions placed on the rights of a transferee or assignee of shares to participate in the management or administration of the close corporation's business and affairs during the term of the shareholders' agreement;

(7) the right of one or more shareholders to cause the winding up and termination of the close corporation at will or on the occurrence of a specified event or contingency, in which case the winding up and termination of the close corporation shall proceed as if all of the shareholders of the close corporation had consented in writing to winding up and termination as provided by Chapter 11;

(8) the exercise or division of voting power either in general or with regard to specified matters by or among the shareholders of the close corporation or other persons, including:

(A) voting agreements and voting trusts that do not conform with Section 6.251 or 6.252;

(B) requiring the vote or consent of the holders of a larger or smaller number of shares than is otherwise required by this chapter or other law, including an action for termination of close corporation status;

(C) granting one or some other specified number of votes for each shareholder; and

(D) permitting an action for which this chapter

requires approval by the vote of the board of directors or the shareholders of an ordinary corporation, or both, to be taken without a vote, in the manner provided by the shareholders' agreement;

(9) the terms and conditions of employment of a shareholder, director, officer, or other employee of the close corporation, regardless of the length of the period of employment;

(10) the individuals who will serve as directors, if any, and officers of the close corporation;

(11) the arbitration or mediation of issues about which the shareholders may become deadlocked in voting or about which the directors or those empowered to manage the close corporation may become deadlocked and the shareholders are unable to break the deadlock;

(12) the termination of close corporation status, including a right of dissent or other rights that may be granted to shareholders who object to the termination;

(13) qualifications of persons who are or are not entitled to be shareholders of the close corporation;

(14) amendments to or termination of the shareholders' agreement; and

(15) any provision required or permitted to be contained in the bylaws by this chapter. (TBCA 12.32.)

Source Law

12.32.A. Close Corporation Provisions. All shareholders of a close corporation may make one or more shareholders' agreements. The business and affairs of a close corporation or the relations among the shareholders that may be regulated by a shareholders' agreement include without limitation:

(1) management of the business and affairs of the close corporation with or without a board of directors, by its shareholders, or in whole or part by one or more of its shareholders or by one or more persons not shareholders;

(2) buy-sell, first option, first refusal, or similar arrangements with respect to the close corporation's shares or other securities, and restrictions on their transfer, including restrictions beyond those permitted to be imposed by Article 2.22 of this Act;

(3) declaration and payment of

dividends and other distributions, whether or not in proportion to ownership of shares, in amounts permitted by this Act or the manner in which profits or losses shall be apportioned;

(4) restrictions on the rights of a transferee of shares or assignee to participate in the management or administration of the close corporation's business and affairs during the term of the shareholders' agreement;

(5) rights of one or more shareholders to dissolve the close corporation at will or on the occurrence of a specified event or contingency in which case the dissolution of the close corporation shall proceed as if all of its shareholders had consented in writing to dissolution of the close corporation as provided by Article 6.02 of this Act;

(6) exercise or division of voting power either in general or in regard to specified matters by or among the shareholders of the close corporation or other persons, including without limitation:

(a) voting agreements and voting trusts that need not conform with Article 2.30 of this Act;

(b) requiring the vote or consent of the holders of a greater or lesser number of shares than is otherwise required by this Act or other law, including any action for termination of close corporation status;

(c) granting one or some other specified number of votes for each shareholder; and

(d) permitting any action for which this Act requires approval by the vote of the board of directors or by a vote of the shareholders of an ordinary corporation or by both, to be taken without such a vote, in the manner provided in the shareholders' agreement;

(7) terms and conditions of employment of any shareholder, director, officer, or other employee of the close corporation, regardless of the length of the

period of employment;

(8) the natural persons who shall be directors, if any, and officers of the close corporation;

(9) arbitration of issues about which the shareholders may become deadlocked in voting or about which the directors or those empowered to manage the close corporation may become deadlocked and the shareholders are unable to break the deadlock;

(10) termination of close corporation status, including any right of dissent or other rights that shareholders who object to the termination may be granted;

(11) qualifications of persons who are or are not entitled to be shareholders of the close corporation;

(12) amendments to or termination of the shareholders' agreement; and

(13) any provision required or permitted by this Act to be set forth in the bylaws.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.715. EXECUTION OF SHAREHOLDERS' AGREEMENT. A shareholders' agreement shall be executed:

(1) in the case of an existing close corporation, by each shareholder at the time of execution, regardless of whether the shareholder has voting power;

(2) in the case of an existing ordinary corporation that will adopt close corporation status under Section 21.705, by each shareholder at the time of execution, regardless of whether the shareholder has voting power; or

(3) in the case of a close corporation that is being formed under Section 21.703, by each person who is a subscriber to the corporation's shares or agrees to become a holder of the corporation's shares under the shareholders' agreement of the close corporation. (TBCA 12.33.A.)

Source Law

A. Execution. A shareholders' agreement shall be executed:

(1) in the case of an existing close corporation, by each person who is then a shareholder, whether or not the shareholder

has voting power;

(2) in the case of an existing ordinary corporation that pursuant to the agreement will adopt close corporation status in conformance with Article 12.13 of this Act, by each person who is then a shareholder, whether or not the shareholder has voting power; or

(3) in the case of a close corporation that is being formed in conformance with Article 12.12 of this Act, by each person who either is a subscriber to its shares or by the shareholders' agreement agrees to become a holder of its shares.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.716. ADOPTION OF AMENDMENT OF SHAREHOLDERS' AGREEMENT. Unless otherwise provided by a shareholders' agreement, an amendment to the shareholders' agreement of a close corporation may be adopted only by the written consent of each person who would be required to execute the shareholders' agreement if it were being executed originally at the time of adoption of the amendment, regardless of whether the person has voting power in the close corporation. (TBCA 12.33.B.)

Source Law

B. Amendment of Agreement. Unless otherwise provided in a shareholders' agreement, an amendment to the shareholders' agreement may be adopted only by the written consent of each person who would be required to execute the shareholders' agreement if it were being executed originally at the time of adoption of the amendment, whether or not the person has voting power in the close corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.717. DELIVERY OF SHAREHOLDERS' AGREEMENT. (a) The close corporation shall deliver a complete copy of a shareholders' agreement to:

(1) each person who is bound by the shareholders' agreement;

(2) each person who is or will become a shareholder in

the close corporation as provided by Section 21.715 when a certificate representing shares in the close corporation is delivered to the person; and

(3) each person to whom a certificate representing shares is issued and who has not received a complete copy of the agreement.

(b) The failure to deliver a complete copy of a shareholders' agreement as required by this section does not affect the validity or enforceability of the shareholders' agreement. (TBCA 12.33.C.)

Source Law

C. Delivery of Shareholders' Agreement.
The close corporation shall deliver a complete copy of any shareholders' agreement to each person who is bound by the shareholders' agreement and who is or will become a shareholder in the close corporation as provided in Section A of this article when a certificate or certificates representing shares in the close corporation are delivered to the person. The close corporation shall also deliver a complete copy of any shareholders' agreement to each person to whom a certificate representing shares is issued and who has not received a complete copy of the agreement. Failure to deliver a complete copy of a shareholders' agreement as required by this section does not affect the validity or enforceability of the shareholders' agreement.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.718. STATEMENT OF OPERATION AS CLOSE CORPORATION.

(a) On or after the formation of a close corporation or adoption of close corporation status, a close corporation that begins to conduct its business and affairs under a shareholders' agreement that has become effective shall promptly execute and file with the secretary of state a statement of operation as a close corporation in accordance with Chapter 4.

(b) The statement required by Subsection (a) must:

- (1) contain the name of the close corporation;
- (2) state that the close corporation is being operated and its business and affairs are being conducted under the terms of a shareholders' agreement under this subchapter; and
- (3) contain the date the operation of the corporation

began.

(c) A statement of operation as a close corporation shall be executed by an officer on behalf of the corporation.

(d) On the filing of the statement of operation as a close corporation, the fact that the close corporation is being operated and its business and affairs are being conducted under the terms of a shareholders' agreement becomes a matter of public record. (TBCA 12.34.A, B, D.)

Source Law

A. In General. If on or after the formation of a close corporation or adoption of close corporation status, a close corporation begins to conduct its business and affairs pursuant to a shareholders' agreement that has become effective, the close corporation shall promptly execute and file a statement of operation as a close corporation with the Secretary of State.

B. Execution and Delivery. A statement of operation as a close corporation shall be signed on behalf of the close corporation by an officer. The close corporation shall deliver the original and a copy of the statement to the Secretary of State. The statement must set forth:

(1) the name of the close corporation;

(2) a statement that the close corporation is being operated and its business and affairs are being conducted under the terms of a shareholders' agreement made pursuant to the Texas Close Corporation Law; and

(3) the date when the operation of the corporation began.

. . .

D. Effect of Filing. On the filing of the statement of operation as a close corporation, the fact that the close corporation is being operated and its business and affairs are being conducted under the terms of a shareholders' agreement becomes a matter of public record.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.719. VALIDITY AND ENFORCEABILITY OF SHAREHOLDERS' AGREEMENT. (a) A shareholders' agreement executed in accordance with Section 21.715 is valid and enforceable notwithstanding:

- (1) the elimination of a board of directors;
- (2) any restriction imposed on the discretion or powers of the board of directors or other person empowered to manage the close corporation; and
- (3) that the effect of the shareholders' agreement is to treat the business and affairs of the close corporation as if the close corporation were a partnership or in a manner that would otherwise be appropriate only among partners.

(b) A close corporation, a shareholder of the close corporation, or a party to a shareholders' agreement may initiate a proceeding to enforce the shareholders' agreement in accordance with Section 21.756. (TBCA 12.35.)

Source Law

12.35.A. In General. A shareholders' agreement, if executed in conformance with Article 12.33 of this Act, is valid and enforceable in accordance with its terms notwithstanding the elimination of a board of directors, notwithstanding any restriction imposed on the discretion or powers of the board of directors or those empowered to manage the close corporation, and notwithstanding that the effect of the shareholders' agreement is to treat the business and affairs of the close corporation as if it were a partnership or in a manner that would otherwise be appropriate only among partners.

B. Enforcement. The close corporation, any of its shareholders, or any person who is a party to a shareholders' agreement may initiate a proceeding to enforce the shareholders' agreement in conformance with Article 12.52 of this Act.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.720. PERSONS BOUND BY SHAREHOLDERS' AGREEMENT. (a) A shareholders' agreement executed in accordance with Section 21.715 is:

- (1) considered to be an agreement among all of the shareholders of the close corporation; and

(2) binding on and enforceable against each shareholder of the close corporation, regardless of whether:

(A) a particular shareholder acquired shares in the close corporation by purchase, gift, bequest, or otherwise; or

(B) the shareholder had actual knowledge of the existence of the shareholders' agreement at the time of acquiring shares.

(b) A transferee or assignee of shares of a close corporation in which there is a shareholders' agreement is bound by the agreement for all purposes, regardless of whether the transferee or assignee executed or was aware of the agreement. (TBCA 12.36.A.)

Source Law

A. Persons Bound. A shareholders' agreement, if executed in conformance with Article 12.33 of this Act, is considered to be an agreement among all the shareholders of the close corporation and is binding and enforceable in accordance with its terms on all shareholders of the close corporation regardless of whether a particular shareholder acquired shares in the close corporation by purchase, gift, bequest, or otherwise, or whether the shareholder had actual knowledge of the existence of the shareholders' agreement at the time of acquiring shares. A transferee or assignee of shares of a close corporation with respect to which there is a shareholders' agreement is bound by the shareholders' agreement for all purposes whether or not the transferee or assignee executed or was aware of the agreement.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.721. DELIVERY OF COPY OF SHAREHOLDERS' AGREEMENT TO TRANSFeree. (a) Before the transfer of shares of a close corporation in which there is a shareholders' agreement, the transferor shall deliver a complete copy of the shareholders' agreement to the transferee.

(b) If the transferor fails to deliver a complete copy of the shareholders' agreement:

(1) the validity and enforceability of the shareholders' agreement against each shareholder of the

corporation, including the transferee, is not affected;

(2) the right, title, or interest of the transferee in the transferred shares is not adversely affected; and

(3) the transferee is entitled to obtain on demand from the transferor or from the close corporation a complete copy of the shareholders' agreement at the transferor's expense.

(TBCA 12.36.B.)

Source Law

B. Delivery of Copy to Transferee.

Before the transfer of any shares of a close corporation as to which there is a shareholders' agreement, the transferor shall deliver a complete copy of the shareholders' agreement to the transferee. If the transferor fails to do so:

(1) the validity and enforceability of the shareholders' agreement against all shareholders of the corporation, including the transferee, is not affected;

(2) the right, title, or interest of the transferee in the shares transferred is not adversely affected; and

(3) the transferee is entitled to obtain on demand a complete copy of the shareholders' agreement from the transferor or from the close corporation at the expense of the transferor.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.722. EFFECT OF REQUIRED STATEMENT ON SHARE CERTIFICATE AND DELIVERY OF SHAREHOLDERS' AGREEMENT. If a certificate representing shares of a close corporation contains the statement required by Section 21.732, and a complete copy of each shareholders' agreement has been delivered as required by Section 21.717, each holder, transferee, or other person claiming an interest in the shares of the close corporation is conclusively presumed to have knowledge of a close corporation provision in effect at the time of the transfer. (TBCA 12.36.C.)

Source Law

C. Effect of Statement on Share Certificate and Delivery of Shareholders' Agreement. If the certificates representing shares of a close corporation contain the statements required by Section A, Article

12.39 of this Act, and a complete copy of each shareholders' agreement has been delivered as required by Section C, Article 12.33 of this Act, each holder, transferee, or other person claiming an interest in the shares of the close corporation is conclusively presumed to have knowledge of any close corporation provision in effect at the time of the transfer.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.723. PARTY NOT BOUND BY SHAREHOLDERS' AGREEMENT ON CESSATION; LIABILITY. (a) Notwithstanding the person's signature, a person ceases to be a party to, and bound by, a shareholders' agreement when the person ceases to be a shareholder of the close corporation unless:

(1) the person's attempted cessation was in violation of Section 21.721 or the shareholders' agreement; or

(2) the shareholders' agreement provides to the contrary.

(b) Cessation as a party to a shareholders' agreement or as a shareholder does not relieve a person of liability the person may have incurred for breach of the shareholders' agreement.

(TBCA 12.36.D.)

Source Law

D. When Party No Longer Bound. A person ceases to be a party to, and bound by, a shareholders' agreement, notwithstanding the person's signature to the agreement, when the person ceases to be a shareholder of the close corporation unless the person's attempted cessation as a shareholder was in violation of Section B of this article or the shareholders' agreement or unless the shareholders' agreement provides to the contrary. Cessation as a party to a shareholders' agreement or as a shareholder does not relieve a person of any liability the person may have incurred for breach of the shareholders' agreement.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.724. TERMINATION OF SHAREHOLDERS' AGREEMENT. (a)

Except as provided by Subsection (b), a shareholders' agreement terminates when the close corporation terminates its status as a close corporation.

(b) If provided by the shareholders' agreement, all or part of the agreement is valid and enforceable to the extent permitted for an ordinary corporation by this chapter or other law.

(TBCA 12.36.E.)

Source Law

E. Termination of Agreement. A shareholders' agreement terminates when the close corporation terminates its status as a close corporation except that if the shareholders' agreement so provides, the agreement or any provision of the agreement continues to be valid and enforceable to the extent permitted for an ordinary corporation by this Act or other law.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.725. CONSEQUENCES OF MANAGEMENT BY PERSONS OTHER THAN BOARD OF DIRECTORS. Sections 21.726-21.729 apply only to a close corporation the business and affairs of which are managed wholly or partly by the shareholders of the close corporation or any other person as provided by a shareholders' agreement rather than solely by a board of directors. (TBCA 12.37.A.)

Source Law

A. In General. This article applies only to a close corporation whose business and affairs, pursuant to a shareholders' agreement, are managed in whole or in part by its shareholders or any other person or persons rather than solely by a board of directors.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.726. SHAREHOLDERS CONSIDERED DIRECTORS. (a) When required by the context of this chapter, the shareholders of a close corporation described by Section 21.725 are considered to be directors of the close corporation for purposes of applying a provision of this chapter, other than a provision relating to the election and removal of directors.

(b) A requirement that an instrument filed with a

governmental agency contain a statement that a specified action has been taken by the board of directors is satisfied by a statement that:

(1) the corporation is a close corporation with no board of directors; and

(2) the action was approved by the shareholders of the close corporation or the persons empowered to manage the business and affairs of the close corporation under a shareholders' agreement. (TBCA 12.37.B.)

Source Law

B. Shareholders Deemed Directors.

Whenever the context of this Act requires, the shareholders of the close corporation are considered to be directors of the close corporation for purposes of applying any provision of this Act other than with respect to the election and removal of directors. Any requirement that an instrument filed with any governmental agency contain a statement that a specified action has been taken by the board of directors is satisfied by a statement that the corporation is a close corporation having no board of directors and that the action was approved by the shareholders of the close corporation, or by the persons empowered to manage the business and affairs of the close corporation, pursuant to a shareholders' agreement.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.727. LIABILITY OF SHAREHOLDERS. The shareholders of a close corporation described by Section 21.725 are subject to any liability imposed on a director of a corporation by this chapter or other law for a managerial act of or omission made by the shareholders or any other person empowered to manage the business and affairs of the close corporation under a shareholders' agreement and relating to the business and affairs of the close corporation, if the action is required by law to be undertaken by the board of directors. (TBCA 12.37.C.)

Source Law

C. Liabilities. The shareholders of the close corporation are subject to the liabilities imposed on directors by this Act or other law for any managerial acts or

omissions, relating to any aspect of the business and affairs of the close corporation, taken by the shareholders or by any other persons empowered to manage the business and affairs of the close corporation pursuant to a shareholders' agreement if the action is required by this Act or other law to be taken by the board of directors.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.728. MODE AND EFFECT OF TAKING ACTION BY SHAREHOLDERS AND OTHERS. (a) An action that shall or may be taken by the board of directors of an ordinary corporation as required or authorized by this chapter shall or may be taken by action of the shareholders of a close corporation described by Section 21.725 at a meeting of the shareholders or, in the manner permitted by a shareholders' agreement, this subchapter, or this chapter, without a meeting.

(b) Unless otherwise provided by the certificate of formation of the close corporation or a shareholders' agreement of the close corporation, an action is binding on a close corporation if the action is taken after:

(1) the affirmative vote of the holders of the majority of all outstanding shares entitled to vote on the action; or

(2) the consent of all of the shareholders of the close corporation, which may be proven by:

(A) the full knowledge of the action by all of the shareholders and the shareholders' failure to object to the action in a timely manner;

(B) written consent to the action in accordance with Section 6.201 or this chapter or any other writing executed by or on behalf of all of the shareholders reasonably evidencing the consent; or

(C) any other means reasonably evidencing the consent. (TBCA 12.37.D.)

Source Law

D. Mode of Taking Action. Any action that this Act requires or permits to be taken by the board of directors of an ordinary corporation shall be taken, if required, or may be taken, if permitted, by action of the shareholders of the close corporation at a meeting of the shareholders or in the manner permitted by a shareholders' agreement, this

article, or this Act, without a meeting. Unless otherwise provided in the articles of incorporation of the close corporation or a shareholders' agreement, such an action is binding on the close corporation if taken on the basis of:

(1) the affirmative vote of the holders of a majority of all outstanding shares entitled to vote on the action; or

(2) consent by all the shareholders of the close corporation, which may be proven by:

(a) the full knowledge of the action by all the shareholders and their failure to object to the action in a timely manner;

(b) a consent in writing to the action in conformance with Article 9.10 of this Act or any other writing executed by or on behalf of all the shareholders reasonably evidencing the consent; or

(c) any other means reasonably evidencing the consent.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.729. LIMITATION OF SHAREHOLDER'S LIABILITY. (a) A shareholder of a close corporation described by Section 21.725 is not liable because of a shareholders' vote or shareholder action without a vote unless the shareholder had the right to vote or consent to the action.

(b) A shareholder of a close corporation, without regard to the right to vote or consent, may not be held liable for an action taken by the shareholders or a person empowered to manage the business and affairs of the close corporation under a shareholders' agreement if the shareholder dissents from and has not voted for or consented to the action.

(c) The dissent of a shareholder may be proven by:

(1) an entry in the minutes of the meeting of shareholders;

(2) a written dissent filed with the secretary of the meeting before the adjournment of the meeting;

(3) a written dissent sent by registered mail to the secretary of the close corporation promptly after the meeting or after a written consent was obtained from the other shareholders; or

(4) any other means reasonably evidencing the dissent.

Source Law

E. Limitation of Liability. A shareholder of a close corporation is not liable by virtue of a shareholders' vote or shareholder action without a vote unless the shareholder had the right to vote or consent to the action. A shareholder of a close corporation, whether with or without right to vote or consent, is not liable for any action taken by the shareholders, or by the persons empowered to manage the business and affairs of the close corporation pursuant to a shareholders' agreement if the shareholder dissents from, and has not voted for or consented to, the action. The dissent may be proven by:

(1) an entry in the minutes of the meeting of shareholders;

(2) a written dissent filed with the person acting as secretary of the meeting before the adjournment of the meeting;

(3) a written dissent sent by registered mail to the secretary of the close corporation promptly after the meeting or after a consent in writing was obtained from the other shareholders; or

(4) any other means reasonably evidencing the dissent.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.730. LACK OF FORMALITIES; TREATMENT AS PARTNERSHIP. The failure of a close corporation under this subchapter to observe a usual formality or requirement prescribed for an ordinary corporation by this chapter relating to the exercise of corporate powers or the management of a corporation's business and affairs and the performance of a shareholders' agreement that treats the close corporation as if the corporation were a partnership or in a manner that otherwise is appropriate only among partners may not:

(1) be a factor in determining whether to impose personal liability on the shareholders for the close corporation's obligations by disregarding the separate entity of the close corporation or otherwise;

(2) be grounds for invalidating an otherwise valid

shareholders' agreement; or

(3) affect the status of the close corporation as a corporation under this chapter or other law. (TBCA 12.37.F.)

Source Law

F. Lack of Formalities; Treatment as Partnership. Neither the failure of a close corporation to observe usual formalities or requirements prescribed for an ordinary corporation by this Act relating to the exercise of corporate powers or the management of a corporation's business and affairs nor the performance of a shareholders' agreement that treats the close corporation as if it were a partnership or in a manner that otherwise is appropriate only among partners:

(1) shall be a factor in determining whether to impose personal liability on the shareholders for the close corporation's obligations by disregarding the separate entity of the close corporation or otherwise;

(2) is grounds for invalidating an otherwise valid shareholders' agreement; or

(3) shall affect the status of the close corporation as a corporation under this Act or in law.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.731. OTHER AGREEMENTS AMONG SHAREHOLDERS PERMITTED. Sections 21.713-21.730 do not prohibit or impair any other agreement between two or more shareholders of an ordinary corporation permitted by this chapter or other law. (TBCA 12.38.)

Source Law

12.38.A. In General. Articles 12.31 through 12.37 of this Act do not prohibit or impair any other agreement among two or more shareholders of an ordinary corporation permitted by this Act or by other law.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.732. CLOSE CORPORATION SHARE CERTIFICATES. (a) In addition to a matter required or authorized by law to be stated on a certificate representing shares, each certificate representing shares issued by a close corporation must conspicuously state on the front or back of the certificate: "These shares are issued by a close corporation as defined by the Texas Business Organizations Code. Under Chapter 21 of that code, a shareholders' agreement may provide for management of a close corporation by the shareholders or in other ways different from an ordinary corporation. This may subject the holder of this certificate to certain obligations and liabilities not otherwise imposed on shareholders of an ordinary corporation. On a sale or transfer of these shares, the transferor is required to deliver to the transferee a complete copy of any shareholders' agreement."

(b) Notwithstanding this chapter and Section 3.202, the status of a corporation as a close corporation is not affected by the failure of a share certificate to contain the statement required by Subsection (a). (TBCA 12.39.)

Source Law

12.39.A. Required Statements. In addition to any matter required or permitted to be stated on a certificate representing shares by this Act or other law, each certificate representing shares issued by a close corporation must state conspicuously on its face or the back: "These shares are issued by a close corporation as defined by the Texas Business Corporation Act. Under that Act, a shareholders' agreement may provide for management of a close corporation by the shareholders or in other ways different from an ordinary corporation. This may subject the holder of this certificate to certain obligations and liabilities not otherwise imposed on shareholders of an ordinary corporation. On any sale or transfer of these shares, the transferor is obligated to deliver to the transferee a complete copy of any shareholders' agreement."

B. Failure to Contain Statements. Notwithstanding any provision of this Act, including Article 2.19, to the contrary, the status of a corporation as a close corporation is not affected by the failure of any share certificate to contain the

statements required by Section A of this article.

Revisor's Note

No substantive change is intended.

[Sections 21.733-21.750 reserved for expansion]

SUBCHAPTER P. JUDICIAL PROCEEDINGS RELATING TO
CLOSE CORPORATION

Revised Law

Sec. 21.751. DEFINITIONS. In this subchapter:

(1) "Court" means a district court in the county in which the principal office of the close corporation is located.

(2) "Custodian" means a person appointed by a court under Section 21.761.

(3) "Provisional director" means a person appointed by a court under Section 21.758.

(4) "Shareholder" means a record or beneficial owner of shares in a close corporation, including:

(A) a person holding a beneficial interest in the shares under an inter vivos, testamentary, or voting trust; or

(B) the personal representative, as defined by the Texas Probate Code, of a record or beneficial owner.

(TBCA 12.51.A.)

Source Law

A. Definitions. As used in this article and the succeeding articles of this part, unless the context otherwise requires:

(1) "Court of competent jurisdiction" means a district court in the county in which the close corporation has its principal office.

(2) "Provisional director" means a person appointed by a court of competent jurisdiction in conformance with Article 12.53 of this Act.

(3) "Custodian" means a person appointed by a court of competent jurisdiction in conformance with Article 12.54 of this Act.

(4) "Shareholder" means any person who is a record or beneficial owner of shares in a close corporation, including any person holding a beneficial interest in the shares under an inter vivos, testamentary, or voting trust, or any person who is the personal representative, as that term is defined in the Texas Probate Code, of a record or

beneficial owner.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.752. PROCEEDINGS AUTHORIZED. In addition to any other judicial proceeding pertaining to an ordinary corporation provided for by this chapter or other law, a close corporation or shareholder may institute a proceeding in a district court in the county in which the principal office of the close corporation is located to:

- (1) enforce a close corporation provision;
- (2) appoint a provisional director; or
- (3) appoint a custodian. (TBCA 12.51.B.)

Source Law

B. Proceedings Authorized. In addition to any other judicial proceeding pertaining to an ordinary corporation provided for in this Act or by law, a proceeding may be brought in a court of competent jurisdiction by a close corporation or a shareholder to:

- (1) enforce a close corporation provision;
- (2) appoint a provisional director; or
- (3) appoint a custodian.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.753. NOTICE; INTERVENTION. (a) Notice of the institution of a proceeding shall be given to the close corporation, if the corporation is not a plaintiff, and to each shareholder who is not a plaintiff in the manner prescribed by law and consistent with due process of law as directed by the court.

(b) The close corporation or a shareholder of the close corporation may intervene in the proceeding. (TBCA 12.51.C.)

Source Law

C. Notice; Intervention. Notice of the commencement of a proceeding must be given in the manner prescribed by this Act or other law and otherwise in a manner consistent with due process of law as directed by the court, to the close corporation, if not a plaintiff, and to each shareholder that is not a

plaintiff. The close corporation or any shareholder may intervene in the proceeding.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.754. PROCEEDING NONEXCLUSIVE. Except as provided by Section 21.755, the right of a close corporation or a shareholder to institute a proceeding under Section 21.752 is in addition to another right or remedy the plaintiff is entitled to under law. (TBCA 12.51.D.)

Source Law

D. Proceeding Nonexclusive. Except as otherwise provided in Section E of this article, the right of the close corporation or a shareholder to commence a proceeding permitted by Section B of this article is in addition to any other right or remedy the plaintiff may have under this Act or other law.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.755. UNAVAILABILITY OF JUDICIAL PROCEEDING. (a) A shareholder may not institute a proceeding before exhausting any nonjudicial remedy contained in a close corporation provision for resolution of an issue that is in dispute unless the shareholder proves that the close corporation, the shareholders as a whole, or the shareholder will suffer irreparable harm before the nonjudicial remedy is exhausted.

(b) A shareholder may not institute a proceeding to seek damages or other monetary relief if the shareholder is entitled to dissent from a proposed action and receive the fair value of the shareholder's shares under this code or a shareholders' agreement. (TBCA 12.51.E.)

Source Law

E. Unavailability of Proceeding. A shareholder may not commence a proceeding before any nonjudicial remedy in a close corporation provision, such as arbitration, for resolution of the issues that are in dispute has been exhausted unless the shareholder proves that the close corporation, the shareholders as a whole, or the shareholder will suffer irreparable harm

before the nonjudicial remedy is exhausted. A shareholder may not commence a proceeding to seek damages or other monetary relief if the shareholder has the right to dissent from any proposed action and to receive the fair value of his shares under this Act or a shareholders' agreement.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.756. JUDICIAL PROCEEDING TO ENFORCE CLOSE CORPORATION PROVISION. (a) In a judicial proceeding under this section, a court shall enforce a close corporation provision without regard to whether there is an adequate remedy at law.

(b) The court may enforce a close corporation provision by injunction, specific performance, or other relief the court determines to be fair and equitable under the circumstances, including:

(1) damages instead of or in addition to specific enforcement;

(2) the appointment of a provisional director or custodian;

(3) the appointment of a receiver for specific assets of the close corporation in accordance with Section 11.403;

(4) the appointment of a receiver to rehabilitate the close corporation in accordance with Section 11.404;

(5) subject to Section 21.757, the liquidation of the assets and business and involuntary termination of the close corporation and appointment of a receiver to effect the liquidation in accordance with Section 11.405; and

(6) the termination of close corporation status.

(c) The court may not order termination of close corporation status under Subsection (b)(6) unless the court determines that:

(1) any other remedy in law or equity, including appointment of a provisional director, custodian, or other type of receiver, is inadequate; and

(2) the size, the nature of the business, or the number of shareholders of the close corporation, or their relationship to one another or other similar factors, make it wholly impractical to continue close corporation status. (TBCA 12.52.A.)

Source Law

A. In General. A court of competent jurisdiction, in a judicial proceeding brought under this article, shall enforce a

close corporation provision without regard to whether or not there is an adequate remedy at law. The enforcement may be by injunction, specific performance, or other relief that the court determines is fair and equitable under the circumstances, including without limitation:

(1) damages instead of or in addition to specific enforcement;

(2) appointment of a provisional director or custodian;

(3) appointment of a receiver for specific assets of the close corporation in conformance with Article 7.04 of this Act;

(4) appointment of a receiver to rehabilitate the close corporation in conformance with Article 7.05 of this Act;

(5) subject to Section B of this article, liquidation of the assets and business and involuntary dissolution of the close corporation and appointment of a receiver to effect the liquidation in conformance with Article 7.06 of this Act; and

(6) termination of close corporation status, but termination may not be decreed unless the court determines that all other remedies in law or in equity, including appointment of a provisional director, custodian, or other type of receiver, are inadequate and that the size of the close corporation, the nature of its business, the number of its shareholders, or their relationship to one another or other similar factors make it wholly impractical to continue close corporation status.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.757. LIQUIDATION; INVOLUNTARY WINDING UP AND TERMINATION; RECEIVERSHIP. Except as provided by Section 21.756, in a case in which a shareholder is entitled to wind up and terminate a close corporation under a shareholders' agreement, a court may not order liquidation, involuntary termination, or receivership under that section unless the court determines that any other remedy in law or equity, including appointment of a provisional director, custodian, or other type of receiver, is

inadequate. (TBCA 12.52.B.)

Source Law

B. Liquidation; Involuntary
Dissolution; Receivership. Except where a shareholder seeking relief had the right to dissolve the close corporation under a shareholders' agreement, liquidation, involuntary dissolution, and receivership may not be decreed unless the court determines that all other remedies in law or in equity, including appointment of a provisional director, custodian, or other type of receiver, are inadequate.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.758. APPOINTMENT OF PROVISIONAL DIRECTOR. (a) In a judicial proceeding under this section, a court shall appoint a provisional director for a close corporation on presentation of proof that the directors or the persons empowered to manage the business and affairs of the close corporation under a shareholders' agreement are so divided with respect to the management of the business and affairs of the close corporation that the required votes or consent to take action on behalf of the close corporation cannot be obtained, resulting in the business and affairs being conducted in a manner that is not to the general advantage of the shareholders.

(b) The provisional director must be an impartial person who is not a shareholder, a party to a shareholders' agreement, a person empowered to manage the close corporation under a shareholders' agreement, or a creditor of the close corporation or of a subsidiary or affiliate of the close corporation. The court shall determine any further qualifications.

(c) A provisional director shall serve until removed by court order or by a vote of the majority of the directors or the holders of the majority of the shares with voting power, or by a vote of a different number, not fewer than the majority, of shareholders or directors if a close corporation provision requires the concurrence of a larger or different majority for action by the directors or shareholders. (TBCA 12.53.A, B (part).)

Source Law

A. In General. A court of competent jurisdiction, in a proceeding brought under this article, shall appoint a provisional

director for a close corporation on proof that the directors or the persons empowered to manage the business and affairs of the close corporation pursuant to a shareholders' agreement are so divided respecting the management of its affairs that the votes or consents required to take action on behalf of the close corporation cannot be obtained with the consequence that its business and affairs can no longer be conducted to the general advantage of the shareholders.

B. . . .

(1) a provisional director must be an impartial person who is not a shareholder, a party to a shareholders' agreement, a person empowered to manage the close corporation pursuant to a shareholders' agreement, or a creditor of the close corporation or of any of its subsidiaries or affiliates and whose further qualifications, if any, are determined by the court;

. . . .

(3) a provisional director shall serve until removed by order of the court or by a vote of a majority of the directors or the holders of a majority of the shares having voting power, as the case may be, or if a close corporation provision requires the concurrence of a greater or different majority for action by the directors or the shareholders, as the case may be, then by that majority; and

. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.759. RIGHTS AND POWERS OF PROVISIONAL DIRECTOR. A provisional director has all the rights and powers of an elected director of the close corporation, or the rights of vote or consent of a shareholder and other rights and powers of shareholders or other persons who have been empowered to manage the business and affairs of the close corporation under a shareholders' agreement with the voting power provided by court order, including the right to notice of, and to vote at, meetings of directors or shareholders. (TBCA 12.53.B (part).)

Source Law

B. . . .

(2) a provisional director has all the rights and powers of an elected director of the close corporation, or the rights and powers of vote or consent of a shareholder or other persons who have been empowered to manage the business and affairs of the close corporation pursuant to a shareholders' agreement (with the voting power provided by order of the court), including the right to notice of, and to vote at, meetings of directors or shareholders, as the case may be;

. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.760. COMPENSATION OF PROVISIONAL DIRECTOR. (a) The compensation of a provisional director shall be determined by an agreement between the provisional director and the close corporation, subject to court approval.

(b) The court may set the compensation in the absence of an agreement or in the event of a disagreement between the provisional director and the close corporation. (TBCA 12.53.B (part).)

Source Law

B. . . .

(4) the compensation of a provisional director shall be determined by an agreement between the provisional director and the close corporation subject to the approval of the court, which may fix the compensation in the absence of an agreement or in the event of a disagreement between the provisional director and the close corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.761. APPOINTMENT OF CUSTODIAN. (a) In a judicial proceeding under this section, a court shall appoint a custodian for a close corporation on presentation of proof that:

(1) at a meeting held for the election of directors,

the shareholders are so divided that the shareholders have failed to elect successors to directors whose terms have expired or would have expired on qualification of a successor;

(2) the business of the close corporation is suffering or is threatened with irreparable injury because the directors, or the shareholders or the persons empowered to manage the business and affairs of the close corporation under a shareholders' agreement, are so divided with respect to the management of the business and affairs of the close corporation that the required vote or consent to take action on behalf of the close corporation cannot be obtained and a remedy with respect to the deadlock in a close corporation provision has failed; or

(3) the plaintiff or intervenor has the right to wind up and terminate the close corporation under a shareholders' agreement as provided by Section 21.714.

(b) To be eligible to serve as a custodian, a person must comply with all the qualifications required to serve as a receiver under Section 11.406. (TBCA 12.54.A, B (part).)

Source Law

A. In General. A court of competent jurisdiction in a judicial proceeding brought under this article shall appoint a custodian for a close corporation on proof that:

(1) at any meeting held for the election of directors, the shareholders are so divided that they have failed to elect successors to directors whose terms have expired or would have expired on qualification of their successors;

(2) the business of the close corporation is suffering or is threatened with irreparable injury because the directors, or the shareholders or the persons empowered to manage the business and affairs of the close corporation pursuant to a shareholders' agreement or otherwise, are so divided respecting the management of the affairs of the close corporation that the required vote or consent to take action on behalf of the close corporation cannot be obtained and any remedy with respect to the deadlock in a close corporation provision has failed; or

(3) the plaintiff or intervenor has the right to dissolve the close corporation under a shareholders' agreement as permitted by Article 12.32 of this Act.

B. Status of Custodian. To be eligible to serve as a custodian, a person must comply with all the qualifications required of a receiver under Article 7.07 of this Act. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.762. POWERS AND DUTIES OF CUSTODIAN. A person who qualifies as a custodian has all of the powers and duties and the title of a receiver appointed under Sections 11.404-11.406. The custodian shall continue the business of the close corporation and may not liquidate the affairs or distribute the assets of the close corporation, except as provided by court order or Section 21.761(a)(3). (TBCA 12.54.B (part).)

Source Law

B. . . . A person who qualifies as a custodian has all of the powers and duties and the title of a receiver appointed under Articles 7.05 through 7.07 of this Act but the authority of the custodian is to continue the business of the close corporation and not to liquidate its affairs and distribute its assets, except when the court otherwise orders or as provided by Subsection A(3) of this article. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.763. TERMINATION OF CUSTODIANSHIP. If the condition requiring the appointment of a custodian is remedied other than by liquidation or winding up and termination, the court shall terminate the custodianship immediately and management of the close corporation shall be restored to the directors or shareholders of the close corporation or to the persons empowered to manage the business and affairs of the close corporation under a shareholders' agreement. (TBCA 12.54.B (part).)

Source Law

B. . . . If the condition necessitating the appointment of a custodian is remedied, other than by liquidation or dissolution, the custodianship is to be terminated immediately and the management of the close corporation shall be restored to

the directors or to the shareholders of the close corporation or to the persons empowered to manage the business and affairs of the close corporation pursuant to a shareholders' agreement, as the case may be.

Revisor's Note

No substantive change is intended.

[Sections 21.764-21.800 reserved for expansion]

SUBCHAPTER Q. MISCELLANEOUS PROVISIONS

Revised Law

Sec. 21.801. SHARES AND OTHER SECURITIES ARE PERSONAL PROPERTY. Except as otherwise provided by this code, the shares and other securities of a corporation are personal property. (TBCA 2.22.A (part).)

Source Law

A. The shares and other securities of a corporation shall be personal property for all purposes and shall be . . . except as otherwise provided in this Act.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 21.802. PENALTIES FOR LATE FILING OF CERTAIN INSTRUMENTS. (a) A person required under Title 1 or this title to file a change of registered office or agent, a certificate of voluntary withdrawal, or a certificate of termination for a corporation commits an offense if the person does not file the required filing with the secretary of state before the earlier of:

(1) the 30th day after the date of the change, withdrawal, or termination; or

(2) the date the filing is otherwise required by law.

(b) A person who violates Subsection (a) is liable to the state for a civil penalty in an amount not to exceed \$2,500 for each violation. In determining the amount of a penalty under this subsection, the court shall consider all the circumstances giving rise to the offense. The attorney general or the prosecuting attorney in the county in which the violation occurs may bring suit to recover the civil penalty imposed under this section.

(c) The attorney general may bring an action in the name of the state to restrain or enjoin a person from violating this section.

(d) In an action or proceeding brought against a person who has not complied with this section, the plaintiff or other party

bringing the suit or proceeding may recover, at the court's discretion, reasonable costs and attorney's fees incurred by locating and effecting service of process on the person. Any damages recovered must be in conjunction with a pending action or proceeding and shall be awarded as costs under the Texas Rules of Civil Procedure. This section does not create a private independent cause of action for failure to comply with this section.

(e) A person who is entitled to recover damages under Subsection (d) may request from the attorney general nonconfidential information on the other person for the purpose of effecting service of process. The attorney general shall comply with a request made under this subsection to the extent practicable. (TBCA 9.07.B, C, D, E, F.)

Source Law

B. A person required under this Act to file with the Secretary of State a change of registered office or agent, an application or certificate of withdrawal or termination, or articles of dissolution commits an offense if the person does not file the required filing with the Secretary of State before the earlier of:

- (1) the 30th day after the date of the change, withdrawal, or termination; or
- (2) the date the filing is otherwise required by law.

C. A person who violates Section B of this article is liable to the state for a civil penalty in an amount not to exceed \$2,500 for each violation. In determining the amount of a penalty under this section, the court shall consider all the circumstances giving rise to the offense. The attorney general or the prosecuting attorney in the county in which the violation occurs may bring suit to recover the civil penalty imposed under this article.

D. The attorney general may bring an action in the name of the state to restrain or enjoin a person from violating Section B of this article.

E. In an action or proceeding brought against a person who has not complied with Section B of this article, the plaintiff or other party bringing the suit or proceeding may recover, at the court's discretion,

reasonable costs and attorney's fees incurred by locating and effecting service of process on the person. Any damages recovered must be in conjunction with a pending action or proceeding and shall be awarded as costs under the Texas Rules of Civil Procedure. This section does not create a private independent cause of action for failure to comply with Section B of this article.

F. A person who is entitled to recover damages under Section E of this article may request from the attorney general nonconfidential information on the other person for the purpose of effecting service of process. The attorney general shall comply with a request made under this section to the extent practicable.

Revisor's Note

No substantive change is intended.

CHAPTER 22. NONPROFIT CORPORATIONS

SUBCHAPTER A. GENERAL PROVISIONS

Revised Law

Sec. 22.001. DEFINITIONS. In this chapter:

(1) "Board of directors" means the group of persons vested with the management of the affairs of the corporation, regardless of the name used to designate the group.

(2) "Bylaws" means the rules adopted to regulate or manage the corporation, regardless of the name used to designate the rules.

(3) "Corporation" or "domestic corporation" means a domestic nonprofit corporation subject to this chapter.

(4) "Foreign corporation" means a foreign nonprofit corporation.

(5) "Nonprofit corporation" means a corporation no part of the income of which is distributable to a member, director, or officer of the corporation.

(6) "Ordinary care" means the care that an ordinarily prudent person in a similar position would exercise under similar circumstances. (TNPCA 1.02.A(1), (2), (3), (5), (7), (15).)

Source Law

A. As used in this Act, unless the context otherwise requires, the term:

(1) "Corporation" or "domestic corporation" means a corporation not for profit subject to the provisions of this Act, except a foreign corporation.

(2) "Foreign corporation" means a corporation not for profit organized under laws other than the laws of this State.

(3) "Non-Profit Corporation" is the equivalent of "not for profit corporation" and means a corporation no part of the income of which is distributable to its members, directors, or officers.

(5) "By-laws" means the code or codes of rules adopted for the regulation or management of the corporation, irrespective of the name or names by which such rules are designated.

(7) "Board of Directors" means the group of persons vested with the management of the affairs of the corporation, irrespective of the name by which such group is designated.

(15) "Ordinary care" means the care that an ordinarily prudent person in a similar position would exercise under similar circumstances.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.002. MEETINGS BY REMOTE COMMUNICATIONS TECHNOLOGY. Subject to the provisions of this code and the certificate of formation and bylaws of a corporation, a meeting of the members of a corporation, the board of directors of a corporation, or any committee designated by the board of directors of a corporation may be held by means of a remote electronic communications system, including videoconferencing technology or the Internet, only if:

(1) each person entitled to participate in the meeting consents to the meeting being held by means of that system; and

(2) the system provides access to the meeting in a manner or using a method by which each person participating in the meeting can communicate concurrently with each other participant. (TNPCA 9.11.A.)

Source Law

A. Subject to the provisions required or permitted by this Act for notice of meetings, unless otherwise restricted by the

articles of incorporation or bylaws, members of a corporation, members of the board of directors of a corporation, or members of any committee designated by such board may participate in and hold a meeting of such members, board, or committee by means of:

(1) conference telephone or similar communications equipment by which all persons participating in the meeting can hear each other; or

(2) another suitable electronic communications system, including videoconferencing technology or the Internet, only if:

(a) each member entitled to participate in the meeting consents to the meeting being held by means of that system; and

(b) the system provides access to the meeting in a manner or using a method by which each member participating in the meeting can communicate concurrently with each other participant.

Revisor's Note

No substantive change is intended.

[Sections 22.003-22.050 reserved for expansion]

SUBCHAPTER B. PURPOSES AND POWERS

Revised Law

Sec. 22.051. GENERAL PURPOSES. A nonprofit corporation may be formed for any lawful purpose or purposes not expressly prohibited under this chapter or Chapter 2, including any purpose described by Section 2.002. (TNPCA 2.01.A (part).)

Source Law

A. Except as hereinafter in this Article expressly excluded herefrom, non-profit corporations may be organized under this Act for any lawful purpose or purposes, which purposes shall be fully stated in the articles of incorporation. . . .

Revisor's Note

No substantive change is intended. The revised law omits the requirement of stating the purpose in the articles of incorporation because that requirement is in Section 3.005,

which sets forth the contents of the certificate of formation.

Revised Law

Sec. 22.052. DENTAL HEALTH SERVICE CORPORATION. (a) A charitable corporation may be formed to operate a dental health service corporation that manages and coordinates the relationship between a dentist who contracts to perform dental services and a patient who will receive the services as a member of a group that contracted with the dental health service corporation to provide dental care to group members.

(b) The certificate of formation for a charitable corporation formed under this section must have attached as an exhibit:

(1) an affidavit of the organizer or organizers stating:

(A) that not less than 30 percent of the dentists legally engaged in the practice of dentistry in this state have signed a contract to perform the required dental services for a period of at least one year after incorporation; and

(B) the names and addresses of those dentists; and

(2) a certification by the State Board of Dental Examiners that:

(A) the applicants are reputable residents of this state of good moral character; and

(B) the corporation will be in the best interest of the public health.

(c) A corporation formed under this section must have at least 12 directors, including 9 directors who are licensed to practice dentistry in this state and are actively engaged in the practice of dentistry in this state.

(d) A corporation formed under this section shall maintain as participating or contracting dentists at least 30 percent of the number of dentists actually engaged in the practice of dentistry in this state. The corporation shall file annually in September with the State Board of Dental Examiners the name and address of each participating or contracting dentist.

(e) A corporation formed under this section may not:

(1) prevent a patient from selecting the licensed dentist of the patient's choice to provide dental services to the patient;

(2) deny a licensed dentist the right to participate as a contracting dentist to perform the dental services contracted for by the patient;

(3) discriminate among patients or licensed dentists regarding payment or reimbursement for the cost of performing dental services; or

(4) authorize any person to regulate, interfere with,

or intervene in any manner in the diagnosis or treatment provided by a licensed dentist to a patient.

(f) A corporation formed under this section may require the attending dentist to provide a narrative oral or written description of the dental services provided to determine benefits or provide proof of treatment. The corporation may request but may not require diagnostic aids used in the course of treatment. (TNPCA 2.01.A (part).)

Source Law

A. . . .

(1) Charitable corporations may be formed for the purpose of operating a Dental Health Service Corporation which service corporation will manage and coordinate the relationship between the contracting dentist, who will perform the dental services, and the patient who will receive such services where such patient is a member of a group which has contracted with the Dental Health Service Corporation to provide dental care to members of that group. An application for a charter under this Section shall have attached as exhibits (1) an affidavit by the applicants that not less than thirty percent (30%) of the dentists legally engaged in the practice of dentistry in this state together with their names and addresses have signed contracts to perform the required dental services for a period of not less than one (1) year, after incorporation, and (2) a certification by the Texas State Board of Dental Examiners that the applicant incorporators are reputable citizens of the State of Texas and are of good moral character and that the corporation sought to be formed will be in the best interest of the public health. A corporation formed hereunder shall have not less than twelve (12) directors, nine (9) of whom shall be dentists licensed by the Texas State Board of Dental Examiners to practice dentistry in this state and be actively engaged in the practice of dentistry in this state. A corporation formed hereunder shall maintain not less than thirty percent (30%) of the number of dentists actually engaged in the practice of dentistry in this state as

participating or contracting dentists, and shall file with the Texas State Board of Dental Examiners each September the names and addresses of all contracting or participating dentists. A corporation formed hereunder shall not (1) prevent any patient from selecting the licensed dentist of his choice to render dental services to him, (2) deny any licensed dentist the right to participate as a contracting dentist to perform the dental services contracted for by the patient, (3) discriminate among patients or licensed dentists regarding payment or reimbursement for the cost of performing dental services provided the dentist is licensed to perform the dental service, or (4) authorize any person to regulate, interfere, or intervene in any manner in the diagnosis or treatment rendered by a licensed dentist to his patient. A corporation formed hereunder may require the attending dentist to provide a narrative oral or written description of the dental services rendered for the purpose of determining benefits or providing proof of treatment. Diagnostic aids used in the course of treatment may be requested by the corporation, but may not be required for any purpose.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.053. DIVIDENDS PROHIBITED. A dividend may not be paid to, and no part of the income of a corporation may be distributed to, the corporation's members, directors, or officers. (TNPCA 2.24 (part).)

Source Law

2.24.A. No dividend shall be paid and no part of the income of a corporation shall be distributed to its members, directors, or officers. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.054. AUTHORIZED BENEFITS AND DISTRIBUTIONS. A corporation may:

(1) pay compensation in a reasonable amount to the members, directors, or officers of the corporation for services provided;

(2) confer benefits on the corporation's members in conformity with the corporation's purposes; and

(3) make distributions to the corporation's members on winding up and termination to the extent authorized by this chapter. (TNPCA 2.24 (part).)

Source Law

2.24.A. . . . A corporation may pay compensation in a reasonable amount to its members, directors, or officers for services rendered, may confer benefits upon its members in conformity with its purposes, and upon dissolution or final liquidation may make distributions to its members, but only as permitted by this Act.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.055. POWER TO ASSIST EMPLOYEE OR OFFICER. (a) A corporation may lend money to or otherwise assist an employee or officer of the corporation, but not a director, if the loan or assistance may reasonably be expected to directly or indirectly benefit the corporation.

(b) A loan made to an officer must be:

(1) made for the purpose of financing the officer's principal residence; or

(2) set in an original principal amount that does not exceed:

(A) 100 percent of the officer's annual salary, if the loan is made before the first anniversary of the officer's employment; or

(B) 50 percent of the officer's annual salary, if the loan is made in any subsequent year. (TNPCA 2.02.A (part).)

Source Law

A. . . .

(6) To lend money to and otherwise assist its employees and officers, but not its directors, if the loan or assistance may reasonably be expected to benefit, directly or indirectly, the corporation providing the assistance. Loans made to officers must be:

(a) made for the purpose of financing the principal residence of the

officer; or

(b) made during the first year of that officer's employment, in which case the original principal amount may not exceed 100 percent of the officer's annual salary; or

(c) made in any subsequent year, in which case the original principal amount may not exceed 50 percent of the officer's annual salary.

. . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.056. HEALTH ORGANIZATION CORPORATION. (a) Doctors of medicine and osteopathy licensed by the Texas State Board of Medical Examiners and podiatrists licensed by the Texas State Board of Podiatric Medical Examiners may form a corporation that is jointly owned, managed, and controlled by those practitioners to perform a professional service that falls within the scope of practice of those practitioners and consists of:

(1) carrying out research in the public interest in medical science, medical economics, public health, sociology, or a related field;

(2) supporting medical education in medical schools through grants or scholarships;

(3) developing the capabilities of individuals or institutions studying, teaching, or practicing medicine, including podiatric medicine;

(4) delivering health care to the public; or

(5) instructing the public regarding medical science, public health, hygiene, or a related matter.

(b) When doctors of medicine, osteopathy, and podiatry form a corporation that is jointly owned by those practitioners, the authority of each of the practitioners is limited by the scope of practice of the respective practitioners and none can exercise control over the other's clinical authority granted by their respective licenses, either through agreements, the certificate of formation or bylaws of the corporation, directives, financial incentives, or other arrangements that would assert control over treatment decisions made by the practitioner. The Texas State Board of Medical Examiners and the Texas State Board of Podiatric Medical Examiners continue to exercise regulatory authority over their respective licenses. (TNPCA 2.01.C, D.)

Source Law

C. Doctors of medicine and osteopathy

licensed by the Texas State Board of Medical Examiners and podiatrists licensed by the Texas State Board of Podiatric Medical Examiners may organize a non-profit corporation under this Act that is jointly owned, managed, and controlled by those practitioners to perform a professional service that falls within the scope of practice of those practitioners and consists of:

(1) carrying out research in the public interest in medical science, medical economics, public health, sociology, or a related field;

(2) supporting medical education in medical schools through grants or scholarships;

(3) developing the capabilities of individuals or institutions studying, teaching, or practicing medicine, including podiatric medicine;

(4) delivering health care to the public; or

(5) instructing the public regarding medical science, public health, hygiene, or a related matter.

D. When doctors of medicine, osteopathy, and podiatry organize a non-profit corporation that is jointly owned by those practitioners, the authority of each of the practitioners is limited by the scope of practice of the respective practitioners and none can exercise control over the other's clinical authority granted by their respective licenses, either through agreements, articles of incorporation, bylaws, directives, financial incentives, or other arrangements that would assert control over treatment decisions made by the practitioner. The Texas State Board of Medical Examiners and the Texas State Board of Podiatric Medical Examiners continue to exercise regulatory authority over their respective licenses.

Revisor's Note

No substantive change is intended.

[Sections 22.057-22.100 reserved for expansion]

SUBCHAPTER C. FORMATION AND GOVERNING DOCUMENTS

Revised Law

Sec. 22.101. INCORPORATION OF CERTAIN ORGANIZATIONS. A religious society, a charitable, benevolent, literary, or social association, or a church may incorporate as a corporation governed by this chapter with the consent of a majority of its members. Those members shall authorize the organizers to execute the certificate of formation. (TNPCA 3.01.B.)

Source Law

B. Any religious society, charitable, benevolent, literary, or social association, or church may incorporate under this Act with the consent of a majority of its members, who shall authorize the incorporators to execute the articles of incorporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.102. BYLAWS. (a) The initial bylaws of a corporation shall be adopted by the corporation's board of directors or, if the management of the corporation is vested in the corporation's members, by the members.

(b) The bylaws may contain provisions for the regulation and management of the affairs of the corporation that are consistent with law and the certificate of formation.

(c) The board of directors may amend or repeal the bylaws, or adopt new bylaws, unless:

(1) this chapter or the corporation's certificate of formation wholly or partly reserves the power exclusively to the corporation's members;

(2) the management of the corporation is vested in the corporation's members; or

(3) in amending, repealing, or adopting a bylaw, the members expressly provide that the board of directors may not amend or repeal the bylaw. (TNPCA 2.09.)

Source Law

2.09.A. The initial by-laws of a corporation shall be adopted by its board of directors or, if the management of the corporation is vested in its members, by the members. The by-laws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation.

B. A corporation's board of directors may amend or repeal the corporation's by-laws, or adopt new by-laws, unless:

(1) the articles of incorporation or this Act reserves the power exclusively to the members in whole or in part;

(2) the management of the corporation is vested in its members; or

(3) the members in amending, repealing, or adopting a particular by-law expressly provide that the board of directors may not amend or repeal that by-law.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.103. INCONSISTENCY BETWEEN CERTIFICATE OF FORMATION AND BYLAW. (a) A provision of a certificate of formation of a corporation that is inconsistent with a bylaw controls over the bylaw, except as provided by Subsection (b).

(b) A change in the number of directors by amendment to the bylaws controls over the number stated in the certificate of formation, unless the certificate of formation provides that a change in the number of directors may be made only by amendment to the certificate. (TNPCA 3.02.D.)

Source Law

D. Unless the articles of incorporation provide that a change in the number of directors shall be made only by amendment to the articles of incorporation, a change in the number of directors made by amendment to the by-laws shall be controlling. In all other cases, whenever a provision of the articles of incorporation is inconsistent with a by-law, the provision of the articles of incorporation shall be controlling.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.104. ORGANIZATION MEETING. (a) After the certificate of formation is filed, the board of directors named in the certificate of formation of a corporation shall hold an organization meeting of the board, either in or out of this state, at the call of the incorporators or a majority of the directors to adopt bylaws and elect officers and for other purposes determined by the board at the meeting. The

incorporators or directors calling the meeting shall send notice of the time and place of the meeting to each director named in the certificate of formation not later than the third day before the date of the meeting.

(b) A first meeting of the members may be held at the call of the majority of the directors on notice provided not later than the third day before the date of the meeting. The notice must state the purposes of the meeting.

(c) If the management of a corporation is vested in the corporation's members, the members shall hold the organization meeting on the call of an incorporator. An incorporator who calls the meeting shall:

(1) send notice of the time and place of the meeting to each member not later than the third day before the date of the meeting;

(2) if the corporation is a church, make an oral announcement of the time and place of the meeting at a regularly scheduled worship service before the meeting; or

(3) send notice of the meeting in the manner provided by the certificate of formation. (TNPCA 3.05.)

Source Law

3.05.A. After the issuance of the certificate of incorporation, an organization meeting of the board of directors named in the articles of incorporation shall be held, either within or without this State, at the call of the incorporators or the call of a majority of the directors named in the articles of incorporation, for the purpose of adopting by-laws, electing officers, and for such other purposes as may come before the meeting. The incorporators or directors calling the meeting shall give at least three (3) days' notice thereof by mail to each director named in the articles of incorporation, which notice shall state the time and place of the meeting.

B. A first meeting of the members may be held at the call of the directors, or a majority of them, upon at least three (3) days' notice, for such purposes as shall be stated in the notice of the meeting.

C. If the management of a corporation is vested in its members, the organization meeting shall be held by the members upon the call of any of the incorporators. The incorporators calling the meeting shall (a)

give at least three (3) days' notice by mail to each member stating the time and place of the meeting, or shall (b) make an oral announcement of the time and place of meeting at a regularly scheduled worship service prior to such meeting if the corporation is a church, or shall (c) give such notice of the meeting as may be provided for in the articles of incorporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.105. PROCEDURES TO ADOPT AMENDMENT TO CERTIFICATE OF FORMATION BY MEMBERS HAVING VOTING RIGHTS. (a) Except as provided by Section 22.107(b), to amend the certificate of formation of a corporation with members having voting rights, the board of directors of the corporation must adopt a resolution specifying the proposed amendment and directing that the amendment be submitted to a vote at an annual or special meeting of the members having voting rights.

(b) Written notice containing the proposed amendment or a summary of the changes to be effected by the amendment shall be given to each member entitled to vote at the meeting within the time and in the manner provided by this chapter for giving notice of a meeting of members.

(c) The proposed amendment shall be adopted on receiving the vote required by Section 22.164. (TNPCA 4.02.A(1) (part).)

Source Law

(1) Except as provided in Section A(4) of this article, where there are members having voting rights, the board of directors shall adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given to each member entitled to vote at such meeting within the time and in the manner provided in this Act for the giving of notice of meetings of members. The proposed amendment shall be adopted upon receiving

Revisor's Note

No substantive change is intended. The revised law omits the "printed" notice in this section, as well as other sections of the revised law, because that term is subsumed within "written."

Revised Law

Sec. 22.106. PROCEDURES TO ADOPT AMENDMENT TO CERTIFICATE OF FORMATION BY MANAGING MEMBERS. (a) To be approved, a proposed amendment to the certificate of formation of a corporation the management of the affairs of which is vested in the corporation's members under Section 22.202 must be submitted to a vote at an annual, regular, or special meeting of the members.

(b) Except as otherwise provided by the certificate of formation or bylaws, notice containing the proposed amendment or a summary of the changes to be effected by the amendment shall be given to the members within the time and in the manner provided by this chapter for giving notice of a meeting of members.

(c) The proposed amendment shall be adopted on receiving the vote required by Section 22.164. (TNPCA 4.02.A(3) (part).)

Source Law

(3) Where the management of the affairs of the corporation is vested in the members pursuant to Article 2.14C of this Act, the proposed amendment shall be submitted to a vote at a meeting of members which may be an annual, a regular, or a special meeting. Except as otherwise provided in the articles of incorporation or the by-laws, notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given to the members within the time and in the manner provided in this Act for the giving of notice of meetings of members. The proposed amendment shall be adopted upon receiving
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Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.107. PROCEDURES TO ADOPT AMENDMENT TO CERTIFICATE OF FORMATION BY BOARD OF DIRECTORS. (a) If a corporation has no members or has no members with voting rights, or in the case of an amendment under Subsection (b), an amendment to the corporation's certificate of formation shall be adopted at a meeting of the board of directors on receiving the vote of

directors required by Section 22.164.

(b) Except as otherwise provided by the certificate of formation, the board of directors of a corporation with members having voting rights may, without member approval, adopt amendments to the certificate of formation to:

(1) extend the duration of the corporation if the corporation was incorporated when limited duration was required by law;

(2) delete the names and addresses of the initial directors;

(3) delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the secretary of state; or

(4) change the corporate name by:

(A) substituting the word "corporation," "incorporated," "company," or "limited," or the abbreviation "corp.," "inc.," "co.," or "ltd.," for a similar word or abbreviation in the name; or

(B) adding, deleting, or changing a geographical attribution to the name. (TNPCA 4.02.A(2), (4).)

Source Law

(2) Where there are no members, no members having voting rights, or in the case of an amendment under Section A(4) of this article, an amendment shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

(4) Unless the articles of incorporation provide otherwise, the board of directors of a corporation with members having voting rights may adopt one or more of the following amendments to the articles of incorporation without member approval:

(a) extend the duration of the corporation if it was incorporated when limited duration was required by law;

(b) delete the names and addresses of the initial directors;

(c) delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the Secretary of State; or

(d) change the corporate name by substituting the word "corporation," "incorporated," "company," "limited," or the

abbreviation "corp.," "inc.," "co.," "ltd.," for a similar word or abbreviation in the name, or by adding, deleting, or changing a geographical attribution to the name.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.108. NUMBER OF AMENDMENTS SUBJECT TO VOTE AT MEETING. Any number of amendments to the corporation's certificate of formation may be submitted to and voted on by a corporation's members at any one meeting of the members. (TNPCA 4.02.B.)

Source Law

B. Any number of amendments may be submitted and voted upon at any one meeting.

Revisor's Note

No substantive change is intended.

[Sections 22.109-22.150 reserved for expansion]

SUBCHAPTER D. MEMBERS

Revised Law

Sec. 22.151. MEMBERS. (a) A corporation may have one or more classes of members or may have no members.

(b) If the corporation has one or more classes of members, the corporation's certificate of formation or bylaws must include:

- (1) a designation of each class;
- (2) the manner of the election or appointment of the members of each class; and
- (3) the qualifications and rights of the members of each class.

(c) A corporation may issue a certificate, card, or other instrument evidencing membership rights, voting rights, or ownership rights as authorized by the certificate of formation or bylaws. (TNPCA 2.08.A, B, D.)

Source Law

A. A corporation may have one or more classes of members or may have no members.

B. If the corporation has one or more classes of members, the designation of such class or classes, the manner of election or appointment, and the qualifications and rights of the members of each class shall be set forth in the articles of incorporation or by-laws.

D. A corporation may issue certificates, or cards, or other instruments evidencing membership rights, voting rights or ownership rights as may be authorized in the articles of incorporation or in the by-laws.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.152. IMMUNITY FROM LIABILITY. The members of a corporation are not personally liable for a debt, liability, or obligation of the corporation. (TNPCA 2.08.E.)

Source Law

E. The members of a non-profit corporation shall not be personally liable for the debts, liabilities, or obligations of the corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.153. ANNUAL MEETING. (a) Except as provided by Subsection (b), a corporation shall hold an annual meeting of the members at a time that is stated in or determined in accordance with the corporation's bylaws.

(b) If the bylaws provide for more than one regular meeting of members each year, an annual meeting is not required. If an annual meeting is not required, directors may be elected at a meeting as provided by the bylaws. (TNPCA 2.10.A(2) (part).)

Source Law

(2) An annual meeting of the members shall be held at such times as may be provided in the by-laws, except that where the by-laws of a corporation provide for more than one regular meeting of members each year, an annual meeting shall not be required, and directors may be elected at such meetings as the by-laws may provide. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.154. FAILURE TO CALL ANNUAL MEETING. (a) If the board of directors of a corporation fails to call the annual

meeting of members at the designated time, a member of the corporation may demand that the meeting be held within a reasonable time. The demand must be made in writing and sent to an officer of the corporation by registered mail.

(b) If the annual meeting is not called before the 61st day after the date of demand, a member of the corporation may compel the holding of the meeting by legal action directed against the board of directors, and each of the extraordinary writs of common law and of courts of equity are available to the member to compel the holding of the meeting. Each member has a justiciable interest sufficient to enable the member to institute and prosecute the legal proceedings.

(c) Failure to hold the annual meeting at the designated time does not result in the winding up and termination of the corporation. (TNPCA 2.10.A(2) (part).)

Source Law

(2) . . . Failure to hold the annual meeting at the designated time shall not work a dissolution of the corporation. In the event the board of directors fails to call the annual meeting at the designated time, any member may make demand that such meeting be held within a reasonable time, such demand to be made in writing by registered mail directed to any officer of the corporation. If the annual meeting of members is not called within sixty (60) days following such demand, any member may compel the holding of such annual meeting by legal action directed against said board, and all of the extraordinary writs of common law and of courts of equity shall be available to such member to compel the holding of such annual meeting. Each and every member is hereby declared to have a justiciable interest sufficient to enable him to institute and prosecute such legal proceedings.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.155. SPECIAL MEETINGS OF MEMBERS. A special meeting of the members of a corporation may be called by:

- (1) the president;
- (2) the board of directors;
- (3) members having not less than one-tenth of the

votes entitled to be cast at the meeting; or

(4) other officers or persons as provided by the certificate of formation or bylaws of the corporation. (TNPCA 2.10.A(3).)

Source Law

(3) Special meetings of the members may be called by the president, the board of directors, by members having not less than one-tenth (1/10) of the votes entitled to be cast at such meeting, or such other officers or persons as may be provided in the articles of incorporation or by-laws.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.156. NOTICE OF MEETING. (a) A corporation other than a church shall provide written notice of the place, date, and time of a meeting of the members of the corporation and, if the meeting is a special meeting, the purpose or purposes for which the meeting is called. The notice shall be delivered to each member entitled to vote at the meeting not later than the 10th day and not earlier than the 60th day before the date of the meeting. Notice may be delivered personally or in accordance with Section 6.051(b).

(b) Notice of a meeting of the members of a corporation that is a church is sufficient if given by oral announcement at a regularly scheduled worship service before the meeting or as otherwise provided by the certificate of formation or bylaws of the corporation. (TNPCA 2.11.A (part), B.)

Source Law

A. In the case of a corporation other than a church, written or printed notice stating the place, day, and hour of the meeting and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than ten (10) nor more than sixty (60) days before the date of the meeting, either personally,

B. In the case of a corporation which is a church, notice of meetings of members will be deemed sufficient if made by oral announcement at a regularly scheduled worship service prior to such meeting, or as otherwise provided in its articles of

incorporation or its by-laws.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.157. SPECIAL BYLAWS AFFECTING NOTICE. (a) A corporation may provide in the corporation's bylaws that notice of an annual or regular meeting is not required.

(b) A corporation having more than 1,000 members at the time a meeting is scheduled or called may provide notice of a meeting by publication in a newspaper of general circulation in the community in which the principal office of the corporation is located, if the corporation provides for that notice in its bylaws. (TNPCA 2.11.C, D.)

Source Law

C. The by-laws may provide that no notice of annual or regular meetings shall be required.

D. If its by-laws so provide, a corporation having more than one thousand (1,000) members at the time a meeting is scheduled or called may give notice of such meeting by publication in any newspaper of general circulation in the community in which the principal office of such corporation is located.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.158. PREPARATION AND INSPECTION OF LIST OF VOTING MEMBERS. (a) After setting a record date for the notice of a meeting, a corporation shall prepare an alphabetical list of the names of all its voting members. The list must identify:

- (1) the members who are entitled to notice and the members who are not entitled to notice of the meeting;
- (2) the address of each voting member; and
- (3) the number of votes each voting member is entitled to cast at the meeting.

(b) Not later than the second business day after the date notice is given of a meeting for which a list was prepared in accordance with Subsection (a), and continuing through the meeting, the list of voting members must be available at the corporation's principal office or at a reasonable place in the municipality in which the meeting will be held, as identified in the notice of the meeting, for inspection by members entitled to vote at the meeting for the purpose of communication with other

members concerning the meeting.

(c) A voting member or voting member's agent or attorney is entitled on written demand to inspect and, at the member's expense and subject to Section 22.351, copy the list at a reasonable time during the period the list is available for inspection.

(d) The corporation shall make the list of voting members available at the meeting. A voting member or voting member's agent or attorney is entitled to inspect the list at any time during the meeting or an adjournment of the meeting. (TNPCA 2.11B.)

Source Law

2.11B.A. After fixing a record date for the notice of a meeting, a corporation shall prepare an alphabetical list of the names of all its voting members who are entitled to notice of the meeting. The list must show the address and number of votes each voting member is entitled to cast at the meeting. The corporation shall maintain, through the time of the members' meeting, a list of members who are entitled to vote at the meeting but are not entitled to notice of the meeting. This list shall be prepared on the same basis and be part of the list of voting members.

B. Not later than two (2) business days after the date notice is given of a meeting for which a list was prepared, as provided by Section A of this article, and continuing through the meeting, the list of voting members must be available for inspection by any member entitled to vote at the meeting for the purpose of communication with other members concerning the meeting at the corporation's principal office or at a reasonable place identified in the meeting notice in the city where the meeting will be held. A voting member or voting member's agent or attorney is entitled on written demand to inspect and, subject to the limitations of Section B, Article 2.23, of this Act to copy the list at a reasonable time and at the member's expense during the period it is available for inspection.

C. The corporation shall make the list of voting members available at the meeting,

and any voting member or voting member's agent or attorney is entitled to inspect the list at any time during the meeting or any adjournment.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.159. QUORUM OF MEMBERS. (a) Unless otherwise provided by the certificate of formation or bylaws of a corporation, members of the corporation holding one-tenth of the votes entitled to be cast, in person or by proxy, constitute a quorum.

(b) The vote of the majority of the votes entitled to be cast by the members present or represented by proxy at a meeting at which a quorum is present is the act of the members meeting, unless the vote of a greater number is required by law or the certificate of formation or bylaws.

(c) Unless otherwise provided by the certificate of formation or bylaws, a church incorporated before May 12, 1959, is considered to have provided in the certificate of formation or bylaws that members present at a meeting for which notice has been given constitute a quorum. (TNPCA 2.12.)

Source Law

2.12.A. Unless otherwise provided in the articles of incorporation or in the by-laws, members holding one-tenth of the votes entitled to be cast, represented in person or by proxy, shall constitute a quorum. The vote of the majority of the votes entitled to be cast by the members present, or represented by proxy at a meeting at which a quorum is present, shall be the act of the members meeting, unless the vote of a greater number is required by law, the articles of incorporation, or the by-laws.

B. In the absence of an express provision to the contrary in the articles of incorporation or the by-laws, a church incorporated prior to the effective date of this Act shall be deemed to have provided in its articles of incorporation or its by-laws that members present at a meeting, notice for which shall have been duly given, shall constitute a quorum.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.160. VOTING OF MEMBERS. (a) Each member of a corporation, regardless of class, is entitled to one vote on each matter submitted to a vote of the corporation's members, except to the extent that the voting rights of members of a class are limited, enlarged, or denied by the certificate of formation or bylaws of the corporation.

(b) A member may vote in person or, unless otherwise provided by the certificate of formation or bylaws, by proxy executed in writing by the member or the member's attorney-in-fact.

(c) Unless otherwise provided by the proxy, a proxy is revocable and expires 11 months after the date of its execution. A proxy may not be irrevocable for longer than 11 months.

(d) If authorized by the certificate of formation or bylaws of the corporation, a member vote on any matter may be conducted by mail, by facsimile transmission, by electronic message, or by any combination of those methods. (TNPCA 2.13.A, B.)

Source Law

A. Each member, regardless of class, shall be entitled to one (1) vote on each matter submitted to a vote of the members, except to the extent that the voting rights of members of any class or classes are limited, enlarged, or denied by the articles of incorporation or the by-laws.

B. A member may vote in person or, unless the articles of incorporation or the by-laws otherwise provide, may vote by proxy executed in writing by the member or by his duly authorized attorney-in-fact. No proxy shall be valid after eleven (11) months from the date of its execution, unless otherwise provided in the proxy. Each proxy shall be revocable unless expressly provided therein to be irrevocable, and in no event shall it remain irrevocable for more than eleven (11) months. Where directors or officers are to be elected by members, the by-laws may provide that such elections may be conducted by mail, by facsimile transmission, or by any combination of the two.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.161. ELECTION OF DIRECTORS. (a) A member entitled to vote at an election of directors is entitled to vote, in person or by proxy, for as many persons as there are directors to be elected and for whose election the member has a right to vote.

(b) If expressly authorized by the corporation's certificate of formation, the member may cumulate the member's vote by:

(1) giving one candidate a number of votes equal to the number of the directors to be elected multiplied by the member's vote; or

(2) distributing the votes on the same principle among any number of the candidates.

(c) A member who intends to cumulate votes under Subsection (b) shall give written notice of the member's intention to the secretary of the corporation not later than the day preceding the date of the election. (TNPCA 2.13.C.)

Source Law

C. At each election for directors every member entitled to vote at such election shall have the right to vote, in person or by proxy, for as many persons as there are directors to be elected and for whose election he has a right to vote, or, if expressly authorized by the articles of incorporation, to cumulate his vote by giving one candidate as many votes as the number of such directors multiplied by his vote shall equal, or by distributing such votes on the same principle among any number of such candidates. Any member who intends to cumulate his votes as herein authorized shall give written notice of such intention to the secretary of the corporation on or before the day preceding the election at which such member intends to cumulate his votes.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.162. GREATER VOTING REQUIREMENTS UNDER CERTIFICATE OF FORMATION. If the corporation's certificate of formation requires the vote or concurrence of a greater proportion of the members of a corporation than is required by this chapter with respect to an action to be taken by the members, the certificate of formation controls. (TNPCA 9.08.)

Source Law

9.08.A. Whenever, with respect to any action to be taken by the members or directors of a corporation, the articles of incorporation require the vote or concurrence of a greater proportion of the members or directors, as the case may be, then required by this Act with respect to such action, the provisions of the articles of incorporation shall control.

Revisor's Note

No substantive change is intended. Section 22.214 of the revised law contains the provisions from the source law relating to directors.

Revised Law

Sec. 22.163. RECORD DATE FOR DETERMINATION OF MEMBERS. (a) The record date for determining members of a corporation may be set as provided by Section 6.101.

(b) If a record date is not set under Section 6.101:

(1) members on the date of the meeting who are otherwise eligible to vote are entitled to vote at the meeting;

(2) members at the close of business on the business day preceding the date notice is given, or if notice is waived, at the close of business on the business day preceding the date of the meeting, are entitled to notice of a meeting of members; and

(3) members at the close of business on the later of the day the board of directors adopts the resolution relating to the action or the 60th day before the date of the action are entitled to exercise any rights regarding any other lawful action.

(c) The board of directors of a corporation may set a new date for determining the right to notice of or to vote at any adjournment of a members' meeting. The board shall set a new date if the meeting is adjourned to a date more than 90 days after the record date for determining members entitled to notice of the original meeting. (TNPCA 2.11A.A (part), B (part), C (part), E.)

Source Law

A. . . . If a record date is not fixed, members at the close of business on the business day preceding the date on which notice is given, or if notice is waived, at the close of business on the business day

preceding the date of the meeting, are entitled to notice of the meeting.

B. . . . If a record date is not fixed, members on the date of the meeting who are otherwise eligible to vote are entitled to vote at the meeting.

C. . . . If a record date is not fixed, members at the close of business on the date on which the board of directors adopts the resolution relating to the record date, or the 60th day before the date of the other action, whichever is later, are entitled to exercise those rights.

E. A determination of members entitled to notice of or to vote at a members' meeting is effective for any adjournment of the meeting unless the board fixes a new date for determining the right to notice or the right to vote. The board must fix a new date for determining the right to notice or the right to vote if the meeting is adjourned to a date more than ninety (90) days after the record date for determining members entitled to notice of the original meeting.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.164. VOTE REQUIRED TO APPROVE FUNDAMENTAL ACTION.

(a) In this section, "fundamental action" means:

- (1) an amendment of a certificate of formation;
- (2) a voluntary winding up under Chapter 11;
- (3) a revocation of a voluntary decision to wind up under Section 11.151;
- (4) a cancellation of an event requiring winding up under Section 11.152;
- (5) a reinstatement under Section 11.202;
- (6) a distribution plan under Section 22.305;
- (7) a plan of merger under Subchapter F;
- (8) a sale of all or substantially all of the assets of a corporation under Subchapter F;
- (9) a plan of conversion under Subchapter F; or
- (10) a plan of exchange under Subchapter F.

(b) Except as otherwise provided by Subsection (c) or the certificate of formation in accordance with Section 22.162, the vote required for approval of a fundamental action is:

- (1) at least two-thirds of the votes that members

present in person or by proxy are entitled to cast at the meeting at which the action is submitted for a vote, if the corporation has members with voting rights;

(2) at least two-thirds of the votes of members present at the meeting at which the action is submitted for a vote, if the management of the affairs of the corporation is vested in the corporation's members under Section 22.202; or

(3) the affirmative vote of the majority of the directors in office, if the corporation has no members or has no members with voting rights.

(c) If any class of members is entitled to vote on the fundamental action as a class by the terms of the certificate of formation or the bylaws, the vote required for the approval of the fundamental action is the vote required by Subsection (b)(1) and at least two-thirds of the votes that the members of each class in person or by proxy are entitled to cast at the meeting at which the action is submitted for a vote. (TNPCA 4.02.A (part), 5.03.A (part), 5.09 (part), 6.01.A (part), 6.03 (part), 6.04.A (part).)

Source Law

[4.02]

A. Amendments to the articles of incorporation may be made in the following manner:

(1) Except as provided in Section A(4) of this article, where there are members having voting rights, The proposed amendment shall be adopted upon receiving at least two-thirds of the votes which members present at such meeting in person or by proxy are entitled to cast, unless any class of members is entitled to vote as a class thereon by the terms of the articles of incorporation or of the by-laws, in which event the proposed amendment shall not be adopted unless it also receives at least two-thirds of the votes which the members of each such class who are present at such meeting in person or by proxy are entitled to cast.

(2) Where there are no members, no members having voting rights, or in the case of an amendment under Section A(4) of this article, an amendment shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

(3) Where the management of the affairs of the corporation is vested in the members pursuant to Article 2.14C of this Act, the proposed amendment shall be submitted to a vote at a meeting of members The proposed amendment shall be adopted upon receiving at least two-thirds of the votes of members present at such meeting.
.

[5.03]

A. A plan of merger or consolidation of domestic corporations shall be adopted in the following manner:

(1) Where the members of any merging or consolidating corporation have voting rights, The proposed plan shall be adopted upon receiving at least two-thirds of the votes which members present at such meeting in person or by proxy are entitled to cast, unless any class of members is entitled to vote as a class thereon by the terms of the articles of incorporation or of the by-laws, in which event as to such corporations the proposed plan shall not be adopted unless it also receives at least two-thirds of the votes which members of each such class who are present at such meeting in person or by proxy are entitled to cast.

(2) Where any merging or consolidating corporation has no members, or no members having voting rights, a plan of merger or consolidation shall be adopted at a meeting of the board of directors of such corporation upon receiving the vote of a majority of the directors in office.

(3) Where the management of the affairs of any merging or consolidating corporation is vested in its members pursuant to Article 2.14C of this Act, The proposed plan shall be adopted upon receiving at least two-thirds of the votes of the members present at such meeting.

5.09.A. A sale, lease or exchange of all, or substantially all, the property and assets of a corporation, . . . may be authorized in the following manner:

(1) Where there are members having voting rights, Such authorization shall require at least two-thirds (2/3) of the votes which members present at such meeting in person or by proxy are entitled to cast, unless any class of members is entitled to vote as a class thereon by the terms of the articles of incorporation or of the by-laws in which event such authorization shall also require at least two-thirds (2/3) of the votes which members of each such class who are present at such meeting in person or by proxy are entitled to cast. . . .

(2) Unless otherwise provided in the articles of incorporation, where there are no members, or no members having voting rights, a sale, lease, or exchange of all, or substantially all, the property and assets of a corporation shall be authorized upon receiving the vote of a majority of the directors in office.

(3) Where the management of the affairs of a corporation vested in its members pursuant to Article 2.14C of this Act, Such authorization shall require at least two-thirds of the votes of the members present at such meeting.

. . . .

[6.01]

A. A corporation may dissolve and wind up its affairs in the following manner:

(1) Where there are members having voting rights, A resolution to dissolve the corporation shall be adopted upon receiving at least two-thirds of the votes which members present at such meeting in person or by proxy are entitled to cast, unless any class of members is entitled to vote as a class thereon by the terms of the articles of incorporation or of the by-laws, in which event the resolution shall not be adopted unless it also receives at least two-thirds of the votes which members of each such class who are present at such meeting in person or by proxy are entitled to cast.

(2) Where there are no members, or no members having voting rights, the

dissolution of the corporation shall be authorized at a meeting of the board of directors upon the adoption of a resolution to dissolve by the vote of a majority of the directors in office.

(3) Where the management of the affairs of the corporation is vested in the members pursuant to Article 2.14C of this Act, A resolution to dissolve the corporation shall be adopted upon receiving at least two-thirds of the votes of members present at such meeting.

6.03.A. A plan providing for the distribution of assets, not inconsistent with the provisions of this Act, may be adopted . . . in the following manner:

(1) Where there are members having voting rights, Such plan of distribution shall be adopted upon receiving at least two-thirds (2/3) of the votes which members present at such meeting in person or by proxy are entitled to cast, unless any class of members is entitled to vote as a class thereon by the terms of the articles of incorporation or of the by-laws, in which event the proposed plan shall not be adopted unless it also receives at least two-thirds of the votes which members of each such class who are present at such meeting in person or by proxy are entitled to cast.

(2) Where there are no members, or no members having voting rights, a plan of distribution shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

(3) Where the management of the affairs of the corporation is vested in its members pursuant to Article 2.14C of this Act, Such plan of distribution shall be adopted upon receiving at least two-thirds of the votes of the members present at such meeting.

[6.04]

A. A corporation may, at any time prior to the issuance of a certificate of dissolution by the Secretary of State, revoke

the action theretofore taken to dissolve the corporation, in the following manner:

(1) Where there are members having voting rights, A resolution to revoke the voluntary dissolution proceedings shall be adopted upon receiving at least two-thirds (2/3) of the votes which members present at such meeting in person or by proxy are entitled to cast, unless any class of members is entitled to vote as a class thereon by the terms of the articles of incorporation or of the by-laws, in which event the proposed resolution shall not be adopted unless it also receives at least two-thirds (2/3) of the votes which members of each such class who are present at such meeting in person or by proxy are entitled to cast.

(2) Where there are no members, or no members having voting rights, a resolution to revoke the voluntary dissolution proceedings shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

(3) Where the management of the affairs of the corporation is vested in its members pursuant to Article 2.14C of this Act, A resolution to revoke the voluntary dissolution proceedings shall be adopted upon receiving at least two-thirds (2/3) of the votes of the members present at such meeting.

Revisor's Note

The revised law references a "cancellation of an event requiring winding up under Section 11.152" and "a reinstatement under Section 11.202." The existing law in the Texas Non-Profit Corporation Act does not have these concepts as provided in Chapter 11. These new concepts allow additional flexibility in preventing or reversing unwarranted or unintentional terminations of nonprofit corporations. The reinstatement is similar to a revocation of voluntary dissolution after filing of the articles of dissolution as currently permitted under the

Texas Business Corporation Act.

[Sections 22.165-22.200 reserved for expansion]

SUBCHAPTER E. MANAGEMENT

Revised Law

Sec. 22.201. MANAGEMENT BY BOARD OF DIRECTORS. Except as provided by Section 22.202, the affairs of a corporation are managed by a board of directors. The board of directors may be designated by any name appropriate to the customs, usages, or tenets of the corporation. (TNPCA 2.14.A (part), D.)

Source Law

A. The affairs of a corporation shall be managed by a board of directors. . . .

D. The board of directors may be designated by any name appropriate to the customs, usages, or tenets of the corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.202. MANAGEMENT BY MEMBERS. (a) The certificate of formation of a corporation may vest the management of the affairs of the corporation in the members of the corporation. If the corporation has a board of directors, the corporation may limit the authority of the board to the extent provided by the certificate of formation or bylaws.

(b) A corporation is considered to have vested the management of the corporation's affairs in the board of directors of the corporation in the absence of a provision to the contrary in the certificate of formation, unless the corporation is a church organized and operating under a congregational system that:

- (1) was incorporated before January 1, 1994; and
- (2) has the management of its affairs vested in the corporation's members. (TNPCA 2.14.C.)

Source Law

C. The articles of incorporation of a corporation may vest the management of the affairs of the corporation in its members. If the corporation has a board of directors, it may limit the authority of the board of directors to whatever extent as may be set forth in the articles of incorporation or by-laws. Except for a church organized and operating under a congregational system, was

incorporated before January 1, 1994, and has the management of its affairs vested in its members, a corporation shall be deemed to have vested the management of the affairs of the corporation in its board of directors in the absence of an express provision to the contrary in the articles of incorporation or the by-laws.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.203. BOARD MEMBER ELIGIBILITY REQUIREMENTS. A director of a corporation is not required to be a resident of this state or a member of the corporation unless the certificate of formation or a bylaw of the corporation imposes that requirement. The certificate of formation or bylaws may prescribe other qualifications for directors. (TNPCA 2.14.A (part).)

Source Law

A. . . . Directors need not be residents of this State or members of the corporation unless the articles of incorporation or the by-laws so require. The articles of incorporation or the by-laws may prescribe other qualifications for directors.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.204. NUMBER OF DIRECTORS. (a) If the corporation has a board of directors, a corporation may not have fewer than three directors. The number of directors shall be set by, or in the manner provided by, the certificate of formation or bylaws of the corporation, except that the number of directors on the initial board of directors must be set by the certificate of formation.

(b) The number of directors may be increased or decreased by amendment to, or in the manner provided by, the certificate of formation or bylaws. A decrease in the number of directors may not shorten the term of an incumbent director.

(c) In the absence of a provision of the certificate of formation or a bylaw setting the number of directors or providing for the manner in which the number of directors shall be determined, the number of directors is the same as the number constituting the initial board of directors. (TNPCA 2.15.A.)

Source Law

A. The number of directors of a corporation shall be not less than three (3). Subject to such limitation, the number of directors shall be fixed by, or in the manner provided in, the articles of incorporation or the by-laws, except as to the number constituting the initial board of directors, which number shall be fixed by the articles of incorporation. The number of directors may be increased or decreased from time to time by amendment to, or in the manner provided in, the articles of incorporation or the by-laws, but no decrease shall have the effect of shortening the term of any incumbent director. The number of directors may not be decreased to fewer than three (3). In the absence of a by-law or a provision of the articles of incorporation fixing the number of directors or providing for the manner in which the number of directors shall be fixed, the number of directors shall be the same as the number constituting the initial board of directors as fixed by the articles of incorporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.205. DESIGNATION OF INITIAL BOARD OF DIRECTORS. If the corporation is to be managed by a board of directors, the certificate of formation of a corporation must state the names of the members of the initial board of directors of the corporation. (TNPCA 2.15.B (part).)

Source Law

B. The directors constituting the initial board of directors shall be named in the articles of incorporation and

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.206. ELECTION OR APPOINTMENT OF BOARD OF DIRECTORS. Directors other than the initial directors are elected, appointed, or designated in the manner provided by the certificate of formation or bylaws. If the method of election,

designation, or appointment is not provided by the certificate of formation or bylaws, directors other than the initial directors are elected by the board of directors. (TNPCA 2.15.B (part).)

Source Law

B. . . . Thereafter, directors shall be elected, appointed, or designated in the manner and for the terms provided in the articles of incorporation or the by-laws. If the method of election, designation, or appointment is not provided in the articles of incorporation or by-laws, the directors, other than the initial directors, shall be elected by the board of directors. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.207. ELECTION AND CONTROL BY CERTAIN ENTITIES. (a) The board of directors of a religious, charitable, educational, or eleemosynary corporation may be affiliated with, elected, and controlled by an incorporated or unincorporated convention, conference, or association organized under the laws of this or another state, the membership of which is composed of representatives, delegates, or messengers from a church or other religious association.

(b) The board of directors of a corporation may be wholly or partly elected by one or more associations or corporations organized under the laws of this or another state if:

(1) the certificate of formation or bylaws of the corporation provide for that election; and

(2) the corporation has no members with voting rights.
(TNPCA 2.14.B, E.)

Source Law

B. Boards of directors of religious, charitable, educational, or eleemosynary institutions may be affiliated with, elected and controlled by a convention, conference or association organized under the laws of this State or another state, whether incorporated or unincorporated, whose membership is composed of representatives, delegates, or messengers from any church or other religious association.

E. The board of directors of a corporation may be elected (in whole or in

part) by one or more associations or corporations, organized under the laws of this State or another state if (1) the articles of incorporation or the by-laws of the former corporation so provide, and (2) the former corporation has no members with voting rights.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.208. TERM OF OFFICE. (a) A director on the initial board of directors of a corporation holds office until the first annual election of directors or for the period specified in the certificate of formation or bylaws of the corporation. Directors other than the initial directors are elected, appointed, or designated for the terms provided by the certificate of formation or bylaws.

(b) In the absence of a provision in the certificate of formation or bylaws setting the term of office for directors, a director holds office until the next annual election of directors and until a successor is elected, appointed, or designated and qualified.

(c) A director may be removed from office as provided in Section 22.211. (TNPCA 2.15.B (part), C (part).)

Source Law

B. The directors constituting the initial board of directors . . . shall hold office until the first annual election of directors or for such other period as may be specified in the articles of incorporation or the by-laws. . . . In the absence of a provision in the articles of incorporation or the by-laws fixing the term of office, a director shall hold office until the next annual election of directors and until his successor shall have been elected, appointed, or designated and qualified.

C. . . . Unless removed in accordance with the provisions of the articles of incorporation or the by-laws, each director shall hold office for the term for which he is elected, appointed, or designated and until his successor shall have been elected, appointed, or designated and qualified.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.209. CLASSIFICATION OF DIRECTORS. Directors may be divided into classes. The terms of office of the several classes are not required to be uniform. (TNPCA 2.15.C (part).)

Source Law

C. Directors may be divided into classes and the terms of office of the several classes need not be uniform. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.210. EX OFFICIO MEMBER OF BOARD. (a) The certificate of formation or bylaws of a corporation may provide that a person may be an ex officio member of the board of directors of the corporation.

(b) A person designated as an ex officio member of the board is entitled to receive notice of and to attend board meetings.

(c) An ex officio member is not entitled to vote unless the certificate of formation or bylaws authorize the member to vote. An ex officio member of the board who is not entitled to vote does not have the duties or liabilities of a director provided by this chapter. (TNPCA 2.14.F.)

Source Law

F. The articles of incorporation or the by-laws may provide that any one or more persons may be ex-officio members of the board of directors. A person designated as an ex-officio member of the board of directors is entitled to notice of and to attend meetings of the board of directors. The ex-officio member is not entitled to vote unless otherwise provided in the articles of incorporation or the by-laws. An ex-officio member of the board of directors who is not entitled to vote does not have the duties or liabilities of a director as provided in this Act.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.211. REMOVAL OF DIRECTOR. (a) A director of a

corporation may be removed from office under any procedure provided by the certificate of formation or bylaws of the corporation.

(b) In the absence of a provision for removal in the certificate of formation or bylaws, a director may be removed from office, with or without cause, by the persons entitled to elect, designate, or appoint the director. If the director was elected to office, removal requires an affirmative vote equal to the vote necessary to elect the director. (TNPCA 2.15.D.)

Source Law

D. A director may be removed from office pursuant to any procedure therefor provided in the articles of incorporation or by-laws. In the absence of a provision providing for removal, a director may be removed from office, with or without cause, by the persons entitled to elect, designate, or appoint the director. If the director was elected to office, removal requires an affirmative vote equal to the vote necessary to elect the director.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.212. VACANCY. (a) Unless otherwise provided by the certificate of formation or bylaws of the corporation, a vacancy in the board of directors of a corporation shall be filled by the affirmative vote of the majority of the remaining directors, regardless of whether that majority is less than a quorum. A director elected to fill a vacancy is elected for the unexpired term of the member's predecessor in office.

(b) A vacancy in the board occurring because of an increase in the number of directors shall be filled by election at an annual meeting or at a special meeting of members called for that purpose. If a corporation has no members or has no members with the right to vote on the vacancy, the vacancy shall be filled as provided by the certificate of formation or bylaws. (TNPCA 2.16.)

Source Law

2.16.A. Unless otherwise provided in the articles of incorporation or the by-laws, any vacancy occurring in the board of directors shall be filled by the affirmative vote of a majority of the remaining directors though less than a quorum of the board of directors. A director elected to fill a

vacancy shall be elected for the unexpired term of his predecessor in office.

B. Any directorship to be filled by reason of an increase in the number of directors shall be filled by election at an annual meeting or at a special meeting of members called for that purpose. If a corporation has no members, or no members having the right to vote thereon, such directorship shall be filled as provided in the articles of incorporation or the by-laws.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.213. QUORUM. (a) A quorum for the transaction of business by the board of directors of a corporation is the lesser of:

(1) the majority of the number of directors set by the corporation's bylaws or, in the absence of a bylaw setting the number of directors, a majority of the number of directors stated in the corporation's certificate of formation; or

(2) any number, not less than three, set as a quorum by the certificate of formation or bylaws.

(b) A director present by proxy at a meeting may not be counted toward a quorum. (TNPCA 2.17.A, B.)

Source Law

A. A quorum for the transaction of business by the board of directors shall be whichever is less:

(1) A majority of the number of directors fixed by the bylaws, or in the absence of a bylaw fixing the number of directors, a majority of the number of directors stated in the articles of incorporation, or

(2) Any number, not less than three, fixed as a quorum by the articles of incorporation or the bylaws.

B. Directors present by proxy may not be counted toward a quorum.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.214. ACTION BY DIRECTORS. The act of a majority of the directors present in person or by proxy at a meeting at which

a quorum is present is the act of the board of directors of a corporation, unless the act of a greater number is required by the certificate of formation or bylaws of the corporation.
(TNPCA 2.17.C.)

Source Law

C. The act of the majority of the directors present in person or by proxy at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by the articles of incorporation or the bylaws.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.215. VOTING IN PERSON OR BY PROXY. A director of a corporation may vote in person or, if authorized by the certificate of formation or bylaws of the corporation, by proxy executed in writing by the director. (TNPCA 2.17.D (part).)

Source Law

D. A director may vote in person or (if the articles of incorporation or the bylaws so provide) by proxy executed in writing by the director. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.216. TERM AND REVOCABILITY OF PROXY. (a) A proxy expires three months after the date the proxy is executed.

(b) A proxy is revocable unless otherwise provided by the proxy or made irrevocable by law. (TNPCA 2.17.D (part).)

Source Law

D. . . . No proxy shall be valid after three months from the date of its execution. Each proxy shall be revocable unless expressly provided therein to be irrevocable, and unless otherwise made irrevocable by law.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.217. NOTICE OF MEETING; WAIVER OF NOTICE. (a) Regular meetings of the board of directors of a corporation may be held with or without notice as prescribed by the corporation's

bylaws.

(b) Special meetings of the board of directors shall be held with notice as prescribed by the bylaws. Attendance of a director at a meeting constitutes a waiver of notice, unless the director attends a meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

(c) Unless required by the bylaws, the business to be transacted at, or the purpose of, a regular or special meeting of the board of directors is not required to be specified in the notice or waiver of notice of the meeting.

(d) Notice may be delivered personally or in accordance with Section 6.051(b). (TNPCA 2.19.B.)

Source Law

B. Regular meetings of the board of directors may be held with or without notice as prescribed in the by-laws. Special meetings of the board of directors shall be held upon such notice as is prescribed in the by-laws. Attendance of a director at a meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board of directors need be specified in the notice or waiver of notice of such meeting, unless required by the by-laws.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.218. MANAGEMENT COMMITTEE. (a) If authorized by the certificate of formation or bylaws of the corporation, the board of directors of a corporation, by resolution adopted by the majority of the directors in office, may designate one or more committees to have and exercise the authority of the board in the management of the corporation to the extent provided by:

- (1) the resolution;
- (2) the certificate of formation; or
- (3) the bylaws.

(b) A committee designated under this section must consist of at least two persons. The majority of the persons on the committee must be directors. If provided by the certificate of

formation or bylaws, the remaining persons on the committee are not required to be directors.

(c) The designation of a committee and the delegation of authority to the committee does not operate to relieve the board of directors, or an individual director, of any responsibility imposed on the board or director by law. A committee member who is not a director has the same responsibility with respect to the committee as a committee member who is a director. (TNPCA 2.18.A)

Source Law

A. If the articles of incorporation or the bylaws so provide, the board of directors, by resolution adopted by a majority of the directors in office, may designate one or more committees, which, to the extent provided in such resolution, in the articles of incorporation, or in the bylaws, shall have and exercise the authority of the board of directors in the management of the corporation. Each such committee shall consist of two or more persons, a majority of whom are directors; the remainder, if the articles of incorporation or the bylaws so provide, need not be directors. The designation of such committees and the delegation thereto of authority shall not operate to relieve the board of directors, or any individual director, of any responsibility imposed upon it or him by law. Any non-director who becomes a member of any such committee shall have the same responsibility with respect to such committee as a director who is a member thereof.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.219. OTHER COMMITTEES. (a) The board of directors of a corporation, by resolution adopted by the majority of the directors at a meeting at which a quorum is present, or the president, if authorized by a similar resolution of the board of directors or by the certificate of formation or bylaws of the corporation, may designate and appoint one or more committees that do not have the authority of the board of directors in the management of the corporation.

(b) The membership on a committee designated under this

section may be limited to directors. (TNPCA 2.18.B.)

Source Law

B. Other committees not having and exercising the authority of the board of directors in the management of the corporation may be designated and appointed by a resolution adopted by a majority of the directors at a meeting at which a quorum is present, or by the president thereunto authorized by a like resolution of the board of directors or by the articles of incorporation or by the by-laws. Membership on such committees may, but need not be, limited to directors.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.220. ACTION WITHOUT MEETING OF DIRECTORS OR COMMITTEE. (a) The certificate of formation of a corporation may provide that an action required by this chapter to be taken at a meeting of the corporation's directors or an action that may be taken at a meeting of the directors or a committee may be taken without a meeting if a written consent, stating the action to be taken, is signed by the number of directors or committee members necessary to take that action at a meeting at which all of the directors or committee members are present and voting. The consent must state the date of each director's or committee member's signature.

(b) A written consent signed by less than all of the directors or committee members is not effective to take the action that is the subject of the consent unless, not later than the 60th day after the date of the earliest dated consent delivered to the corporation in the manner required by this section, a consent or consents signed by the required number of directors or committee members are delivered to the corporation:

(1) at the registered office or principal place of business of the corporation; or

(2) through the corporation's registered agent, transfer agent, registrar, or exchange agent or an officer or agent of the corporation having custody of the books in which proceedings of meetings of directors or committees are recorded.

(c) Delivery under Subsection (b) must be by hand or by certified or registered mail, return receipt requested. Delivery to the corporation's principal place of business must be addressed to the president or principal executive officer of the corporation.

(d) Prompt notice of the taking of an action by directors or a committee without a meeting by less than unanimous written consent shall be given to each director or committee member who did not consent in writing to the action. (TNPCA 9.10.C(1), (2), (3).)

Source Law

(1) The articles of incorporation may provide that any action required by this Act to be taken at a meeting of the members or directors of a corporation or any action that may be taken at a meeting of the members or directors or of any committee may be taken without a meeting if a consent in writing, setting forth the action to be taken, is signed by a sufficient number of members, directors, or committee members as would be necessary to take that action at a meeting at which all of the members, directors, or members of the committee were present and voted.

(2) Each written consent shall bear the date of signature of each member, director, or committee member who signs the consent. A written consent signed by less than all of the members, directors, or committee members is not effective to take the action that is the subject of the consent unless, within 60 days after the date of the earliest dated consent delivered to the corporation in the manner required by this article, a consent or consents signed by the required number of members, directors, or committee members is delivered to the corporation at its registered office, registered agent, principal place of business, transfer agent, registrar, exchange agent, or an officer or agent of the corporation having custody of the books in which proceedings of meetings of members, directors, or committees are recorded. Delivery shall be by hand or certified or registered mail, return receipt requested. Delivery to the corporation's principal place of business shall be addressed to the president or principal executive officer of the corporation.

(3) Prompt notice of the taking of

any action by members, directors, or a committee without a meeting by less than unanimous written consent shall be given to all members, directors, or committee members who did not consent in writing to the action.

Revisor's Note

No substantive change is intended. The source law provisions relating to member consents are omitted in this section of the revised law but are set forth in Sections 6.202 and 6.203 of the revised law.

Revised Law

Sec. 22.221. GENERAL STANDARDS FOR DIRECTORS. (a) A director shall discharge the director's duties, including duties as a committee member, in good faith, with ordinary care, and in a manner the director reasonably believes to be in the best interest of the corporation.

(b) A director is not liable to the corporation, a member, or another person for an action taken or not taken as a director if the director acted in compliance with this section. A person seeking to establish liability of a director must prove that the director did not act:

- (1) in good faith;
- (2) with ordinary care; and
- (3) in a manner the director reasonably believed to be in the best interest of the corporation. (TNPCA 2.28.A, D.)

Source Law

A. A director shall discharge the director's duties, including the director's duties as a member of a committee, in good faith, with ordinary care, and in a manner the director reasonably believes to be in the best interest of the corporation.

D. A director is not liable to the corporation, any member, or any other person for any action taken or not taken as a director if the director acted in compliance with this article. A person seeking to establish liability of a director must prove that the director has not acted:

- (1) in good faith;
- (2) with ordinary care; and
- (3) in a manner the director reasonably believes to be in the best interest of the corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.222. RELIGIOUS CORPORATION DIRECTOR'S GOOD FAITH RELIANCE ON CERTAIN INFORMATION. A director of a religious corporation, in the discharge of a duty imposed or power conferred on the director, including a duty imposed or power conferred as a committee member, may rely in good faith on information or on an opinion, report, or statement, including a financial statement or other financial data, concerning the corporation or another person that was prepared or presented by:

- (1) a religious authority; or
- (2) a minister, priest, rabbi, or other person whose position or duties in the corporation the director believes justify reliance and confidence and whom the director believes to be reliable and competent in the matters presented. (TNPCA 2.28.B (part).)

Source Law

B. . . .

- (4) in the case of religious corporations, religious authorities and ministers, priests, rabbis, or other persons whose position or duties in the religious organization the director believes justify reliance and confidence and whom the director believes to be reliable and competent in the matters presented.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.223. NOT A TRUSTEE. A director of a corporation is not considered to have the duties of a trustee of a trust with respect to the corporation or with respect to property held or administered by the corporation, including property subject to restrictions imposed by the donor or transferor of the property. (TNPCA 2.28.E.)

Source Law

- E. A director is not deemed to have the duties of a trustee of a trust with respect to the corporation or with respect to any property held or administered by the corporation, including property that may be subject to restrictions imposed by the donor or transferor of the property.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.224. DELEGATION OF INVESTMENT AUTHORITY. (a) The board of directors of a corporation may:

(1) contract with an advisor who is an investment counsel or a trust company, bank, investment advisor, or investment manager; and

(2) confer on that advisor the authority to:

(A) purchase or otherwise acquire a stock, bond, security, or other investment on behalf of the corporation; and

(B) sell, transfer, or otherwise dispose of an asset or property of the corporation at a time and for a consideration the advisor considers appropriate.

(b) The board of directors may:

(1) confer on an advisor described by Subsection (a) other powers regarding the corporation's investments as the board considers appropriate; and

(2) authorize the advisor to hold title to an asset or property of the corporation, in the advisor's own name or in the name of a nominee, for the benefit of the corporation.

(c) The board of directors is not liable for an action taken or not taken by an advisor under this section if the board acted in good faith and with ordinary care in selecting the advisor. The board of directors may remove or replace the advisor, with or without cause, if the board considers that action appropriate or necessary. (TNPCA 2.29.)

Source Law

2.29.A. The board of directors of a corporation may:

(1) from time to time contract with investment counsel, trust companies, banks, investment advisors, or investment managers; and

(2) confer on those advisors full power and authority to:

(a) purchase or otherwise acquire stocks, bonds, securities, and other investments on behalf of the corporation; and

(b) sell, transfer, or otherwise dispose of any of the corporation's assets and properties at a time and for a consideration that the advisor deems appropriate.

B. The board of directors also may:

(1) confer on an advisor described by Section A of this article other powers

regarding the corporation's investments as the board of directors deems appropriate; and

(2) authorize the advisor to hold title to any of the corporation's assets and properties in its own name for the benefit of the corporation or in the name of a nominee for the benefit of the corporation.

C. The board of directors has no liability regarding any action taken or omitted by an advisor engaged under this article if the board of directors acted in good faith and with ordinary care in selecting the advisor. The board of directors may remove or replace the advisor, with or without cause, if they deem that action appropriate or necessary.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.225. LOAN TO DIRECTOR PROHIBITED. (a) A corporation may not make a loan to a director.

(b) The directors of a corporation who vote for or assent to the making of a loan to a director, and any officer who participates in making the loan, are jointly and severally liable to the corporation for the amount of the loan until the loan is repaid. (TNPCA 2.25.)

Source Law

2.25.A. No loans shall be made by a corporation to its directors.

B. The directors of a corporation who vote for or assent to the making of a loan to a director of the corporation, and any officer or officers participating in the making of such loan, shall be jointly and severally liable to the corporation for the amount of such loan until repayment thereof.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.226. DIRECTOR LIABILITY FOR CERTAIN DISTRIBUTIONS OF ASSETS. (a) In addition to any other liability imposed by law on the directors of a corporation, the directors who vote for or assent to a distribution of assets other than in payment of the corporation's debts, when the corporation is insolvent or when distribution would render the corporation insolvent, or during

the liquidation of the corporation, without the payment and discharge of or making adequate provisions for any known debt, obligation, or liability of the corporation, are jointly and severally liable to the corporation for the value of the assets distributed, to the extent that the debt, obligation, or liability is not paid and discharged.

(b) A director is not liable under this section if, in voting for or assenting to a distribution, the director:

(1) relied in good faith and with ordinary care on information or an opinion, report, or statement in accordance with Section 3.102;

(2) acting in good faith and with ordinary care, considered the assets of the corporation to be at least equal to their book value; or

(3) in determining whether the corporation made adequate provision for the discharge of all of its liabilities and obligations as provided in Section 11.053, relied in good faith and with ordinary care on financial statements of, or other information concerning, a person who was or became contractually obligated to discharge some or all of those liabilities or obligations. (TNPCA 2.26.A, C.)

Source Law

A. In addition to any other liabilities imposed by law upon directors of a corporation, the directors who vote for or assent to any distribution of assets other than in payment of its debts, when the corporation is insolvent or when such distribution would render the corporation insolvent, or during the liquidation of the corporation without the payment and discharge of or making adequate provisions for all known debts, obligations and liabilities of the corporation, shall be jointly and severally liable to the corporation for the value of such assets which are thus distributed, to the extent that such debts, obligations and liabilities of the corporation are not thereafter paid and discharged.

C. A director shall not be liable under Section A of this Article if, in voting for or assenting to a distribution, the director:

(1) relied in good faith and with ordinary care on information, opinions, reports, or statements, including financial

statements and other financial data, concerning the corporation or another person that were prepared or presented by:

(a) one or more officers or employees of the corporation;

(b) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or

(c) a committee of the board of directors of which the director is not a member;

(2) acting in good faith and with ordinary care, considered the assets of the corporation to be at least that of their book value; or

(3) in determining whether the corporation made adequate provision for payment, satisfaction, or discharge of all of its liabilities and obligations as provided in Article 6.03 of this Act, relied in good faith and with ordinary care on financial statements of, or other information concerning, a person who was or became contractually obligated to pay, satisfy, or discharge some or all of those liabilities or obligations.

Revisor's Note

No substantive change is intended. The revised law cross-references to Section 3.102 for the types of reports, opinions, or statements that can be relied on by a director.

Revised Law

Sec. 22.227. DISSENT TO ACTION. (a) A director of a corporation who is present at a meeting of the board of directors at which action is taken on a corporate matter described by Section 22.226(a) is presumed to have assented to the action unless:

(1) the director's dissent has been entered in the minutes of the meeting;

(2) the director has filed a written dissent to the action with the person acting as the secretary of the meeting before the meeting is adjourned; or

(3) the director has sent a written dissent by registered mail to the secretary of the corporation immediately

after the meeting has been adjourned.

(b) The right to dissent under this section does not apply to a director who voted in favor of the action. (TNPCA 2.26.B.)

Source Law

B. A director of a corporation who is present at a meeting of its board of directors at which action was taken on such corporate matter shall be presumed to have assented to such action unless his dissent shall be entered in the minutes of the meeting or unless he shall file his written dissent to such action with the person acting as the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the secretary of the corporation immediately after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of the action.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.228. RELIANCE ON WRITTEN OPINION OF ATTORNEY. A director is not liable under Section 22.226 or 22.227 if, in the exercise of ordinary care, the director acted in good faith and in reliance on the written opinion of an attorney for the corporation. (TNPCA 2.26.D.)

Source Law

D. A director shall not be liable under this Article if, in the exercise of ordinary care, he acted in good faith and in reliance upon the written opinion of an attorney for the corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.229. RIGHT TO CONTRIBUTION. A director against whom a claim is asserted under Section 22.226 or 22.227 and who is held liable on the claim is entitled to contribution from persons who accepted or received the distribution knowing the distribution to have been made in violation of that section, in proportion to the amounts received by those persons. (TNPCA 2.26.E.)

Source Law

E. A director against whom a claim shall be asserted under this Article and who shall be held liable thereon shall be entitled to contribution from persons who accepted or received such distribution knowing such distribution to have been made in violation of this Article, in proportion to the amounts received by them respectively.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.230. CONTRACTS OR TRANSACTIONS INVOLVING INTERESTED DIRECTORS, OFFICERS, AND MEMBERS. (a) This section applies only to a contract or transaction between a corporation and:

- (1) one or more of the corporation's directors, officers, or members; or
- (2) an entity or other organization in which one or more of the corporation's directors, officers, or members:
 - (A) is a managerial official or a member; or
 - (B) has a financial interest.

(b) An otherwise valid contract or transaction is valid notwithstanding that a director, officer, or member of the corporation is present at or participates in the meeting of the board of directors, of a committee of the board, or of the members that authorizes the contract or transaction, or votes to authorize the contract or transaction, if:

- (1) the material facts as to the relationship or interest and as to the contract or transaction are disclosed to or known by:
 - (A) the corporation's board of directors, a committee of the board of directors, or the members, and the board, the committee, or the members in good faith and with ordinary care authorize the contract or transaction by the affirmative vote of the majority of the disinterested directors, committee members or members, regardless of whether the disinterested directors, committee members or members constitute a quorum; or
 - (B) the members entitled to vote on the authorization of the contract or transaction, and the contract or transaction is specifically approved in good faith and with ordinary care by a vote of the members; or
- (2) the contract or transaction is fair to the corporation when the contract or transaction is authorized, approved, or ratified by the board of directors, a committee of the board of directors, or the members.

(c) Common or interested directors or members of a corporation may be included in determining the presence of a quorum at a meeting of the board, a committee of the board, or members that authorizes the contract or transaction. (TNPCA 2.30.)

Source Law

2.30.A. A contract or transaction between a corporation and one or more of its directors, officers, or members, or between a corporation and any other corporation, partnership, association, or other organization in which one or more of its directors, officers, or members are directors, officers, or members, or have a financial interest, is not void or voidable solely for that reason, solely because the director, officer, or member is present at or participates in the meeting of the board or committee of the board or of the members that authorizes the contract or transaction, or solely because the director's, officer's, or member's votes are counted for that purpose, if:

(1) the material facts as to the relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors, the committee, or the members, and the board, committee, or members in good faith and with ordinary care authorizes the contract or transaction by the affirmative vote of a majority of the disinterested directors or members, even though the disinterested directors or members are less than a quorum;

(2) the material facts as to the relationship or interest and as to the contract or transaction are disclosed or are known to the members entitled to vote on the contract or transaction, and the contract or transaction is specifically approved in good faith and with ordinary care by vote of the disinterested members; or

(3) the contract or transaction is fair to the corporation when it is authorized, approved, or ratified by the board of directors, a committee of the board, or the members.

B. Common or interested directors or members may be counted in determining the presence of a quorum at a meeting of the board of directors, of a committee, or of the members that authorizes the contract or transaction.

Revisor's Note

The provisions in Section 22.230 have been changed to be consistent with those applicable to for-profit corporations in Section 21.418. The presumption is that a contract between the corporation and an officer or director is valid if the material facts of the relationship and the contract have been disclosed and one of specified approval procedures is followed. Currently, in the Texas Non-Profit Corporation Act, the presumption is that the contract is not void or voidable.

Revised Law

Sec. 22.231. OFFICERS. (a) The officers of a corporation shall include a president and a secretary and may include one or more vice presidents, a treasurer, and other officers and assistant officers as considered necessary. Any two or more offices, other than the offices of president and secretary, may be held by the same person.

(b) A properly designated committee may perform the functions of an officer. A single committee may perform the functions of any two or more officers, including the functions of president and secretary.

(c) The officers of a corporation may be designated by other or additional titles as provided by the certificate of formation or bylaws of the corporation. (TNPCA 2.20.A (part), B.)

Source Law

A. The officers of a corporation shall consist of a president and a secretary and may also consist of one or more vice-presidents, a treasurer, and such other officers and assistant officers as may be deemed necessary, Any two or more offices may be held by the same person, except the offices of president and secretary. A committee duly designated may perform the functions of any officer and the functions of any two or more officers may be

performed by a single committee, including the functions of both president and secretary.

B. The officers of a corporation may be designated by such other or additional titles as may be provided in the articles of incorporation or the by-laws.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.232. ELECTION OR APPOINTMENT OF OFFICERS. (a) An officer of a corporation shall be elected or appointed at the time, in the manner, and for the terms prescribed by the certificate of formation or bylaws of the corporation. The term of an officer may not exceed three years.

(b) If the certificate of formation or bylaws do not include provisions for the election or appointment of officers, the officers shall be elected or appointed annually by the board of directors or, if the management of the corporation is vested in the corporation's members, by the members. (TNPCA 2.20.A (part).)

Source Law

A. The officers of a corporation . . . each of whom shall be elected or appointed at such time and in such manner and for such terms not exceeding three (3) years as may be prescribed in the articles of incorporation or the by-laws. In the absence of any such provisions, all officers shall be elected or appointed annually by the board of directors, or, if the management of the corporation is vested in its members, by the members. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.233. APPLICATION TO CHURCH. A corporation that is a church is not required to have officers as provided by this subchapter. The duties and responsibilities of the officers may be vested in the corporation's board of directors or other designated body in any manner provided for by the certificate of formation or bylaws of the corporation. (TNPCA 2.20.C.)

Source Law

C. In the case of a corporation which is a church, it shall not be necessary that there be officers as provided herein, but such duties and responsibilities may be vested in the board of directors or other designated body in any manner provided for in the articles of incorporation or the by-laws.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.234. RELIGIOUS CORPORATION OFFICER'S GOOD FAITH RELIANCE ON CERTAIN INFORMATION. An officer of a religious corporation, in the discharge of a duty imposed or power conferred on the officer, may rely in good faith and with ordinary care on information or on an opinion, report, or statement concerning the corporation or another person that was prepared or presented by:

(1) a religious authority or another religious corporation; or

(2) a minister, priest, rabbi, or other person whose position or duties in the religious authority or religious corporation the officer believes justify reliance and confidence and whom the officer believes to be reliable and competent in the matters presented. (TNPCA 2.20.D (part).)

Source Law

D. . . .

(3) in the case of religious corporations, religious authorities and ministers, priests, rabbis, or other persons whose position or duties in the religious organization the officer believes justify reliance and confidence and whom the officer believes to be reliable and competent in the matters presented.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.235. OFFICER LIABILITY. (a) An officer is not liable to the corporation or any other person for an action taken or omission made by the officer in the person's capacity as an officer unless the officer's conduct was not exercised:

(1) in good faith;

(2) with ordinary care; and

(3) in a manner the officer reasonably believes to be in the best interest of the corporation.

(b) This section shall not affect the liability of the corporation for an act or omission of the officer. (TNPCA 2.22.)

Source Law

2.22. (a) An officer is not liable to the corporation or any other person for an action taken or omission made by the officer in the person's capacity as an officer unless the officer's conduct was not exercised:

- (1) in good faith;
- (2) with ordinary care; and
- (3) in a manner the officer reasonably believes to be in the best interest of the corporation.

(b) This article shall not affect the liability of the corporation for an act or omission of the officer.

Revisor's Note

No substantive change is intended.

[Sections 22.236-22.250 reserved for expansion]

SUBCHAPTER F. FUNDAMENTAL BUSINESS TRANSACTIONS

Revised Law

Sec. 22.251. APPROVAL OF MERGER. (a) A domestic corporation that is a party to a merger under Chapter 10 must approve the merger by complying with this section.

(b) If the corporation that is a party to the merger has no members or has no members with voting rights, the plan of merger must be approved by the vote of directors required by Section 22.164.

(c) If the management of the affairs of the corporation that is a party to the merger is vested in its members under Section 22.202, the plan of merger:

- (1) must be submitted to a vote at an annual, regular, or special meeting of the members; and
- (2) must be approved by the members by the vote required by Section 22.164.

(d) If the corporation that is a party to the merger has members with voting rights:

- (1) the board of directors must adopt a resolution that:
 - (A) approves the plan of merger; and
 - (B) directs that the plan be submitted to a vote at an annual or special meeting of the members having voting rights; and
- (2) the members must approve the plan of merger by the

vote required by Section 22.164. (TNPCA 5.03.A(1) (part), (2), (3) (part).)

Source Law

(1) Where the members of any merging or consolidating corporation have voting rights, the board of directors of such corporations shall adopt a resolution approving the proposed plan and directing that it be submitted to a vote at the meeting of members having voting rights, which may be either an annual or a special meeting. . . .

(2) Where any merging or consolidating corporation has no members, or no members having voting rights, a plan of merger or consolidation shall be adopted at a meeting of the board of directors of such corporation upon receiving the vote of a majority of the directors in office.

(3) Where the management of the affairs of any merging or consolidating corporation is vested in its members pursuant to Article 2.14C of this Act, the proposed plan shall be submitted to a vote at a meeting of the members, which may be an annual, a regular, or a special meeting. . . . The proposed plan shall be adopted upon

Revisor's Note

The revised law modernizes the provisions applicable to mergers to parallel those for for-profit corporations in most respects. The source law's reference to "consolidation" is omitted because that concept is included in the definition of "merger" in Section 1.002. See Revisor's Note to Section 10.001. Section 22.251 specifies how a domestic corporation must approve a merger and contains no intended substantive change from the source law in that regard.

Revised Law

Sec. 22.252. APPROVAL OF SALE OF ALL OR SUBSTANTIALLY ALL OF ASSETS. (a) A corporation must approve the sale of all or substantially all of its assets by complying with this section.

(b) If the corporation has no members or has no members with voting rights, the sale of all or substantially all of the

assets of the corporation must be authorized by the vote of directors required by Section 22.164.

(c) If the management of the affairs of the corporation is vested in its members under Section 22.202, a resolution authorizing a sale of all or substantially all of the assets of the corporation:

(1) must be submitted to a vote at an annual, regular, or special meeting of the members; and

(2) must be approved by the members by the vote required by Section 22.164.

(d) If the corporation has members with voting rights:

(1) the board of directors of the corporation must adopt a resolution that:

(A) recommends the sale; and

(B) directs that the resolution be submitted to a vote at an annual or special meeting of the members having voting rights; and

(2) the members must approve the resolution by the vote required by Section 22.164.

(e) At the meeting required by Subsection (c) or (d), in addition to approving the resolution authorizing the sale, the members may set, or authorize the board of directors to set, the terms and conditions of the sale and the consideration to be received by the corporation for the sale by the same vote of members.

(f) After the members authorize a sale under Subsection (d), the board of directors may abandon the sale, subject to the rights of third parties under any contracts relating to the sale, without further action or approval by members.

(g) Notwithstanding Subsection (d), if a corporation is insolvent, a sale of all or substantially all of the assets of the corporation may be authorized on receiving the affirmative vote of the majority of the directors in office.

(h) The phrase "sale of all or substantially all of the assets" means the sale, lease, exchange, or other disposition, other than a pledge, mortgage, deed of trust, or trust indenture unless otherwise provided by the certificate of formation, of all or substantially all of the property and assets of a domestic corporation that is not made in the usual and regular course of the corporation's activities without regard to whether the disposition is made with the goodwill of the corporation's activities. The term does not include a transaction that results in the corporation directly or indirectly:

(1) continuing to engage in one or more activities; or

(2) applying a portion of the consideration received in connection with the transaction to the conduct of an activity that the corporation engages in after the transaction. (TNPCA 5.09 (part).)

Source Law

5.09.A. A sale, lease or exchange of all, or substantially all, the property and assets of a corporation, may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares of any corporation for profit, domestic or foreign, as may be authorized in the following manner:

(1) Where there are members having voting rights, the board of directors shall adopt a resolution recommending such sale, lease, or exchange, and directing the submission thereof to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. . . . At such meeting the members may authorize such sale, lease, or exchange, and may fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. . . . After such authorization by vote of members, the board of directors, nevertheless, in its discretion, may abandon such sale, lease, or exchange of assets, subject to the rights of third parties under any contracts relating thereto, without further action or approval by members.

(2) Unless otherwise provided in the articles of incorporation, where there are no members, or no members having voting rights, a sale, lease, or exchange of all, or substantially all, the property and assets of a corporation shall be authorized upon

(3) Where the management of the affairs of a corporation vested in its members pursuant to Article 2.14C of this Act, a resolution authorizing such sale, lease, or exchange shall be submitted to a vote at a meeting of the members, which may be an annual, a regular, or a special meeting. . . . At such meeting, the members may authorize such sale, lease, or exchange, and may fix, or authorize one or more of its

members to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. . . .

. . . .

(5) Notwithstanding the provisions of Subsection (1) of this Section, when the corporation is insolvent, a sale, lease, or exchange of all, or substantially all, the property and assets of a corporation shall be authorized upon receiving the vote of a majority of the directors in office.

Revisor's Note

A definition of "sale of all or substantially all of the assets" has been added in Subsection (h) of the revised law to parallel the modernized provisions applicable to for-profit corporations, which are found in Sections 21.451 and 21.455 of the revised law.

Revised Law

Sec. 22.253. MEETING OF MEMBERS; NOTICE. (a) The corporation must give to each member entitled to vote at a meeting described by Section 22.251(c) or (d) or Section 22.252(c) or (d) a written notice stating that the purpose or one of the purposes of the meeting is to consider the plan of merger or the sale of all or substantially all of the assets of the corporation. The notice must be given in the time and manner provided by Chapter 6 and this chapter for giving notice of a meeting to members.

(b) A vote of members entitled to vote at the meeting shall be taken on the plan of merger or the resolution authorizing the sale of all or substantially all of the assets of the corporation. The members must approve the plan or resolution by the vote required by Section 22.164.

(c) For a meeting to vote on a plan of merger, the notice of the meeting must contain the plan of merger or a summary of the plan of merger.

(d) For a corporation the management of the affairs of which is vested in its members under Section 22.202, the notice of the meeting is subject to the provisions of the certificate of formation or bylaws of the corporation. (TNPCA 5.03.A (part), 5.09 (part).)

Source Law

[5.03]

A. A plan of merger or consolidation of

domestic corporations shall be adopted in the following manner:

(1) . . . Written or printed notice setting forth the proposed plan or a summary thereof shall be given to each member entitled to vote at such meeting within the time and in the manner provided in this Act for the giving of notice of meetings of members. The proposed plan shall be adopted upon

. . . .

(3) Where the management of the affairs of any merging or consolidating corporation is vested in its members pursuant to Article 2.14C of this Act, the proposed plan shall be submitted to a vote Except as otherwise provided in the articles of incorporation or the by-laws, notice setting forth the proposed plan or a summary thereof shall be given to the members within the time and in the manner provided in this Act for the giving of notice of meetings of members. The proposed plan shall be adopted upon

5.09.A. A sale, lease or exchange of all, or substantially all, the property and assets of a corporation, may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares of any corporation for profit, domestic or foreign, as may be authorized in the following manner:

(1) Where there are members having voting rights Written or printed notice stating that the purpose, or one of the purposes, of such meeting is to consider the sale, lease, or exchange of all, or substantially all, the property and assets of the corporation shall be given to each member entitled to vote at such meeting, within the time and in the manner provided by this Act for the giving of notice of meetings of members. At such meeting the members may authorize such sale, lease, or exchange, and may fix, or may authorize the board of directors to fix, any or all of the terms and

conditions thereof and the consideration to be received by the corporation therefor. Such authorization shall require at least two-thirds (2/3) of the votes which members present at such meeting in person or by proxy are entitled to cast, unless any class of members is entitled to vote as a class thereon by the terms of the articles of incorporation or of the by-laws in which event such authorization shall also require at least two-thirds (2/3) of the votes which members of each such class who are present at such meeting in person or by proxy are entitled to cast. . . .

. . .

(3) Where the management of the affairs of a corporation vested in its members pursuant to Article 2.14C of this Act Except as otherwise provided in the articles of incorporation or the by-laws, notice stating that the purpose or one of the purposes of such meeting is to consider the sale, lease, or exchange of all, or substantially all, the property and assets of the corporation shall be given to the members, within the time and in the manner provided by this Act for the giving of notice of meetings of members. At such meeting, the members may authorize such sale, lease, or exchange, and may fix, or authorize one or more of its members to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. Such authorization shall require at least two-thirds of the votes of the members present at such meeting.

. . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.254. PLEDGE, MORTGAGE, DEED OF TRUST, OR TRUST INDENTURE. (a) Except as otherwise provided by Subsection (b) or by the corporation's certificate of formation:

(1) the board of directors of a corporation may authorize a pledge, mortgage, deed of trust, or trust indenture; and

(2) an authorization or consent of members is not

required for the validity of the transaction or for any sale under the terms of the transaction.

(b) If the management of the affairs of a corporation is vested in the corporation's members under Section 22.202:

(1) the members may authorize a pledge, mortgage, deed of trust, or trust indenture in the manner provided by Section 22.252(c) for a sale of all or substantially all of the assets of a corporation; and

(2) an authorization by the board of directors is not required for the validity of the transaction or for any sale under the terms of the transaction. (TNPCA 5.09 (part).)

Source Law

5.09. . . .

(4) Except as otherwise provided in the articles of incorporation, the board of directors may authorize any pledge, mortgage, deed of trust, or trust indenture and no authorization or consent of members shall be required for the validity thereof or for any sale pursuant to the terms thereof; provided that where the management of the affairs of the corporation is vested in its members pursuant to Article 2.14C of this Act, the members may authorize any pledge, mortgage, deed of trust, or trust indenture in the same manner as provided in Subsection (3) of this Section, and no authorization by the board of directors shall be required for the validity thereof or for any sale pursuant to the terms thereof.

. . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.255. CONVEYANCE BY CORPORATION. A corporation may convey real property of the corporation when authorized by appropriate resolution of the board of directors or members. (TNPCA 5.08 (part).)

Source Law

5.08.A. Any corporation may convey land by deed, . . . when authorized by appropriate resolution of the board of directors or members. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.256. APPROVAL OF CONVERSION. (a) A domestic corporation must approve a conversion under Chapter 10 by complying with this section.

(b) If the corporation has no members or has no members with voting rights, the plan of conversion must be approved by the vote of directors required by Section 22.164.

(c) If the management of the affairs of the corporation is vested in its members under Section 22.202, the plan of conversion:

(1) must be submitted to a vote at an annual, regular, or special meeting of the members; and

(2) must be approved by the members by the vote required by Section 22.164.

(d) If the corporation has members with voting rights:

(1) the board of directors must adopt a resolution that:

(A) approves the plan of conversion; and

(B) directs that the plan be submitted to a vote at an annual or special meeting of the members having voting rights; and

(2) the members must approve the plan of conversion by the vote required by Section 22.164. (New.)

Revisor's Note

The revised law specifies the manner in which a nonprofit corporation must act on and approve a conversion under Chapter 10.

Revised Law

Sec. 22.257. APPROVAL OF EXCHANGE. (a) A domestic corporation must approve an exchange under Chapter 10 by complying with this section.

(b) If the corporation has no members or has no members with voting rights, the plan of exchange must be approved by the vote of directors required by Section 22.164.

(c) If the management of the affairs of the corporation is vested in its members under Section 22.202, the plan of exchange:

(1) must be submitted to a vote at an annual, regular, or special meeting of the members; and

(2) must be approved by the members by the vote required by Section 22.164.

(d) If the corporation has members with voting rights:

(1) the board of directors must adopt a resolution that:

(A) approves the plan of exchange; and

(B) directs that the plan be submitted to a vote at an annual or special meeting of the members having voting

rights; and

(2) the members must approve the plan of exchange by the vote required by Section 22.164. (New.)

Revisor's Note

The revised law specifies the manner in which a nonprofit corporation must act on and approve a plan of exchange under Chapter 10.

[Sections 22.258-22.300 reserved for expansion]

SUBCHAPTER G. WINDING UP AND TERMINATION

Revised Law

Sec. 22.301. APPROVAL OF VOLUNTARY WINDING UP, REINSTATEMENT, REVOCATION OF VOLUNTARY WINDING UP, OR DISTRIBUTION PLAN. A corporation must approve a voluntary winding up in accordance with Chapter 11, a reinstatement in accordance with Section 11.202, a cancellation of an event requiring winding up under Section 11.152, a revocation of a voluntary decision to wind up in accordance with Section 11.151, or a distribution plan in accordance with Section 22.305 by complying with the procedures prescribed by this subchapter. (New.)

Revisor's Note

Section 22.301 of the revised law introduces Subchapter G and lists the actions that require approval procedures under Subchapter G.

Revised Law

Sec. 22.302. CERTAIN PROCEDURES FOR APPROVAL. 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, a corporation must follow the following procedures:

(1) if the corporation has no members or has no members with voting rights, the corporation's board of directors must adopt a resolution to wind up, to reinstate, to cancel the event requiring winding up, to revoke a voluntary decision to wind up, or to effect the distribution plan by the vote of directors required by Section 22.164;

(2) if the management of the affairs of the corporation is vested in the corporation's members under Section 22.202, the winding up, reinstatement, cancellation of event requiring winding up, revocation of voluntary decision to wind up, or distribution plan:

(A) must be submitted to a vote at an annual, regular, or special meeting of members; and

(B) must be approved by the members by the vote required by Section 22.164; or

(3) if the corporation has members with voting rights:

(A) the corporation's board of directors must approve a resolution:

(i) recommending the winding up, reinstatement, cancellation of event requiring winding up, revocation of a voluntary decision to wind up, or distribution plan; and

(ii) directing that the winding up, reinstatement, cancellation of event requiring winding up, revocation of a voluntary decision to wind up, or distribution plan of the corporation be submitted to a vote at an annual or special meeting of members; and

(B) the members must approve the action described by Paragraph (A) in accordance with Section 22.303. (TNPCA 6.01.A (part), 6.03 (part), 6.04.A (part).)

Source Law

[6.01]

A. A corporation may dissolve and wind up its affairs in the following manner:

(1) Where there are members having voting rights, the board of directors shall adopt a resolution recommending that the corporation be dissolved, and directing that the question of such dissolution be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. . . . A resolution to dissolve the corporation shall be adopted upon

(2) Where there are no members, or no members having voting rights, the dissolution of the corporation shall be authorized at a meeting of the board of directors upon the adoption of a resolution to dissolve by the vote of a majority of the directors in office.

(3) Where the management of the affairs of the corporation is vested in the members pursuant to Article 2.14C of this Act, a resolution that the corporation be dissolved shall be submitted to a vote at a meeting of members, which may be an annual, a regular, or a special meeting. . . . A resolution to dissolve the corporation shall be adopted upon

6.03.A. A plan providing for the distribution of assets, not inconsistent with the provisions of this Act, may be adopted by a corporation in the process of dissolution

and shall be adopted by a corporation for the purpose of authorizing any transfer or conveyance of assets for which this Act requires a plan of distribution, in the following manner:

(1) Where there are members having voting rights, the board of directors shall adopt a resolution recommending a plan of distribution and directing the submission thereof to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. . . . Such plan of distribution shall be adopted upon

(2) Where there are no members, or no members having voting rights, a plan of distribution shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

(3) Where the management of the affairs of the corporation is vested in its members pursuant to Article 2.14C of this Act, a proposed plan of distribution shall be submitted to a vote at a meeting of the members, which may be an annual, a regular, or a special meeting. . . . Such plan of distribution shall be adopted upon

[6.04]

A. A corporation may, at any time prior to the issuance of a certificate of dissolution by the Secretary of State, revoke the action theretofore taken to dissolve the corporation, in the following manner:

(1) Where there are members having voting rights, the board of directors shall adopt a resolution recommending that the voluntary dissolution proceedings be revoked, and directing that the question of such revocation be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. . . . A resolution to revoke the voluntary dissolution proceedings shall be adopted upon

(2) Where there are no members, or no members having voting rights, a resolution to revoke the voluntary dissolution

proceedings shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

(3) Where the management of the affairs of the corporation is vested in its members pursuant to Article 2.14C of this Act, a resolution that the voluntary dissolution proceedings be revoked shall be submitted to a vote at a meeting of the members, which may be an annual, a regular, or a special meeting. . . . A resolution to revoke the voluntary dissolution proceedings shall be adopted upon

Revisor's Note

No substantive change is intended, except that Sections 11.152 and 11.202 permit, under certain conditions, the "reinstatement" of a nonprofit corporation that has been terminated and the "cancellation" of an event requiring winding up. Section 22.302 of the revised law specifies how a reinstatement or cancellation must be approved by the corporation. See Revisor's Notes to Sections 11.152, 11.201, and 11.202.

Revised Law

Sec. 22.303. MEETING OF MEMBERS; NOTICE. (a) The corporation must give to each member entitled to vote at a meeting described by Section 22.302(2) or (3) a written notice stating that the purpose or one of the purposes of the meeting is to consider the winding up, reinstatement, cancellation of event requiring winding up, revocation of the voluntary decision to wind up, or distribution plan of the corporation. The notice must be given in the time and manner provided by Chapter 6 and this chapter for the giving of notice of a meeting to members.

(b) A vote of members entitled to vote at the meeting shall be taken on the resolution to wind up, reinstate, cancel the event requiring winding up, revoke the voluntary decision to wind up, or effect the distribution plan of the corporation. The members must approve the resolution by the vote required under Section 22.164.

(c) For a meeting to vote on a distribution plan, the notice of the meeting must contain the proposed plan of distribution or a summary of the plan.

(d) For a corporation the management of the affairs of which is vested in its members under Section 22.202, the notice

of the meeting is subject to the provisions of the certificate of formation or bylaws of the corporation. (TNPCA 6.01.A (part), 6.03 (part), 6.04.A (part)).

Source Law

[6.01]

A. A corporation may dissolve and wind up its affairs in the following manner:

(1) Where there are members having voting rights, Written or printed notice stating that the purpose, or one of the purposes, of such meeting is to consider the advisability of dissolving the corporation, shall be given to each member entitled to vote at such meeting, within the time and in the manner provided in this Act for the giving of notice of meetings of members. . . .

. . . .

(3) Where the management of the affairs of the corporation is vested in the members pursuant to Article 2.14C of this Act, Except as otherwise provided in the articles of incorporation or the by-laws, notice stating that the purpose or one of the purposes of such meeting is to consider the advisability of dissolving the corporation shall be given to the members, within the time and in the manner provided in this Act for the giving of notice of meetings of members. A resolution to dissolve the corporation shall be adopted upon

6.03.A. A plan providing for the distribution of assets, not inconsistent with the provisions of this Act, may be adopted by a corporation in the process of dissolution and shall be adopted by a corporation for the purpose of authorizing any transfer or conveyance of assets for which this Act requires a plan of distribution, in the following manner:

(1) Where there are members having voting rights, Written or printed notice setting forth the proposed plan of distribution or a summary thereof shall be given to each member entitled to vote at such meeting, within the time and in the manner

provided in this Act for the giving of notice of meetings of members. Such plan of distribution shall be adopted upon

. . . .

(3) Where the management of the affairs of the corporation is vested in its members pursuant to Article 2.14C of this Act, Except as otherwise provided in the articles of incorporation or the by-laws, notice setting forth the proposed plan of distribution or a summary thereof shall be given to the members within the time and in the manner provided in this Act for the giving of notice of meetings of members. Such plan of distribution shall be adopted upon

[6.04]

A. A corporation may, at any time prior to the issuance of a certificate of dissolution by the Secretary of State, revoke the action theretofore taken to dissolve the corporation, in the following manner:

(1) Where there are members having voting rights, Written or printed notice stating that the purpose, or one of the purposes, of such meeting is to consider the advisability of revoking the voluntary dissolution proceedings, shall be given to each member entitled to vote at such meeting, within the time and in the manner provided in this Act for the giving of notice of meetings of members. A resolution to revoke the voluntary dissolution proceedings shall be adopted upon

. . . .

(3) Where the management of the affairs of the corporation is vested in its members pursuant to Article 2.14C of this Act, Except as otherwise provided in the articles of incorporation or the by-laws, notice stating that the purpose, or one of the purposes, of such meeting is to consider the advisability of revoking the voluntary dissolution proceedings shall be given to the members, within the time and in the manner provided in this Act for the giving of notice of meetings of members. A

resolution to revoke the voluntary
dissolution proceedings shall be adopted
upon

Revisor's Note

No substantive change is intended,
except as discussed in the Revisor's Note to
Section 22.302.

Revised Law

Sec. 22.304. APPLICATION AND DISTRIBUTION OF PROPERTY. (a)
After all liabilities and obligations of a corporation in the
process of winding up are paid, satisfied, and discharged in
accordance with Section 11.053, the property of the corporation
shall be applied and distributed as follows:

(1) property held by the corporation on a condition
requiring return, transfer, or conveyance because of the winding
up or termination shall be returned, transferred, or conveyed in
accordance with that requirement; and

(2) unless otherwise provided by the corporation's
certificate of formation, the remaining property of the
corporation shall be distributed only for tax-exempt purposes to
one or more organizations that are exempt under Section
501(c)(3), Internal Revenue Code, or described by Section
170(c)(1) or (2), Internal Revenue Code, under a plan of
distribution adopted under this chapter.

(b) A district court of the county in which the
corporation's principal office is located shall distribute to one
or more organizations exempt under Section 501(c)(3), Internal
Revenue Code, or described by Section 170(c)(1) or (2), Internal
Revenue Code, the property of the corporation remaining after a
distribution of property under the plan of distribution. The
court shall make the distribution in the manner the court
determines will best accomplish the general purposes for which
the corporation was organized. (TNPCA 6.02.A(2), (3).)

Source Law

(2) Assets held by the corporation
upon condition requiring return, transfer or
conveyance, which condition occurs by reason
of the dissolution, shall be returned,
transferred or conveyed in accordance with
such requirements.

(3) Unless provided otherwise by a
provision of the corporation's articles of
incorporation, the remaining assets of the
corporation shall be distributed only for tax
exempt purposes to one or more organizations
which are exempt under Section 501(c)(3),

Internal Revenue Code of 1986 (26 U.S.C. Section 501(c)(3)), or its successor statute, or which are described in Section 170(c)(1) or (2), Internal Revenue Code of 1986 (26 U.S.C. Section 170(c)(1) or (2)), or its successor statute, pursuant to a plan of distribution adopted as provided in this Act. A district court of the county in which the corporation's principal office is located shall distribute to one or more organizations exempt under Section 501(c)(3) or described in Section 170(c)(1) or (2), or their successor statutes, the remaining assets of the corporation not distributed under the plan of distribution. Any distribution by the court shall be made in such manner as, in the judgment of the court, will best accomplish the general purposes for which the corporation was organized.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.305. DISTRIBUTION PLAN. A plan providing for the distribution of property may be adopted by a corporation in the process of winding up, and shall be adopted by a corporation to authorize a transfer or conveyance of assets for which this chapter requires a plan of distribution, in the manner provided by this subchapter. (TNPCA 6.03 (part).)

Source Law

6.03.A. A plan providing for the distribution of assets, not inconsistent with the provisions of this Act, may be adopted by a corporation in the process of dissolution and shall be adopted by a corporation for the purpose of authorizing any transfer or conveyance of assets for which this Act requires a plan of distribution, in the following manner:

. . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.306. LIMITED SURVIVAL AFTER NATURAL EXPIRATION. (a) A corporation that was terminated by the expiration of the period of its duration may, during the three-year period following the

date of termination, amend the corporation's certificate of formation by following the procedures prescribed by Chapter 11 and this chapter to extend or perpetuate the corporation's period of duration. The expiration of a corporation's period of duration does not give a member or creditor of the corporation a vested right to prevent the corporation from taking action under this subsection.

(b) An act or contract of a terminated corporation during a period within which the corporation could have extended the corporation's existence under this section, regardless of whether the corporation has taken action to extend its existence, is not invalidated by the expiration of the period of duration. (TNPCA 7.12.G.)

Source Law

G. A dissolved corporation that was dissolved by the expiration of the period of its duration may, during the three-year period following the date of dissolution, amend its articles of incorporation by following the procedure prescribed in this Act to extend or perpetuate its period of existence. That expiration shall not of itself create any vested right on the part of any member or creditor to prevent such an action. No act or contract of a dissolved corporation during a period within which it could have extended its existence as permitted by this Article, whether or not it has taken action so to extend its existence, shall be in any degree invalidated by the expiration of its period of duration.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.307. RESPONSIBILITY FOR WINDING UP. If a corporation determines or is required to wind up, the winding up of the corporation's affairs shall be managed by:

- (1) the directors, if management of the affairs is not vested in the corporation's members under Section 22.202; or
- (2) the members, if management of the affairs is vested in the corporation's members under Section 22.202. (New.)

Revisor's Note

The Texas Non-Profit Corporation Act states that the directors or members manage the affairs of the corporation. The Texas Non-Profit Corporation Act does not

explicitly state who has the power to manage the winding up of the corporation's affairs, but the rules set forth in the revised law may be implied from the Texas Non-Profit Corporation Act's existing provisions. No substantive change is intended.

[Sections 22.308-22.350 reserved for expansion]

SUBCHAPTER H. RECORDS AND REPORTS

Revised Law

Sec. 22.351. MEMBER'S RIGHT TO INSPECT BOOKS AND RECORDS. A member of a corporation, on written demand stating the purpose of the demand, is entitled to examine and copy at the member's expense, in person or by agent, accountant, or attorney, at any reasonable time and for a proper purpose, the books and records of the corporation relevant to that purpose. (TNPCA 2.23.B.)

Source Law

B. A member of a corporation, on written demand stating the purpose of the demand, has the right to examine and copy, in person or by agent, accountant, or attorney, at any reasonable time, for any proper purpose, the books and records of the corporation relevant to that purpose, at the expense of the member.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.352. FINANCIAL RECORDS AND ANNUAL REPORTS. (a) A corporation shall maintain current and accurate financial records with complete entries as to each financial transaction of the corporation, including income and expenditures, in accordance with generally accepted accounting principles.

(b) Based on the records maintained under Subsection (a), the board of directors of the corporation shall annually prepare or approve a financial report for the corporation for the preceding year. The report must conform to accounting standards as adopted by the American Institute of Certified Public Accountants and must include:

- (1) a statement of support, revenue, and expenses;
- (2) a statement of changes in fund balances;
- (3) a statement of functional expenses; and
- (4) a balance sheet for each fund. (TNPCA 2.23A.A,

B.)

Source Law

A. A corporation shall maintain current

true and accurate financial records with full and correct entries made with respect to all financial transactions of the corporation, including all income and expenditures, in accordance with generally accepted accounting practices.

B. Based on these records, the board of directors shall annually prepare or approve a report of the financial activity of the corporation for the preceding year. The report must conform to accounting standards as promulgated by the American Institute of Certified Public Accountants and must include a statement of support, revenue, and expenses and changes in fund balances, a statement of functional expenses, and balance sheets for all funds.

Revisor's Note

No substantive change is intended. The revised law in Subsection (a) uses the modern term "generally accepted accounting principles" in lieu of the older version "generally accepted accounting practices" contained in the source law.

Revised Law

Sec. 22.353. AVAILABILITY OF FINANCIAL INFORMATION FOR PUBLIC INSPECTION. (a) A corporation shall keep records, books, and annual reports of the corporation's financial activity at the corporation's registered or principal office in this state for at least three years after the close of the fiscal year.

(b) The corporation shall make the records, books, and reports available to the public for inspection and copying at the corporation's registered or principal office during regular business hours. The corporation may charge a reasonable fee for preparing a copy of a record or report. (TNPCA 2.23A.C.)

Source Law

C. All records, books, and annual reports of the financial activity of the corporation shall be kept at the registered office or principal office of the corporation in this state for at least three years after the closing of each fiscal year and shall be available to the public for inspection and copying there during normal business hours. The corporation may charge for the reasonable expense of preparing a copy of a record or

report.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.354. FAILURE TO MAINTAIN FINANCIAL RECORD OR PREPARE ANNUAL REPORT; OFFENSE. (a) A corporation commits an offense if the corporation fails to maintain a financial record, prepare an annual report, or make the record or report available to the public in the manner required by Section 22.353.

(b) An offense under this section is a Class B misdemeanor. (TNPCA 2.23A.D.)

Source Law

D. A corporation that fails to maintain financial records, prepare an annual report, or make a financial record or annual report available to the public in the manner prescribed by this article is guilty of a Class B misdemeanor.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.355. EXEMPTIONS FROM CERTAIN REQUIREMENTS RELATING TO FINANCIAL RECORDS AND ANNUAL REPORTS. Sections 22.352, 22.353, and 22.354 do not apply to:

(1) a corporation that solicits funds only from members of the corporation;

(2) a corporation that does not intend to solicit and receive and does not actually raise or receive during a fiscal year contributions in an amount exceeding \$10,000 from a source other than its own membership;

(3) a private institution of higher education described by Section 61.003(15), Education Code, accredited by a recognized accrediting agency as defined by Section 61.003(13), Education Code, or authorized to grant degrees under a certificate of authority issued by the Texas Higher Education Coordinating Board or a foundation chartered for the benefit of the institution or any component part of the institution, a proprietary school that has received a certificate of approval from the commissioner of education, a public institution of higher education or a foundation chartered for the benefit of the institution or any component part of the institution, or an elementary or secondary school;

(4) a religious institution that is a church, an ecclesiastical or denominational organization, or another established physical place for worship at which religious

services are the primary activity and are regularly conducted;

(5) a trade association or professional society the income of which is principally derived from membership dues and assessments, sales, or services;

(6) an insurer licensed and regulated by the Texas Department of Insurance;

(7) an organization the charitable activities of which relate to public concern in the conservation and protection of wildlife, fisheries, and allied natural resources; or

(8) an alumni association of a public or private institution of higher education in this state that is recognized and acknowledged as the official alumni association by the institution. (TNPCA 2.23A.E.)

Source Law

E. This article does not apply to:

(1) a corporation that solicits funds only from its members;

(2) a corporation which does not intend to solicit and receive and does not actually raise or receive contributions from sources other than its own membership in excess of \$10,000 during a fiscal year;

(3) a proprietary school that has received a certificate of approval from the State Commissioner of Education, a public institution of higher education and foundations chartered for the benefit of such institutions or any component part thereof, a private institution of higher education with a certificate of authority to grant a degree issued by the Coordinating Board, Texas College and University System, or an elementary or secondary school;

(4) religious institutions which shall be limited to churches, ecclesiastical or denominational organizations, or other established physical places for worship at which religious services are the primary activity and such activities are regularly conducted;

(5) a trade association or professional society whose income is principally derived from membership dues and assessments, sales, or services;

(6) any insurer licensed and regulated by the State Board of Insurance;

(7) an organization whose

charitable activities relate to public concern in the conservation and protection of wildlife, fisheries, and allied natural resources;

(8) an alumni association of a public or private institution of higher education in this state, provided that such association is recognized and acknowledged by the institution as its official alumni association.

Revisor's Note

No substantive change is intended, except that Subdivision (3) has been revised to update the subject matter of that exemption to include private institutions of higher education described in the Education Code, which was adopted after the Texas Non-Profit Corporation Act. There is no reason to exempt some kinds of private institutions but exclude those kinds of private institutions covered by the Education Code. For the same reasons, the foundations of private institutions should have the same privilege as those of public institutions. These changes also conform to amendments to H.B. 327 approved by the Texas House Business and Industry Committee in the 2001 session of the Texas Legislature.

Revised Law

Sec. 22.356. CORPORATIONS ASSISTING STATE AGENCIES. (a) In this section, "state agency" means:

(1) a board, commission, department, office, or other entity that is in the executive branch of state government and that was created by the constitution or a statute of this state, including an institution of higher education as defined by Section 61.003, Education Code;

(2) the legislature or a legislative agency; or

(3) the supreme court, the court of criminal appeals, a court of appeals, the state bar, or another state judicial agency.

(b) The books and records of a corporation other than a bona fide alumni association are subject to audit at the discretion of the state auditor if:

(1) the corporation's charter specifically dedicates the corporation's activities to the benefit of a particular state agency; and

(2) a board member, officer, or employee of that state

agency sits on the board of directors of the corporation in other than an ex officio capacity.

(c) If the corporation's charter specifically dedicates the corporation's activities to the benefit of a particular state agency but the conditions described by Subsection (b)(2) do not exist, a corporation shall file with the secretary of state a copy of the report required by Section 22.352(b) for the preceding fiscal year not later than the 89th day after the last day of the corporation's fiscal year. (TNPCA 2.23B.)

Source Law

2.23B.A. In this Article state agency means:

(1) a board, commission, department, office, or other entity that is in the executive branch of state government and that was created by the constitution or a statute of the State, including an institution of higher education as defined by Section 61.003, Texas Education Code, as amended;

(2) the legislature or a legislative agency; or

(3) the Supreme Court, the Court of Criminal Appeals, a court of appeals, or the State Bar of Texas or another state judicial agency.

B. The books and records of a corporation except a bona fide alumni association are subject to audit at the discretion of the State Auditor if both of the following obtain:

(1) the corporation's charter specifically dedicates the corporation's activities to the benefit of a particular agency of state government; and

(2) a board member, officer, or employee of the same agency of state government sits on the board of directors of the corporation in other than an ex officio, nonvoting, advisory capacity.

C. If the corporation's charter specifically dedicates the corporation's activities to the benefit of a particular agency of state government but the conditions in Section B of this Article do not obtain, before the 90th day after the last day of the corporation's fiscal year, the corporation

shall file with the Secretary of State a report for the preceding fiscal year consisting of a copy of a report as described by Section B of Article 2.23A of this Act (Article 1396-2.23A, Vernon's Texas Civil Statutes).

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.357. REPORT OF DOMESTIC AND FOREIGN CORPORATIONS.

(a) The secretary of state may require a domestic corporation or a foreign corporation registered to conduct affairs in this state to file a report in accordance with Chapter 4 not more than once every four years as required by this subchapter. The report must state:

- (1) the name of the corporation;
- (2) the state or country under the laws of which the corporation is incorporated;
- (3) the address of the registered office of the corporation in this state and the name of the registered agent at that address;
- (4) if the corporation is a foreign corporation, the address of the principal office of the corporation in the state or country under the laws of which the corporation is incorporated; and
- (5) the names and addresses of the directors and officers of the corporation.

(b) A corporation required to prepare a report under this section shall prepare the report on a form adopted by the secretary of state for that purpose and shall include in the report information that is accurate as of the date the report is executed. An officer or, if the corporation is in the hands of a receiver or trustee, the receiver or trustee shall sign the report on behalf of the corporation. (TNPCA 9.01.A, B.)

Source Law

A. The Secretary of State is authorized to require each domestic corporation and each foreign corporation authorized to conduct affairs in this State to file, not more often than once every four (4) years for any corporation, a report setting forth:

- (1) The name of the corporation and the state or country under the laws of which it is incorporated.
- (2) The address of the registered office of the corporation in this State, and

the name of its registered agent in this State at such address, and, in the case of a foreign corporation, the address of its principal office in the state or country under the laws of which it is incorporated.

(3) The names and respective addresses of the directors and officers of the corporation.

B. Such report shall be made on forms promulgated by the Secretary of State, and the information contained shall be given as of the date of the execution of the report. It shall be signed on behalf of the corporation by an officer; or, if the corporation is in the hands of a receiver or trustee, it shall be signed on behalf of the corporation by such receiver or trustee.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.358. NOTICE REGARDING REPORT. (a) The secretary of state shall send written notice that the report required by Section 22.357 is due. The notice must be:

(1) addressed to the corporation; and
(2) mailed to the corporation's registered agent or to the corporation at:

(A) the last known address of the corporation as it appears on record in the office of the secretary of state; or

(B) any other known place of business of the corporation.

(b) The secretary of state shall include with the notice a report form to be prepared and filed as provided by this subchapter. (TNPCA 9.01.C, D.)

Source Law

C. Such report shall be delivered to the Secretary of State within thirty (30) days of the mailing of notice by the Secretary of State to the corporation that such report is due. Such notice may be either written or printed and shall be addressed to such corporation and mailed to the address named in its articles of incorporation as its principal place of business, or to its registered agent, or to the last address of the corporation as it appears on record in the office of the

Secretary of State, or to any other known place of business of such corporation.

D. Along with the notice that such report is due, the Secretary of State shall mail to the corporation two (2) copies of a report form which shall be prepared and filed as herein provided.

Revisor's Note

No substantive change is intended. The requirement for two copies of the report has been changed to only one copy. This change is consistent with the change in filing requirements from two copies to one copy that was adopted by Article 1302-7.08, Texas Miscellaneous Corporation Laws Act.

Revised Law

Sec. 22.359. FILING OF REPORT. A copy of the report must be filed with the secretary of state in accordance with Chapter 4 not later than the 30th day after the date notice is mailed under Section 22.358. (TNPCA 9.01.C (part), E (part).)

Source Law

C. Such report shall be delivered to the Secretary of State within thirty (30) days of the mailing of notice by the Secretary of State to the corporation that such report is due. . . .

E. One (1) copy of such report shall be delivered to the Secretary of State. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.360. FAILURE TO FILE REPORT. (a) A domestic or foreign corporation that fails to file a report under Sections 22.357 and 22.359 when the report is due forfeits the corporation's right to conduct affairs in this state.

(b) The forfeiture takes effect, without judicial action, when the secretary of state enters on the record of the corporation kept in the office of the secretary of state:

(1) the words "right to conduct affairs forfeited";
and

(2) the date of forfeiture. (TNPCA 9.02.A, B (part).)

Source Law

A. Any domestic or foreign corporation

which shall fail to file the report provided for in Article 9.01 of this Act, when the same shall become due, shall, for such default, forfeit its right to conduct affairs in this State.

B. Such forfeiture shall be consummated without judicial ascertainment by the Secretary of State entering upon the margin of the record kept in his office relating to such corporation the words "right to conduct affairs forfeited," together with the date of such forfeiture. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.361. NOTICE OF FORFEITURE. Notice of forfeiture under Section 22.360 shall be mailed to the corporation's registered agent at the registered office or to the corporation at:

- (1) the address of the principal place of business of the corporation as it appears in the certificate of formation;
- (2) the last known address of the corporation as it appears on record in the office of the secretary of state; or
- (3) any other known place of business of the corporation. (TNPCA 9.02.B (part).)

Source Law

B. . . . Notice of such forfeiture shall thereupon be mailed to the corporation to the address named in its articles of incorporation as its principal place of business, or to its registered agent, or to the last address of the corporation as it appears on record in the office of the Secretary of State, or to any other known place of business of such corporation. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.362. EFFECT OF FORFEITURE. (a) Unless the right of the corporation to conduct affairs in this state is revived under Section 22.363:

- (1) the corporation may not maintain an action, suit, or proceeding in a court of this state; and
- (2) a successor or assignee of the corporation may not maintain an action, suit, or proceeding in a court of this state

on a right, claim, or demand arising from the conduct of affairs by the corporation in this state.

(b) This section does not affect the right of an assignee of the corporation as:

(1) the holder in due course of a negotiable promissory note, check, or bill of exchange; or

(2) the bona fide purchaser for value of a warehouse receipt, stock certificate, or other instrument negotiable by law.

(c) The forfeiture of the right to conduct affairs in this state does not:

(1) impair the validity of a contract or act of the corporation; or

(2) prevent the corporation from defending an action, suit, or proceeding in a court of this state. (TNPCA 9.02.B (part).)

Source Law

B. . . . Until the right of such corporation to conduct affairs in this State shall be revived in accordance with Sections C and D of this Article, it shall not be permitted to maintain any action, suit or proceeding in any court of this State. Nor shall any action, suit or proceeding be maintained in any court of this State by any successor or assignee of such corporation on any right, claim, or demand arising out of the conduct of affairs by such corporation in this State, until the right of such corporation to conduct affairs in this State shall have been revived in accordance with Sections C and D of this Article. It is expressly provided, however, that the provisions of this Article shall not affect the rights of any assignee of the corporation as the holder in due course of a negotiable promissory note, check, or bill of exchange, or as the bona fide purchaser for value of a warehouse receipt, stock certificate, or other instrument negotiable by law. The forfeiture of the right to conduct affairs in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action, suit, or proceeding in any court of this State.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.363. REVIVAL OF RIGHT TO CONDUCT AFFAIRS. (a) A corporation may be relieved from a forfeiture under Section 22.360 by filing the required report, accompanied by the revival fee, not later than the 120th day after the date of mailing of the notice of forfeiture under Section 22.361.

(b) If a corporation complies with Subsection (a), the secretary of state shall:

(1) revive the right of the corporation to conduct affairs in this state;

(2) cancel the words regarding the forfeiture on the record of the corporation; and

(3) endorse on that record the word "revived" and the date of revival. (TNPCA 9.02.C (part), D.)

Source Law

C. Any corporation whose right to conduct affairs may have been forfeited as provided in this Act, shall be relieved from such forfeiture by filing the required report with the Secretary of State within 120 days of the date of mailing such notice of forfeiture, together with a late filing fee

D. When such report shall be filed and the revival fee shall be paid to the Secretary of State, he shall revive the right of the corporation to conduct affairs in this State, cancelling the words "right to conduct affairs forfeited" upon his record, and endorsing thereon the word "Revived" and the date of such revival.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.364. FAILURE TO REVIVE; TERMINATION OR REVOCATION.

(a) The failure of a corporation that has forfeited its right to conduct affairs in this state to revive that right under Section 22.363 is grounds for:

(1) the involuntary termination of the domestic corporation; or

(2) the revocation of the foreign corporation's registration to transact business in this state.

(b) The termination or revocation takes effect, without judicial action, when the secretary of state enters on the record

of the corporation filed in the office of the secretary of state the word "forfeited" and the date of forfeiture and cites this chapter as authority for that forfeiture. (TNPCA 9.02.E.)

Source Law

E. If any corporation whose right to conduct affairs within this State shall hereafter be forfeited under the provisions of this Act shall fail to file such report and pay to the Secretary of State the required revival fee within one hundred and twenty (120) days after the date of mailing of the notice of such forfeiture, such failure shall constitute sufficient ground for the involuntary dissolution of the corporation or the revocation of its certificate of authority, which dissolution or revocation shall be consummated without judicial ascertainment, by the Secretary of State entering upon the record of such corporation filed in his office, the word "Forfeited" giving the date thereof and citing this Act as authority therefor.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.365. REINSTATEMENT. (a) A corporation that is terminated or the registration of which has been revoked as provided by Section 22.364 may be relieved of the termination or revocation by filing the report required by Section 22.357, accompanied by the filing fee for the report, if the corporation has paid:

(1) all fees, taxes, penalties, and interest due and accruing before the termination or revocation; and

(2) an amount equal to the total taxes from the date of termination or revocation to the date of reinstatement that would have been payable if the corporation had not been terminated or had its registration revoked.

(b) When the report is filed and the filing fee is paid to the secretary of state, the secretary of state shall:

(1) reinstate the certificate of formation or registration without judicial action;

(2) cancel the word "forfeited" on the record; and

(3) endorse on the record kept in the secretary's office relating to the corporation the words "set aside" and the date of the reinstatement.

(c) If a termination or revocation is set aside under this

section, the corporation shall determine from the secretary of state whether the name of the corporation is available. If the name of the corporation is not available at the time of reinstatement, the corporation shall amend its corporate name under this code. (TNPCA 9.02.F (part), G.)

Source Law

F. Any corporation which is involuntarily dissolved or whose certificate of authority is revoked without judicial ascertainment, as provided in Section E hereof, and which has paid all fees, taxes, penalties and interest due thereon which accrued before the dissolution or revocation plus an amount equal to the total taxes from the date of dissolution or revocation to the date of reinstatement which would have been payable had the corporation not been dissolved or its certificate revoked may be relieved from such dissolution or revocation by filing the required report with the Secretary of State together with a filing fee

G. When such report shall be filed and the revival fee shall be paid to the Secretary of State, he shall reinstate the certificate of incorporation or charter or certificate of authority without judicial ascertainment, cancelling the word "Forfeited" upon his record, and endorsing thereon the words "Set Aside" and the date of such reinstatement; provided, if such dissolution or revocation is to be set aside, the corporation shall ascertain from the Secretary of State whether the name of the corporation is available, and if not available, amend its corporate name pursuant to the provisions of this Act.

Revisor's Note

No substantive change is intended.

[Sections 22.366-22.400 reserved for expansion]

SUBCHAPTER I. CHURCH BENEFITS BOARDS

Revised Law

Sec. 22.401. DEFINITION. In this chapter, "church benefits board" means an organization described by Section 414(e)(3)(A), Internal Revenue Code, that:

- (1) has the principal purpose or function of

administering or funding a plan or program to provide retirement benefits, welfare benefits, or both for the ministers or employees of a church or a conference, convention, or association of churches; and

(2) is controlled by or affiliated with a church or a conference, convention, or association of churches. (V.A.C.S. 1407a, Sec. 1.)

Source Law

1. In this Act "church benefits board" means an organization as described in Section 414(e)(3)(A) of the Internal Revenue Code of 1986 (26 U.S.C. Section 414(e)) that:

(1) has the principal purpose or function of administering or funding a plan or program for providing retirement benefits, welfare benefits, or both for the ministers or employees of a church or a conference, convention, or association of churches; and

(2) is controlled by or affiliated with a church or a conference, convention, or association of churches.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.402. PENSIONS AND BENEFITS. When authorized by the corporation's members or as otherwise provided by law, a domestic or foreign nonprofit corporation formed for a religious purpose may provide, directly or through a separate church benefits board, for the support and payment of benefits and pensions to:

(1) the ministers, teachers, employees, trustees, directors, or other functionaries of the corporation;

(2) the ministers, teachers, employees, trustees, directors, or other functionaries of organizations controlled by or affiliated with a church or a conference, convention, or association of churches under the jurisdiction and control of the corporation; and

(3) the spouse, children, dependents, or other beneficiaries of the persons described by Subdivisions (1) and (2). (V.A.C.S. 1407a, Sec. 2.)

Source Law

2. If duly authorized by its members or as otherwise provided by law, a domestic or foreign nonprofit corporation formed for a religious purpose may provide, directly or through a separate church benefits board, for

the support and payment of pensions and benefits to its ministers, teachers, employees, trustees, directors, or other functionaries and to the ministers, teachers, employees, trustees, directors, or functionaries of organizations controlled by or affiliated with a church or a conference, convention, or association of churches under its jurisdiction and control and may provide for the payment of pensions and benefits to the spouse, children, dependents, or other beneficiaries of those persons.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.403. CONTRIBUTIONS. (a) A church benefits board may provide for:

(1) the collection of contributions and other payments to assist in providing pensions and benefits under this subchapter; and

(2) the creation, maintenance, investment, management, and disbursement of necessary annuities, endowments, reserves, or other funds for a purpose under Subdivision (1).

(b) A church benefits board may receive payments from a trust fund or corporation that funds a church plan as defined by Section 414(e), Internal Revenue Code. (V.A.C.S. 1407a, Sec. 3.)

Source Law

3. A church benefits board may provide for the collection of contributions and other payments to aid in providing pensions and benefits under this Act and for the creation, maintenance, investment, management, and disbursement of necessary annuities, endowments, reserves, and other funds for those purposes. Payments may be received from a trust fund or corporation that funds a "church plan" as defined by Section 414(e), Internal Revenue Code of 1986 (26 U.S.C. Section 414(e)).

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.404. POWER TO ACT AS TRUSTEE. A church benefits board may act as:

(1) a trustee under a lawful trust committed to the

board by contract, will, or otherwise; and

(2) an agent for the performance of a lawful act relating to the purposes of the trust. (V.A.C.S. 1407a, Sec. 4 (part).)

Source Law

4. A church benefits board . . . may act as trustee under a lawful trust committed to it by contract, will, or otherwise, and may act as agent for the performance of a lawful act relating to the purposes of the trust.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.405. DOCUMENTS AND AGREEMENTS. A church benefits board may provide to a program participant a certificate or agreement of participation, a debenture, or an indemnification agreement, as appropriate to accomplish the purposes of the board. (V.A.C.S. 1407a, Sec. 4 (part).)

Source Law

4. A church benefits board may provide certificates or agreements of participation and debentures and indemnification agreements to its program participants as appropriate to accomplish its purposes,

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.406. INDEMNIFICATION. A church benefits board, or an affiliate wholly owned by the board, may agree to indemnify against damage or risk of loss:

(1) a minister, teacher, employee, trustee, functionary, or director affiliated with the board or a family member, dependent, or beneficiary of one of those persons;

(2) a church or a convention, conference, or association of churches; or

(3) an organization that is controlled by or affiliated with the board or with a church or a convention, conference, or association of churches. (V.A.C.S. 1407a, Sec. 5.)

Source Law

5. A church benefits board, directly or through an affiliate wholly owned by the

board, may agree to indemnify against damage or risk of loss:

(1) its affiliated ministers, teachers, employees, trustees, functionaries, directors, and their families, dependents, and beneficiaries; and

(2) a church, a convention, conference, or association of churches, or an organization that is controlled by or affiliated with it or with a church or a convention, conference, or association of churches.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.407. PROTECTION OF BENEFITS. (a) Money or other benefits that have been or will be provided to a participant or a beneficiary under a plan or program provided by or through a church benefits board under this subchapter are not subject to execution, attachment, garnishment, or other process and may not be appropriated or applied as part of a judicial, legal, or equitable process or operation of a law other than a constitution to pay a debt or liability of the participant or beneficiary.

(b) This section does not apply to a qualified domestic relations order or an amount required by the church benefits board to recover costs or expenses incurred in the plan or program. (V.A.C.S. 1407a, Sec. 6.)

Source Law

6. Money or other benefits that have been or will be provided to a participant or a beneficiary under a plan or program of retirement income, relief, welfare, or employee benefit provided by or through a church benefits board is not subject to execution, attachment, garnishment, or other process and may not be seized, taken, appropriated, or applied as part of a judicial, legal, or equitable process or operation of a law other than a constitution to pay a debt or liability of the participant or beneficiary. This section does not apply to a qualified domestic relations order or an amount required by the church benefits board to recover costs or expenses it incurred in the plan or program.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.408. ASSIGNMENT OF BENEFITS. An assignment or transfer or an attempt to make an assignment or transfer by a beneficiary of money, benefits, or other rights under a plan or program under this subchapter is void if:

(1) the plan or program contains a provision prohibiting the assignment or other transfer without the written consent of the church benefits board; and

(2) the beneficiary assigns or transfers or attempts to make an assignment or transfer without that consent.

(V.A.C.S. 1407a, Sec. 7.)

Source Law

7. If a plan or program under this Act contains a provision prohibiting assignment or other transfer by a beneficiary of money or benefits to be paid or rendered or of other rights under the plan or program without the written consent of the church benefits board, a prohibited assignment or transfer or an attempt to make a prohibited assignment or transfer is void if made without that consent.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 22.409. INSURANCE CODE NOT APPLICABLE. The Insurance Code does not apply to a church benefits board or a program, plan, benefit, or activity of the board or a person affiliated with the board. (V.A.C.S. 1407a, Sec. 8.)

Source Law

8. The Insurance Code does not apply to a church benefits board or its programs, plans, benefits, activities, or affiliates.

Revisor's Note

No substantive change is intended.

CHAPTER 23. SPECIAL-PURPOSE CORPORATIONS

SUBCHAPTER A. GENERAL PROVISIONS

Revised Law

Sec. 23.001. DETERMINATION OF APPLICABLE LAW. (a) A corporation created under this chapter or under a special statute outside this code, to the extent not inconsistent with a special statute regarding a particular corporation, is governed by:

(1) Title 1 and Chapter 21, if the corporation is organized for profit; and

(2) Title 1 and Chapter 22, if the corporation is organized not for profit.

(b) If a special statute does not contain any provision regarding a matter provided for in Title 1 or Chapter 21 or 22, or if the special statute specifically provides that the general laws for corporations supplement the statute, to the extent consistent with the special statute:

(1) Title 1 and Chapter 21 apply to a corporation organized for profit; and

(2) Title 1 and Chapter 22 apply to a corporation organized not for profit. (TBCA 9.14.A; TMCLA 1.03; TNPCA 10.04.A, C.)

Source Law

[TBCA 9.14]

A. This Act does not apply to domestic corporations organized under any statute other than this Act or to any foreign corporations granted authority to transact business within this State under any statute other than this Act; provided, however, that if any domestic corporation was heretofore or is hereafter organized under or is governed by a statute other than this Act or the Texas Non-Profit Corporation Act (Article 1396-1.01 et seq., Vernon's Texas Civil Statutes) that contains no provisions in regard to some of the matters provided for in this Act, or any foreign corporation was heretofore or is hereafter granted authority to transact business within this State under a statute other than this Act or the Texas Non-Profit Corporation Act that contains no provisions in regard to some of the matters provided for in this Act in respect of foreign corporations, or if such a statute specifically provides that the general laws for incorporation or for the granting of a certificate of authority to transact business in this State, as the case may be, shall supplement the provisions of such statute, then the provisions of this Act shall apply to the extent that they are not inconsistent with the provisions of such other statute; provided further, however, that this Act shall not apply to any domestic corporation

organized under or governed by the Texas Non-Profit Corporation Act or any foreign corporation granted authority to transact business within this State under the Texas Non-Profit Corporation Act.

[TMCLA]

1.03.A. All corporations shall, to the extent not inconsistent with any special statute pertaining to a particular corporation, be governed

(1) by the Texas Business Corporation Act, as amended, if organized for profit, and

(2) by the Texas Non-Profit Corporation Act, as amended, if organized not for profit.

B. Except to the extent that any provisions of this Act are expressly made inapplicable by any provision of the Texas Business Corporation Act, the Texas Non-Profit Corporation Act, or any special Statute of this State pertaining to a particular type of corporation, this Act shall govern (1) all domestic corporations, including without limitation those corporations heretofore or hereafter organized under any Statute of the State, and (2) only to the extent expressly provided in this Act, all foreign corporations, including without limitation those corporations heretofore or hereafter granted a permit to do business under any Statute of the State.

[TNPCA 10.04]

A. Except as otherwise provided by this article, this Act does not apply to domestic corporations organized under any statute other than this Act or to any foreign corporations granted authority to conduct affairs within this State under any statute other than this Act. If any domestic corporation is organized under or is governed by a statute that does not contain a provision regarding a matter provided for in this Act, or any foreign corporation is granted authority to conduct affairs within this State under a statute that does not

contain a provision regarding a matter provided for in this Act in respect of foreign corporations, or if a statute specifically provides that the general laws for incorporation or for the granting of a certificate of authority to conduct affairs in this State supplement the provisions of that statute, the provisions of this Act apply only to the extent not inconsistent with the provisions of the other statute.

. . .

C. This Act shall not apply to those corporations excepted under Article 2.01 B, Subsections (3), (4), and (5) of this Act; provided however, that if any of said excepted domestic corporations were heretofore or are hereafter organized not for profit under special statutes which contain no provisions in regard to some of the matters provided for in this Act, or if such special statutes specifically applicable provide that the general laws for incorporation shall supplement the provisions of such statutes, then the provisions of this Act shall apply to the extent that they are not inconsistent with the provisions of such special statutes.

Revisor's Note

No substantive change is intended. The revised law addresses foreign entities in Section 9.301(a).

Revised Law

Sec. 23.002. APPLICABILITY OF FILING REQUIREMENTS. Except as otherwise provided by the special statute, a document to be filed with the secretary of state under a special statute shall be executed and filed in accordance with Chapter 4. (New.)

Revisor's Note

New Section 23.002 supplements other statutes under which corporations are formed to provide default rules for execution and filing of documents to be filed with the secretary of state. The revised law addresses foreign entities in Section 9.301(b).

Revised Law

Sec. 23.003. DOMESTIC CORPORATION ORGANIZED UNDER SPECIAL STATUTE. A corporation organized under a special statute other

than this code is not considered a "domestic corporation" formed under this code, although this code may apply to the corporation. (New.)

Revisor's Note

New Section 23.003 prevents any circularity in the definition of "domestic corporation" so that the code is clear that domestic corporations include only those corporations formed pursuant to the code.

[Sections 23.004-23.050 reserved for expansion]

SUBCHAPTER B. BUSINESS DEVELOPMENT CORPORATIONS

Revised Law

Sec. 23.051. DEFINITIONS. In this subchapter:

(1) "Corporation" means a business development corporation organized under this subchapter.

(2) "Financial institution" means a banking corporation or trust company, savings and loan association, governmental agency, insurance company, or related corporation, partnership, foundation, or other institution engaged primarily in lending or investing funds.

(3) "Loan limit" means the maximum amount permitted to be outstanding at one time on loans made by a member to a corporation.

(4) "Member" means a financial institution authorized to do business in this state that undertakes to lend money to a corporation. (V.A.C.S. 1528g, Sec. 1.)

Source Law

1. In this Act, unless the context requires a different definition:

(1) "Corporation" means a business development corporation created under the terms of this Act.

(2) "Board of directors" means the board of directors of a business development corporation.

(3) "Financial institution" means any banking corporation or trust company, building and loan association, governmental agency, insurance company, or related corporation, partnership, foundation, or other institution engaged primarily in lending or investing funds.

(4) "Member" means any financial institution authorized to do business in this state which shall undertake to lend money to a corporation created under the terms of this Act.

(5) "Loan limit" means the maximum amount permitted to be outstanding at one time on loans by a member to a business development corporation.

Revisor's Note

No substantive change is intended. The revised law omits the circular, unnecessary definition of "board of directors" contained in the source law. The reference in the source law to "building and loan association" has been modernized to read "savings and loan association."

Revised Law

Sec. 23.052. ORGANIZERS. Subject to The Securities Act (Article 581-1 et seq., Vernon's Texas Civil Statutes), 25 or more persons, the majority of whom must be residents of this state, may form a business development corporation to promote, develop, and advance the prosperity and economic welfare of this state. (V.A.C.S. 1528g, Sec. 2(a).)

Source Law

(a) Subject to the provisions of the Texas Securities Act, 25 or more persons, a majority of whom shall be residents of this state, may form a business development corporation for the purpose of promoting, developing, and advancing the prosperity and economic welfare of this state.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.053. PURPOSES. (a) A business development corporation may be organized as a:

- (1) for-profit corporation under Chapter 21; or
- (2) nonprofit corporation under Chapter 22.

(b) The business development corporation must be organized to:

- (1) promote, stimulate, develop, and advance the business prosperity and economic welfare of this state and the residents of this state;
- (2) encourage and assist, through loans, investments, or other business transactions, new business and industry in this state;
- (3) rehabilitate and assist existing industry in this state;
- (4) stimulate and assist in the expansion of business

activity that will tend to promote the business development and maintain the economic stability of this state, provide maximum opportunities for employment, encourage thrift, and improve the standard of living of the residents of this state;

(5) cooperate and act in conjunction with other public or private organizations in the promotion and advancement of industrial, commercial, agricultural, and recreational developments in this state; or

(6) provide financing for the promotion, development, and conduct of business activity in this state. (V.A.C.S. 1528g, Secs. 2(b), (c) (part).)

Source Law

(b) The corporation may be organized either as a profit making corporation under the Texas Business Corporation Act, or as a nonprofit corporation under the Texas Non-Profit Corporation Act.

(c) The articles of incorporation shall set forth:

. . . .

(2) the purpose or purposes for which the corporation is organized, which shall include the following:

The purposes of the corporation shall be to promote, stimulate, develop, and advance the business prosperity and economic welfare of this state and its citizens; to encourage and assist through loans, investments, or other business transactions, in the location of new business and industry in this state and to rehabilitate and assist existing industry; and so to stimulate and assist in the expansion of all kinds of business activity which will tend to promote the business development and maintain the economic stability of this state, provide maximum opportunities for employment, encourage thrift, and improve the standard of living of the citizens of this state; similarly, to cooperate and act in conjunction with other organizations, public or private, in the promotion and advancement of industrial, commercial, agricultural, and recreational developments in this state; and to provide financing for the promotion, development, and conduct of all kinds of business activity in this state"; and

. . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.054. POWERS. (a) The powers of a corporation include, in addition to the powers conferred on the corporation by Chapters 2 and 21 or 22, as applicable, the power to:

(1) elect, appoint, and employ officers, agents, and employees;

(2) make contracts and incur liabilities for a purpose of the corporation;

(3) borrow money on a secured or unsecured basis to carry out a purpose of the corporation;

(4) issue for the purpose of borrowing money a bond, debenture, note, or other evidence of indebtedness, whether secured or unsecured;

(5) secure an evidence of indebtedness by mortgage, pledge, deed of trust, or other lien on a property, franchise, right, or privilege of the corporation, or any part of or interest in those items, without securing shareholder or member approval;

(6) make a secured or unsecured loan and establish and regulate the terms and conditions of that loan and the charges for interest or service connected with that loan;

(7) purchase, receive, hold, lease, or otherwise acquire, and sell, convey, transfer, lease, or otherwise dispose of, property and exercise those rights and privileges incidental and appurtenant to the acquisition or disposal of the property and to the use of the property, including any property acquired by the corporation periodically in the satisfaction of a debt or enforcement of an obligation;

(8) acquire improved or unimproved real property to construct an industrial plant or other business establishment on the property or dispose of the real property for the construction of an industrial plant or other business establishment;

(9) acquire, construct or reconstruct, alter, repair, maintain, operate, sell, convey, transfer, lease, or otherwise dispose of an industrial plant or business establishment;

(10) protect the corporation's position as creditor by acquiring the goodwill, business, rights, property, including a share, bond, debenture, note, other evidence of indebtedness, other asset, or any part of an asset or interest in an asset, of a person to whom the corporation loaned money and assume, undertake, or pay an obligation, debt, or liability of the person;

(11) mortgage, pledge, or otherwise encumber any property, right, or thing of value, acquired under Subdivision

(7), (8), (9), or (10), as security for the payment of a part of the purchase price;

(12) promote the establishment of local development corporations in the various communities of this state, enter into agreements with those local development corporations, and cooperate with, assist, or otherwise encourage the local foundations; and

(13) participate with a properly authorized federal lending agency in the making of loans.

(b) A corporation may approve an application for a loan under Subsection (a)(6) only if the applicant demonstrates that:

(1) the applicant applied for the loan through ordinary banking channels; and

(2) the loan has been refused by at least two banks or other financial institutions. (V.A.C.S. 1528g, Sec. 3(a).)

Source Law

(a) In addition to the powers conferred on business corporations generally by the Texas Business Corporation Act, or if the corporation is organized as a nonprofit corporation, by the Texas Non-Profit Corporation Act, the corporation has the following powers:

(1) to elect, appoint, and employ officers, agents, and employees; to make contracts and incur liabilities for any of the purposes of the corporation;

(2) to borrow money on a secured or unsecured basis to carry out any of the purposes of the corporation; to issue therefor its bonds, debentures, notes, or other evidences of indebtedness, whether secured or unsecured, and to secure any evidence of indebtedness by mortgage, pledge, deed of trust, or other lien on its property, franchises, rights, and privileges of every kind and nature, or any part thereof or interest therein, without securing stockholder or member approval;

(3) to make secured or unsecured loans and to establish and regulate the terms and conditions of these loans and the charges for interest or service connected therewith; however, the corporation shall not approve any application for a loan unless and until the person applying for the loan demonstrates that he has applied for the loan through

ordinary banking channels and that the loan has been refused by at least two banks or other financial institutions; it is the intention of the Legislature not to take from the lending institutions of this state any loans desired by these institutions generally in the course of their business;

(4) to purchase, receive, hold, lease, or otherwise acquire, and to sell, convey, transfer, lease, or otherwise dispose of real and personal property, together with such rights and privileges as may be incidental and appurtenant thereto and the use thereof, including, but not restricted to, any real or personal property acquired by the corporation from time to time in the satisfaction of debts or enforcement of obligations;

(5) to acquire improved or unimproved real estate for the purpose of constructing industrial plants or other business establishments thereon or for the purpose of disposing of such real estate to others for the construction of industrial plants or other business establishments; and to acquire, construct or reconstruct, alter, repair, maintain, operate, sell, convey, transfer, lease, or otherwise dispose of industrial plants or business establishments;

(6) to protect its position as creditor by acquiring the goodwill, business, rights, real and personal property including stock, shares, bonds, debentures, notes, and other evidences of indebtedness, and other assets or any part thereof or interest therein, of any persons, firms, corporations, joint-stock companies, associations, or trusts to whom or to which the corporation has loaned money, and to assume, undertake, or pay the obligations, debts, and liabilities of any such person, firm, corporation, joint-stock company, or trust;

(7) to mortgage, pledge, or otherwise encumber any property, right, or thing of value, acquired pursuant to the powers contained in paragraphs (4), (5), or (6), as security for the payment of any part of the purchase price thereof;

(8) to promote the establishment of local development corporations in the various communities of this state; to enter into agreements with them; and to cooperate with, assist, and otherwise encourage such local foundations;

(9) to participate with any duly authorized federal lending agency in the making of loans.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.055. STATEWIDE OPERATION. A corporation organized under this subchapter is a state development company as defined by Section 103, Small Business Investment Act of 1958 (15 U.S.C. Section 662), as amended, or similar federal legislation, and may operate on a statewide basis. (V.A.C.S. 1528g, Sec. 3(b).)

Source Law

(b) Any corporation organized under the provisions of this Act shall be a state development company as defined in the Small Business Investment Act of 1958, as amended, Public Law 85699, 85th Congress, or any other similar Federal litigation, and shall be authorized to operate on a statewide basis.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.056. CERTIFICATE OF FORMATION. (a) The certificate of formation of a corporation must state:

- (1) the name of the corporation;
- (2) the purpose or purposes for which the corporation is organized as required by Section 23.053; and
- (3) any other information required by:
 - (A) Chapter 4; and
 - (B) Chapter 21 or 22, as applicable.

(b) The name of a corporation must include the words "Business Development Corporation." (V.A.C.S. 1528g, Sec. 2(c) (part).)

Source Law

(c) The articles of incorporation shall set forth:

- (1) the name of the corporation, which shall include the words "Business

Development Corporation";

(2) the purpose or purposes for which the corporation is organized, . . .

(3) any other information required by the Texas Business Corporation Act, if the corporation is organized as a profit making corporation, or by the Texas Non-Profit Corporation Act, if the corporation is organized as a nonprofit corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.057. MANAGEMENT BY BOARD OF DIRECTORS; NUMBER OF DIRECTORS. (a) The organization, control, and management of a corporation are vested in a board of directors. The board must consist of not fewer than 15 and not more than 21 directors.

(b) The board of directors may exercise any power of the corporation not conferred on the shareholders or members by law or by the corporation's bylaws. (V.A.C.S. 1528g, Secs. 9(a), (b).)

Source Law

(a) The organization, control, and management of the corporation are vested in a board of not less than 15 nor more than 21 directors.

(b) The board of directors may exercise all the powers of the corporation except those conferred upon the stockholders or members by law or by the bylaws of the corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.058. ELECTION OR APPOINTMENT OF DIRECTORS. (a) The incorporators of a corporation shall name the directors constituting the initial board of directors of the corporation. Directors other than the initial directors shall be elected at each annual meeting of the corporation. If an annual meeting is not held at the time designated by the bylaws of the corporation, the directors shall be elected at a special meeting held in lieu of the annual meeting.

(b) At an annual meeting or special meeting held in lieu of the annual meeting, the members of the corporation shall elect two-thirds of the directors, and the shareholders of the corporation shall elect the remaining directors. (V.A.C.S.

Source Law

(d) The board of directors shall be named in the first instance by the incorporators and shall be elected thereafter at each annual meeting of the corporation, or if no annual meeting is held at the time fixed by the bylaws, at a special meeting held in lieu of the annual meeting.

(e) At any annual meeting or special meeting held in lieu of the annual meeting, the members of the corporation shall elect two-thirds of the directors, and the stockholders shall elect the remaining directors.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.059. TERM OF OFFICE; VACANCY. (a) A director of a corporation holds office until the next annual election of directors and until a successor is elected and qualified, unless the director is removed at an earlier date in accordance with the corporation's bylaws.

(b) A vacancy in the office of a director elected by the members shall be filled by the directors elected by the members, and a vacancy in the office of a director elected by the shareholders shall be filled by the directors elected by the shareholders. (V.A.C.S. 1528g, Secs. 9(f), (g).)

Source Law

(f) The directors shall hold office until the next annual meeting or special meeting of the corporation held in lieu of the annual meeting after their election and until their successors are elected and have qualified, unless sooner removed in accordance with the provisions of the bylaws.

(g) Any vacancy in the office of a director elected by the members shall be filled by the directors elected by the members, and any vacancy in the office of a director elected by the stockholders shall be filled by the directors elected by the stockholders.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.060. OFFICERS. The board of directors of a corporation shall appoint a president, a treasurer, and any other agent or officer of the corporation and shall fill each vacancy other than a vacancy on the board. (V.A.C.S. 1528g, Sec. 9(c) (part).)

Source Law

(c) The board of directors shall choose and appoint a president, a treasurer, and all other agents and officers of the corporation and shall fill all vacancies except vacancies in the board of directors. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.061. PARTICIPATION AS OWNER. (a) An individual, corporation, or other organization authorized to conduct business in this state, including a public utility company, insurance and casualty company, or foreign corporation licensed to do business in this state, or a trust may acquire, purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of a bond, security, or other evidence of indebtedness created by, or shares of, the corporation.

(b) An owner of shares of the corporation may exercise any right, power, or privilege of that ownership, including the right to vote. (V.A.C.S. 1528g, Sec. 4.)

Source Law

4. All natural persons and corporations authorized to conduct business in this state, including without any implied limitation public utility companies, insurance and casualty companies, and foreign corporations licensed to do business in this state, and all trusts, may acquire, purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of any bonds, securities, or other evidences of indebtedness created by, or the shares of capital stock of, the corporation, and while owners of the stock, may exercise all the rights, powers, and privileges of ownership, including the right to vote thereon.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.062. FINANCIAL INSTITUTION AS MEMBER OF CORPORATION. (a) A financial institution may become a member of a corporation and may make loans to the corporation as provided by this chapter.

(b) A financial institution may request membership in the corporation by applying to the corporation's board of directors in the manner prescribed by the board. Membership in the corporation takes effect on the board's acceptance of the application.

(c) A financial institution that is a member of a corporation may acquire, purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of a bond, security, or other evidence of indebtedness created by, or a share of, the corporation. As owner of shares of the corporation, a financial institution may exercise any right, power, or privilege of that ownership, including the right to vote. A member of a corporation may not acquire shares of the corporation in an amount greater than 10 percent of the member's loan limit. The amount of shares of the corporation that a member may acquire is in addition to the amount of shares of corporations that the member may otherwise acquire.

(d) A financial institution that is not a member of the corporation may not acquire any shares of the corporation.
(V.A.C.S. 1528g, Sec. 5.)

Source Law

5. (a) Any financial institution may become a member of the corporation and may make loans to the corporation as provided by this Act.

(b) Any financial institution may request membership in the corporation by making application to the board of directors in a manner prescribed by the board of directors, and membership shall be effective upon acceptance of the application by the board of directors.

(c) Any financial institution which becomes a member of the corporation may acquire, purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds, securities, or other evidences of indebtedness created by, or the shares of the capital stock of, the corporation, and while owner of the stock may

exercise all the rights, powers, and privileges of ownership, including the right to vote thereon. However, no member may acquire capital stock in an amount greater than 10 percent of the loan limit of that member. The amount of capital stock of the corporation which a member may acquire is in addition to the amount of capital stock in corporations which the member may otherwise acquire.

(d) A financial institution which is not a member of the corporation may not acquire any shares of the capital stock of the corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.063. WITHDRAWAL OF MEMBER. (a) On written notice to the corporation's board of directors, a member may withdraw from a corporation on the date stated in the notice. The date of a member's withdrawal must be at least six months after the date notice is given under this subsection.

(b) A member is not obligated to make a loan to the corporation pursuant to a call made after the date of the member's withdrawal from the corporation, but a member shall fulfill any obligation that has accrued or for which a commitment has been made before the withdrawal date. (V.A.C.S. 1528g, Sec. 7.)

Source Law

7. Upon written notice to the board of directors six months in advance, a member may withdraw from the corporation at the expiration date of the notice. A member is not obligated to make any loans to the corporation pursuant to calls made subsequent to the expiration date, but a member shall fulfill any obligations which have accrued or for which commitments have been made before the expiration date.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.064. POWERS OF SHAREHOLDERS AND MEMBERS. The shareholders and members of a corporation may:

(1) determine the number of directors and elect the

directors as provided by Section 23.058;

(2) make, amend, and repeal bylaws of the corporation;

or

(3) exercise any other power of the corporation that is conferred on the shareholders and members by the bylaws.

(V.A.C.S. 1528g, Sec. 8(a).)

Source Law

(a) The stockholders and the members of the corporation shall have the following powers:

(1) to determine the number of and elect the directors as provided by Section 9 of this Act;

(2) to make, amend, and repeal bylaws of the corporation; and

(3) to exercise any other powers of the corporation which may be conferred on the stockholders and the members by the bylaws.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.065. VOTING BY SHAREHOLDER OR MEMBER. (a) Each shareholder of a corporation has one vote, in person or by proxy, for each share held by the shareholder.

(b) Each member of a corporation has one vote in person or by proxy.

(c) A member with a loan limit that exceeds \$1,000 has one additional vote, in person or by proxy, for each additional \$1,000 the member may have outstanding on loans to the corporation at any one time as determined under Section 23.068. (V.A.C.S. 1528g, Sec. 8(b).)

Source Law

(b) Each stockholder has one vote, in person or by proxy, for each share of capital stock held by the stockholder, and each member has one vote, in person or by proxy; however, any member with a loan limit greater than \$1,000 has one additional vote, in person or by proxy, for each additional \$1,000 which the member may have outstanding on loans to the corporation at any one time as determined under the provisions of Section 6 of this Act.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.066. LOAN TO CORPORATION. (a) When called on by a corporation to make a loan to the corporation, a member of the corporation shall make the loan on those terms and conditions periodically approved by the board of directors.

(b) A loan made to the corporation by a member shall be evidenced by a bond, debenture, note, or other evidence of indebtedness of the corporation that:

- (1) is freely transferable at any time; and
- (2) accrues interest at a rate of not less than one-fourth of one percent more than the rate of interest determined by the board of directors to be the prime rate prevailing on the date of issuance on unsecured commercial loans. (V.A.C.S. 1528g, Secs. 6(a), (f).)

Source Law

(a) Each member of the corporation shall make loans to the corporation when called upon by it to do so on such terms and conditions as shall be approved from time to time by the board of directors.

(f) All loans to the corporation by members shall be evidenced by bonds, debentures, notes, or other evidences of indebtedness of the corporation, which shall be freely transferable at all times, and which shall bear interest at a rate of not less than one-quarter of one percent in excess of the rate of interest determined by the board of directors to be the prime rate prevailing at the date of issuance hereof on unsecured commercial loans.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.067. PROHIBITED LOAN. (a) A member may not make a loan to a corporation if, immediately after the loan would be made, the total amount of the obligations of the corporation would exceed 50 times the capital of the corporation.

(b) For purposes of this section, the capital of the corporation includes the amount of the outstanding shares of the corporation, whether common or preferred, and the earned or paid-in surplus of the corporation. (V.A.C.S. 1528g, Sec. 6(c).)

Source Law

(c) No loan to the corporation may be made if immediately thereafter the total amount of the obligations of the corporation would exceed 50 times the capital of the corporation. For the purposes of this subsection, the capital of the corporation includes the amount of the outstanding capital stock of the corporation, whether common or preferred, and the earned or paid-in surplus of the corporation.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.068. LOAN LIMITS. (a) A loan limit shall be established at the \$1,000 amount nearest to the amount computed in accordance with this section.

(b) The total amount outstanding on loans made to a corporation by a member at any one time, when added to the amount of the investment in the shares of the corporation then held by the member, may not exceed:

(1) 20 percent of the total amount then outstanding on loans to the corporation by all members, including outstanding amounts validly called for a loan but not yet loaned; or

(2) the following limit, to be determined as of the time the member becomes a member of the corporation, or at any time requested by a member on the basis of the audited balance sheet of the member at the close of its fiscal year immediately preceding its application for membership or, in the case of an insurance company, its last annual statement to the Texas Department of Insurance:

(A) an amount equal to the lesser of \$750,000 or two percent of the capital and surplus of a commercial bank or trust company;

(B) an amount equal to one percent of the total outstanding loans made by a savings and loan association;

(C) an amount equal to one percent of the capital and unassigned surplus of a stock insurance company other than a fire insurance company;

(D) an amount equal to one percent of the unassigned surplus of a mutual insurance company other than a fire insurance company;

(E) an amount equal to one-tenth of one percent of the assets of a fire insurance company; or

(F) the limits approved by the board of directors of the corporation for a government pension fund or other

financial institution.

(c) Subject to Subsection (b), each call made by the corporation shall be prorated among the members of the corporation in substantially the same proportion that the adjusted loan limit of each member bears to the aggregate of the adjusted loan limits of all members.

(d) For purposes of Subsection (c), the adjusted loan limit of a member is the amount of the member's loan limit, reduced by the balance of outstanding loans made by the member to the corporation and the investment in shares of the corporation held by the member at the time of the call. (V.A.C.S. 1528g, Secs. 6(b), (d), (e).)

Source Law

(b) All loan limits shall be established at the thousand-dollar amount nearest to the amount computed in accordance with the provisions of this section.

(d) The total amount outstanding on loans to the corporation made by any member at any one time, when added to the amount of the investment in the capital stock of the corporation then held by the member, shall not exceed:

(1) twenty percent of the total amount then outstanding on loans to the corporation by all members, including outstanding amounts validly called for loan but not yet loaned;

(2) the following limit, to be determined as of the time such member becomes a member or at any time requested by a member on the basis of the audited balance sheet of such member at the close of its fiscal year immediately preceding its application for membership, or, in the case of an insurance company, its last annual statement to the State Board of Insurance: an amount of two percent of the capital and surplus of commercial banks and trust companies or \$750,000, whichever is the lesser amount; an amount of one percent of the total outstanding loans made by a building and loan or savings and loan association; an amount of one percent of the capital and unassigned surplus of stock insurance companies, except fire insurance companies; an amount of one

percent of the unassigned surplus of mutual insurance companies, except fire insurance companies; an amount of one-tenth of one percent of the assets of fire insurance companies; and such limits as may be approved by the board of directors of the corporation for any government pension fund or for other financial institutions.

(e) Subject to Subsection (d) of this section, each call made by the corporation shall be prorated among the members of the corporation in substantially the same proportion that the adjusted loan limit of each member bears to the aggregate of the adjusted loan limits of all members. The adjusted loan limit of a member shall be the amount of such member's loan limit, reduced by the balance of outstanding loans made by such member to the corporation and the investment in capital stock of the corporation held by such member at the time of such call.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.069. SURPLUS. (a) A corporation shall set apart as earned surplus not less than 10 percent of the corporation's net earnings each year until the surplus, with any unimpaired surplus paid in, is equal to one-half of the amount paid in on the shares then outstanding. The surplus shall be kept to secure against losses and contingencies. If the surplus becomes impaired, the surplus shall be reimbursed in the manner provided for its accumulation.

(b) Net earnings and surplus shall be determined by the board of directors after providing for the required reserves as the directors consider advisable. A good faith determination of net earnings and surplus by the directors under this subsection is conclusive. (V.A.C.S. 1528g, Sec. 10.)

Source Law

10. (a) The corporation shall set apart as earned surplus not less than 10 percent of its net earnings each year, until such surplus, with any unimpaired surplus paid in, is equal to one-half of the amount paid in on the capital stock then outstanding. The surplus shall be kept to

secure against losses and contingencies, and whenever it becomes impaired, it shall be reimbursed in the manner provided for its accumulation.

(b) Net earnings and surplus shall be determined by the board of directors after providing for the required reserves as the directors deem advisable, and the determination of the directors made in good faith shall be conclusive on all persons.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.070. DEPOSITORY. (a) A corporation may deposit the corporation's funds in a banking institution that has been designated as a depository by a vote of the majority of the directors present at an authorized meeting of the board of directors of the corporation, excluding a director who is an officer or director of the designated depository.

(b) The corporation may not receive money on deposit.
(V.A.C.S. 1528g, Sec. 11.)

Source Law

11. (a) The corporation may deposit any of its funds in any banking institution which has been designated as a depository by a vote of the majority of the directors present at an authorized meeting of the board of directors, exclusive of any director who is an officer or director of the depository so designated.

(b) The corporation may not receive money on deposit.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.071. ANNUAL REPORT; PROVISION OF REQUIRED INFORMATION. (a) A corporation shall annually make a report of its condition to the banking commissioner and the Texas Department of Insurance.

(b) A corporation shall provide any information that is required by the secretary of state. (V.A.C.S. 1528g, Sec. 12.)

Source Law

12. The corporation shall make annual reports of its condition to the banking

commissioner and the State Board of Insurance, and the corporation shall furnish any information which may from time to time be required by the secretary of state.

Revisor's Note

No substantive change is intended.

[Sections 23.072-23.100 reserved for expansion]

SUBCHAPTER C. GRAND LODGES

Revised Law

Sec. 23.101. FORMATION. (a) An institution or order, by resolution or other consent of its members, may incorporate under this subchapter if the institution or order is:

- (1) the grand lodge of Texas, Ancient, Free and Accepted Masons;
- (2) the Grand Royal Arch Chapter of Texas;
- (3) the Grand Commandery of Knights Templars of Texas;
- (4) the grand lodge of the Independent Order of Odd Fellows of Texas; or
- (5) another similar institution or order organized for charitable or benevolent purposes.

(b) A corporation formed under this subchapter shall file a certificate of formation in accordance with Chapter 4 that complies with this subchapter. (V.A.C.S. 1399; New.)

Source Law

1399. The grand lodge of Texas, Ancient, Free and Accepted Masons, the Grand Royal Arch Chapter of Texas, the Grand Commandery of Knights Templars of Texas (Masonic); the grand lodge of the Independent Order of Odd Fellows of Texas, and other like institutions and orders organized for charitable or benevolent purposes may, by the consent of their respective bodies expressed by a resolution or otherwise, become bodies corporate under this title.

Revisor's Note

No substantive change is intended, except that new Subsection (b) clarifies that a certificate of formation must be filed under Chapter 4. This filing requirement was implied under the source law.

Revised Law

Sec. 23.102. APPLICABILITY OF CHAPTER 22. If this subchapter does not contain any provision regarding a matter provided for in Chapter 22, to the extent consistent with this

subchapter, Chapter 22 applies to a corporation formed under this subchapter. (TMCLA 1.03.A (part).)

Source Law

A. All corporations shall, to the extent not inconsistent with any special statute pertaining to a particular corporation, be governed

. . .

(2) by the Texas Non-Profit Corporation Act, as amended, if organized not for profit.

Revisor's Note

No substantive change is intended. Section 23.102 is added to clarify that Chapter 22 governing nonprofit corporations will apply to lodges to the extent such provisions are consistent with this subchapter. This result conforms with Article 1.03, Texas Miscellaneous Corporation Laws Act.

Revised Law

Sec. 23.103. DURATION. A grand body that incorporates under this subchapter may provide in the grand body's certificate of formation for the expiration of its corporate powers at the end of a stated number of years. If the certificate of formation does not provide for the duration of the grand body, the grand body has perpetual existence. The grand body may by its corporate name have perpetual succession of its officers and members. (V.A.C.S. 1405.)

Source Law

1405. Any grand body incorporating under this subdivision may provide in its charter for the expiration of its corporate powers at the end of any given number of years; or it may provide in its charter for its perpetual existence, and by its corporate name have perpetual succession of the officers and members.

Revisor's Note

No substantive change is intended, except that consistent with Chapter 3, the default rule for the term of a lodge where no duration is stated is perpetual existence. The source law required the period of

duration to be stated in the charter even if perpetual.

Revised Law

Sec. 23.104. SUBORDINATE LODGES. (a) The incorporation of a grand body includes each of its subordinate lodges or bodies holding a warrant or charter under the grand body.

(b) A subordinate body has all of the rights of other corporations under and by the name given to the grand body in the warrant or charter issued to the grand body to which it is attached. Those rights shall be provided for in the charter of the grand body.

(c) A subordinate body is subject to the jurisdiction and control of its respective grand body, and the warrant or charter of the subordinate body may be revoked by the grand body.
(V.A.C.S. 1400.)

Source Law

1400. The incorporation of any such grand lodge shall include all of its subordinate lodges, or bodies holding warrant or charter under such grand body, and each of such subordinate bodies shall have all the rights of other corporations under and by the name given it in such warrant or charter issued by the grand body to which it is attached, such rights being provided for in the charter of the grand body. Such subordinate bodies shall, at all times, be subject to the jurisdiction and control of their respective grand bodies, and subject to have their warrants or charters revoked by such grand body.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.105. TRUSTEES AND DIRECTORS. A grand body and a subordinate of the grand body may elect trustees and directors or may appoint trustees or directors from among their officers.
(V.A.C.S. 1401 (part).)

Source Law

1401. Such grand bodies and their subordinates may elect their own trustee or directors, or name certain of their officers as such, and

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.106. FRANCHISE TAXES. A corporation formed under this subchapter is not subject to or required to pay a franchise tax, except that a corporation is exempt from the franchise tax imposed by Chapter 171, Tax Code, only if the corporation is exempted by that chapter. (V.A.C.S. 1407.)

Source Law

1407. Bodies incorporated under this subdivision shall not be subject to, or required to pay a franchise tax. However, an incorporated body is exempt from the franchise tax imposed by Chapter 171, Tax Code, only if the body is exempted by that chapter.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.107. GENERAL POWERS. A grand body and a subordinate of the grand body may take action as directed or provided by law in the case of other corporations and may make constitutions and bylaws to govern their affairs. (V.A.C.S. 1401 (part).)

Source Law

1401. Such grand bodies and their subordinates may . . . perform such other acts as are directed or provided by law in the case of other corporations, and shall have power to make constitutions and by-laws for the government of their affairs.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.108. AUTHORITY REGARDING PROPERTY. (a) A grand body or subordinate body may acquire and hold property as necessary or convenient for a site on which to erect a building for the use and occupancy of the body and to erect homes and schools for members' widows or orphans or elderly, disabled, or indigent members and may sell or mortgage the property.

(b) A conveyance must be executed by the presiding officer and attested to by the secretary with the seal.

(c) The authority of a subordinate body to sell or to mortgage property is subject to the conditions periodically prescribed or established by the grand body to which the

subordinate is attached. (V.A.C.S. 1402.)

Source Law

1402. Such orders, grand and subordinate, shall have the right to acquire and hold such lands and personalty as may be necessary or convenient for sites upon which to erect buildings for their use and occupancy, and for homes and schools for their widows, orphans or aged or decrepit or indigent members, and to sell or mortgage the same, such conveyances to be executed by the presiding officer, attested by the secretary with the seal. The power and authority of such subordinate bodies to sell or to mortgage shall be subject to such conditions as may be from time to time prescribed or established by the grand body to which the subordinate is attached.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.109. AUTHORITY REGARDING LOANS. (a) A grand body incorporated under this subchapter may:

(1) loan money held and owned by the grand body for charitable purposes, for the endowment of any of the institutions of the grand body, or otherwise; and

(2) secure loans by taking and receiving liens on real property or by another method elected by the grand body.

(b) On sale of real property secured by a lien, a grand body may become the purchaser of the real property and hold title to the property. (V.A.C.S. 1404.)

Source Law

1404. Any grand body incorporated under this subdivision shall have the right and authority to loan any funds held and owned by it for charitable purposes, for the endowment of any of its institutions, or otherwise, and may secure such loans by taking and receiving liens on real estate, or in such other manner as it may elect. Upon sale of any real estate under such lien, such grand body may become the purchaser thereof, and hold title thereto.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 23.110. WINDING UP AND TERMINATION OF SUBORDINATE BODY. (a) On the winding up and termination of a subordinate body attached to a grand body, all property and rights existing in the subordinate body pass to and vest in the grand body to which it was attached, subject to the payment of any debt owed by the subordinate body.

(b) Notwithstanding a grand body's liability for the debt of a subordinate body under Subsection (a), the grand body is not liable for an amount greater than the actual cash value of the subordinate body's effects or authority. (V.A.C.S. 1403.)

Source Law

1403. Upon the demise of any subordinate body so incorporated, all property and rights existing in such subordinate body shall pass to, and vest in, the grand body to which it was attached, subject to the payment of all debts due by such subordinate body; but the grand body shall never be liable for any sum greater than the actual cash value of the effects of such subordinate actually received by it, or its authority.

Revisor's Note

No substantive change is intended.

TITLE 3. LIMITED LIABILITY COMPANIES

CHAPTER 101. LIMITED LIABILITY COMPANIES

SUBCHAPTER A. GENERAL PROVISIONS

Revised Law

Sec. 101.001. DEFINITIONS. In this title:

(1) "Company agreement" means any agreement, written or oral, of the members concerning the affairs or the conduct of the business of a limited liability company. A company agreement of a limited liability company having only one member is not unenforceable because only one person is a party to the company agreement.

(2) "Foreign limited liability company" or "foreign company" means a limited liability company formed under the laws of a jurisdiction other than this state.

(3) "Limited liability company" or "company" means a domestic limited liability company subject to this title. (TLLCA 1.02.A(3), (9); New.)

Source Law

(3) "Limited Liability Company" or "Company" means a limited liability company organized and existing under this chapter.

(9) "Foreign Limited Liability Company" means an entity formed under the laws of a jurisdiction other than this state (a) that is characterized as a limited liability company by such laws or (b) although not so characterized by such laws, that elects to procure a certificate of authority pursuant to Article 7.01 of this act, that is formed under laws which provide that some or all of the persons entitled to receive a distribution of the assets thereof upon the entity's dissolution or otherwise or to exercise voting rights with respect to an interest in the entity shall not be liable for the debts, obligations or liabilities of the entity and which is not eligible to become authorized to do business in this state under any other statute.

Revisor's Note

The revised law adds a definition of "company agreement" and simplifies the definition of "foreign limited liability company." "Company agreement" replaces the term "regulations" used in the Texas Limited Liability Company Act. This change was intended to emphasize the underlying contractual nature of this governing document for a limited liability company and to make the terminology used under Texas law more consistent with the terminology used under laws governing limited liability companies in other states. The Code defines "company agreement" in Section 101.001(1). This definition is based upon the definition of a partnership agreement in the Texas Revised Partnership Act and Texas Revised Limited Partnership Act and is similar to the definition of a limited liability company agreement under Delaware law. It is consistent with the treatment of regulations under the Texas Limited Liability Company Act

although the Texas Limited Liability Company Act does not contain an actual definition of the term "regulations." The Code definition recognizes, as does the Texas Limited Liability Company Act with respect to regulations (see Texas Limited Liability Company Act Article 2.22.A(3)), that the company agreement may be oral and clarifies that a company agreement of a single-member limited liability company is not unenforceable because only one member is a party to the agreement. The Texas Limited Liability Company Act has permitted single-member limited liability companies from its inception, and the language in Section 101.001(1) makes clear that the change in terminology from "regulations" to "company agreement" does not imply that there must be more than one party to this governing document.

The revised law simplifies the definition of a foreign limited liability company to make it parallel the "foreign corporation" definitions in Chapters 21 and 22. The Texas Limited Liability Company Act broadly defines "foreign limited liability company" to include any foreign entity whose owners are not liable for the debts, obligations, or liabilities of the entity. Thus, foreign limited liability entities, for example business trusts, which have no counterpart in existing Texas statutes can qualify to do business as limited liability companies under the Texas Limited Liability Company Act. Under Chapter 9 of the revised law, these types of foreign entities can register directly to transact business in Texas. Therefore, the broader definition of "limited liability company" currently found in the Texas Limited Liability Company Act is not needed in the revised law. See Revisor's Note to Section 9.001.

[Sections 101.002-101.050 reserved for expansion]

SUBCHAPTER B. FORMATION AND GOVERNING DOCUMENTS

Revised Law

Sec. 101.051. CERTAIN PROVISIONS CONTAINED IN CERTIFICATE OF FORMATION. (a) A provision that may be contained in the company agreement of a limited liability company may

alternatively be included in the certificate of formation of the company as provided by Section 3.005(b).

(b) A reference in this title to the company agreement of a limited liability company includes any provision contained in the company's certificate of formation instead of the company agreement as provided by Subsection (a). (TLLCA 2.09.A (part), 3.02.A (part).)

Source Law

[TLLCA 2.09]

A. . . . Any provision of this Act subject to variation or modification by the regulations of a limited liability company is also subject to variation or modification by the articles of organization of the limited liability company.

[TLLCA 3.02]

A. The initial Articles of Organization shall set forth:

. . . .

(9) Any other provisions, not inconsistent with law, that the members elect to set out in the articles of organization for the regulation of the internal affairs of the limited liability company, including any provisions that under this Act are permitted to be set out in the regulations of the limited liability company.

Revisor's Note

No substantive change is intended. The revised law incorporates the new terminology of the code by referring to the "company agreement" and "certificate of formation" rather than the "regulations" and "articles of organization."

Revised Law

Sec. 101.052. COMPANY AGREEMENT. (a) Except as provided by Section 101.054, the company agreement of a limited liability company governs:

(1) the relations among members, managers, and officers of the company, assignees of membership interests in the company, and the company itself; and

(2) other internal affairs of the company.

(b) To the extent that the company agreement of a limited liability company does not otherwise provide, this title and the provisions of Title 1 applicable to a limited liability company

govern the internal affairs of the company.

(c) Except as provided by Section 101.054, a provision of this title or Title 1 that is applicable to a limited liability company may be waived or modified in the company agreement of a limited liability company.

(d) The company agreement may contain any provisions for the regulation and management of the affairs of the limited liability company not inconsistent with law or the certificate of formation. (TLLCA 2.09.A (part).)

Source Law

A. The members of a limited liability company have the power to adopt, alter, amend, or repeal the regulations of a limited liability company. The articles of organization or regulations may provide that the manager or managers also have the power to adopt, alter, amend, or repeal the regulations, in whole or in part. Regulations may provide that they may not, in whole or specified part, be altered, amended, or repealed by the managers. The regulations may contain any provisions for the regulation and management of the affairs of the limited liability company not inconsistent with law or the articles of organization. . . .

Revisor's Note

The most significant change in Title 3 from the Texas Limited Liability Company Act was a change in the structure of how the provisions of the limited liability company statute are applied. The Texas Limited Liability Company Act contained numerous provisions that were expressly qualified with the language "unless otherwise provided in the articles of organization or regulations," or similar limitations. In the interest of clarity and economy of language, the code takes the approach stated in Section 101.052 that, except as provided in Section 101.054, every provision of the code governing limited liability companies may be waived or modified by the company agreement of a limited liability company, and that the terms of the company agreement will, with that qualification, take precedence over the terms of the code. In the absence of a governing

provision in the company agreement, the provisions of the code will govern as a "default" provision. This order of precedence is also reflected by Section 101.252.

Because of the reversal of the prior assumption that each provision of the limited liability company statute was mandatory (unless expressly qualified) to the new assumption in Sections 101.052 and 101.054 that most provisions of the code governing limited liability companies may be waived or modified, a number of the provisions of Title 3 are now stated in such a way that the new provision appears to be the converse of the corresponding provision under the Texas Limited Liability Company Act. But because the actual effect of the operation of Section 101.052, Section 101.054, and the provisions in question is the same as existing law in most cases, these reversals in the form of provisions are not noted separately below unless there is actually a substantive change from existing law as a result of the reversal. One example of a change in the way a provision is stated without a substantive change in the law is found in the rewording of Article 5.05, Texas Limited Liability Company Act, in Section 101.107.

In some cases, however, the reversal of how code sections are stated resulted in a particular section being redrafted as a default rule where there had been none before.

Section 101.052 represents a change from existing law in two respects: first, the change in structure of application of the statute described above, and second, a change of the name of the governing document for a limited liability company other than its certificate of formation (articles of organization under existing law) to "company agreement" rather than "regulations," the term used under prior law. See Revisor's Note to Section 101.001.

Revised Law

Sec. 101.053. AMENDMENT OF COMPANY AGREEMENT. The company

agreement of a limited liability company may be amended only if each member of the company consents to the amendment. (TLLCA 2.09.B.)

Source Law

B. Unless otherwise provided in the articles of organization or regulations, adoption, alteration, amendment, or repeal of the regulations of a limited liability company requires the affirmative vote, approval, or consent of all the members or, if the manager or managers have the power to adopt, alter, amend, or repeal the regulations of a limited liability company, the affirmative vote, approval, or consent of all the managers.

Revisor's Note

No substantive change is intended. This section of the revised law may be modified or waived by the company agreement or certificate of formation. See the revisor's note to Section 101.052 explaining the change in structure of the code.

Revised Law

Sec. 101.054. WAIVER OR MODIFICATION OF CERTAIN STATUTORY PROVISIONS PROHIBITED; EXCEPTIONS. (a) Except as provided by this section, the following provisions may not be waived or modified in the company agreement of a limited liability company:

- (1) this section;
- (2) Section 101.101(b), 101.206, 101.501, or 101.502;
- (3) Chapter 1, if the provision is used to interpret a provision or define a word or phrase contained in a section listed in this subsection;
- (4) Chapter 2, except that Section 2.104(c)(2), 2.104(c)(3), or 2.113 may be waived or modified in the company agreement;
- (5) Chapter 3, except that Subchapters C and E may be waived or modified in the company agreement; or
- (6) Chapter 4, 5, 7, 10, 11, or 12, other than Section 11.056.

(b) A provision listed in Subsection (a) may be waived or modified in the company agreement if the provision that is waived or modified authorizes the limited liability company to waive or modify the provision in the company's governing documents.

(c) A provision listed in Subsection (a) may be modified in the company agreement if the provision that is modified specifies:

(1) the person or group of persons entitled to approve a modification; or

(2) the vote or other method by which a modification is required to be approved.

(d) A provision in this title or in that part of Title 1 applicable to a limited liability company that grants a right to a person, other than a member, manager, officer, or assignee of a membership interest in a limited liability company, may be waived or modified in the company agreement of the company only if the person consents to the waiver or modification. (New.)

Revisor's Note

Section 101.054 lists the provisions of the code that may not be waived or modified by the company agreement of a limited liability company or may be waived or modified only in certain circumstances. This section represents a change in form and structure of the law governing limited liability companies, but does not result in a substantive change in existing law for the most part. See Revisor's Note to Section 101.052. Subsection (d) of the revised law clarifies that the rights of third parties cannot be changed by the company agreement without their consent.

[Sections 101.055-101.100 reserved for expansion]

SUBCHAPTER C. MEMBERSHIP

Revised Law

Sec. 101.101. MEMBERS REQUIRED. (a) A limited liability company may have one or more members. Except as provided by this section, a limited liability company must have at least one member.

(b) A limited liability company that has managers is not required to have any members during a reasonable period between the date the company is formed and the date the first member is admitted to the company.

(c) A limited liability company is not required to have any members during the period between the date the continued membership of the last remaining member of the company is terminated and the date the agreement to continue the company described by Section 11.056 is executed. (TLLCA 4.01.A (part); New.)

Source Law

A. A limited liability company may have one or more members. . . .

Revisor's Note

The revised law clarifies that there are certain times when a limited liability company may be in compliance with the code without members. These times include the period between the formation date of the limited liability company and the admission of its first member, as long as that time is reasonable, and the period between the date of termination of the last remaining member and the date of an agreement to continue the company.

Revised Law

Sec. 101.102. QUALIFICATION FOR MEMBERSHIP. (a) A person may be a member of or acquire a membership interest in a limited liability company unless the person lacks capacity apart from this code.

(b) A person is not required, as a condition to becoming a member of or acquiring a membership interest in a limited liability company, to:

- (1) make a contribution to the company;
- (2) otherwise pay cash or transfer property to the company; or
- (3) assume an obligation to make a contribution or otherwise pay cash or transfer property to the company. (TLLCA 4.01.C; New.)

Source Law

C. Any person may be a member unless the person lacks capacity apart from this Act.

Revisor's Note

Subsection (a) of the revised law provides that a person may be a member of or acquire a membership interest in a limited liability company unless the person lacks capacity apart from the code. The revised law clarifies that the capacity to become a member also applies to the acquisition of membership interests, which can be implied in the source law. In addition, Subsection (b) provides that a person is not required to make a contribution or otherwise pay cash or contribute property to the limited liability company, or assume an obligation to do so, as a condition to becoming a member or acquiring a membership interest. Current law is

unclear in this regard as there is no provision in the Texas Limited Liability Company Act explicitly requiring a member to make a contribution in order to become a member or acquire a membership interest, but such a requirement might be implied in provisions addressing contributions. The approach in Section 101.102 follows the approach taken in the Delaware Limited Liability Company Act.

Revised Law

Sec. 101.103. EFFECTIVE DATE OF MEMBERSHIP. (a) A person who acquires a membership interest in a limited liability company in connection with the formation of the company becomes a member of the company on the date the company is formed if the person is named as an initial member in the company's certificate of formation.

(b) A person who acquires a membership interest in a limited liability company during the formation of the company but who is not named as an initial member in the company's certificate of formation becomes a member of the company on the latest of:

- (1) the date the company is formed;
- (2) the date stated in the company's records as the date the person becomes a member of the company; or
- (3) if the company's records do not state a date described by Subdivision (2), the date the person's admission to the company is first reflected in the company's records.

(c) A person who, after the formation of a limited liability company, acquires directly or is assigned a membership interest in the company becomes a member of the company on approval or consent of all of the company's members. (TLLCA 4.01.A (part), B.)

Source Law

A. . . . In connection with the formation of a limited liability company, a person acquiring an interest as a member becomes a member on the latter of:

- (1) the date of formation of the limited liability company; or
- (2) the date stated in the records of the limited liability company as the date that the person becomes a member or, if no date is stated in those records, on the date that the person's admission is first reflected in the records of the limited liability company.

B. After the formation of a limited liability company, a person becomes a new member:

(1) in the case of a person acquiring a membership interest directly from the limited liability company, on compliance with the provisions of the regulations governing admission of new members or, if the regulations contain no relevant admission provisions, on the written consent of all members; and

(2) in the case of an assignee of a membership interest, as provided by Section A of Article 4.07 of this Act.

Revisor's Note

No substantive change is intended. This section of the revised law may be modified or waived by the company agreement or certificate of formation. See the revisor's note to Section 101.052 explaining the change in structure of the code.

Revised Law

Sec. 101.104. CLASSES OR GROUPS OF MEMBERS OR MEMBERSHIP INTERESTS. (a) The company agreement of a limited liability company may:

(1) establish within the company classes or groups of one or more members or membership interests each of which has certain expressed relative rights, powers, and duties, including voting rights; and

(2) provide for the manner of establishing within the company additional classes or groups of one or more members or membership interests each of which has certain expressed relative rights, powers, and duties, including voting rights.

(b) The rights, powers, and duties of a class or group of members or membership interests described by Subsection (a)(2) may be stated in the company agreement or stated at the time the class or group is established.

(c) If the company agreement of a limited liability company does not provide for the manner of establishing classes or groups of members or membership interests under Subsection (a)(2), additional classes or groups of members or membership interests may be established only by the adoption of an amendment to the company agreement.

(d) The rights, powers, or duties of any class or group of members or membership interests of a limited liability company may be senior to the rights, powers, or duties of any other class or group of members or membership interests in the company,

including a previously established class or group. (TLLCA 4.02.)

Source Law

4.02.A. The regulations may establish classes or groups of one or more members having certain expressed relative rights, powers, and duties, including voting rights, and may provide for the future creation, in the manner provided in the regulations, of additional classes or groups of members having certain relative rights, powers, or duties, including voting rights, expressed either in the regulations or at the time of creation. The rights, powers, or duties of a class or group may be senior to those of one or more existing classes or groups of members.

Revisor's Note

No substantive change is intended. The revised law specifies that additional classes or groups of members or membership interests may be established by the adoption of an amendment to the company agreement if the company agreement does not provide the manner in which additional classes or groups are created. This was implicit in the Texas Limited Liability Company Act provisions.

Revised Law

Sec. 101.105. ISSUANCE OF MEMBERSHIP INTERESTS AFTER FORMATION OF COMPANY. A limited liability company, after the formation of the company, may:

(1) issue membership interests in the company to any person with the approval of all of the members of the company; and

(2) if the issuance of a membership interest requires the establishment of a new class or group of members or membership interests, establish a new class or group as provided by Sections 101.104(a)(2), (b), and (c). (TLLCA 2.23.D (part), 4.02.A.)

Source Law

2.23.D. Except as provided in the articles of organization or the regulations, the affirmative vote, approval, or consent of a majority of all the members is required to:

. . .

(2) issue any additional

membership interests in the limited liability company subsequent to the issuance of membership interests to the initial members of the limited liability company;

. . .

4.02.A. The regulations may establish classes or groups of one or more members having certain expressed relative rights, powers, and duties, including voting rights, and may provide for the future creation, in the manner provided in the regulations, of additional classes or groups of members having certain relative rights, powers, or duties, including voting rights, expressed either in the regulations or at the time of creation. The rights, powers, or duties of a class or group may be senior to those of one or more existing classes or groups of members.

Revisor's Note

Section 101.105 provides that a limited liability company may issue additional membership interests in the company with the approval of all of the members of the company. Existing law provides that additional membership interests may be issued upon the vote of a majority of the members. The change would correct an inconsistency in the existing law under which admission of an additional member after formation of the company requires consent of all members while issuance of the membership interest requires consent of a mere majority of members. To the extent that issuance of additional membership interests implicates or impacts provisions of the company agreement, a unanimous member approval requirement is consistent with the rule requiring unanimous consent to amend the company agreement as well.

Revised Law

Sec. 101.106. NATURE OF MEMBERSHIP INTEREST. (a) A membership interest in a limited liability company is personal property.

(b) A member of a limited liability company or an assignee of a membership interest in a limited liability company does not have an interest in any specific property of the company. (TLLCA

4.04.)

Source Law

4.04.A. A membership interest is personal property. A member has no interest in specific limited liability company property.

Revisor's Note

No substantive change is intended. The revised law adds language clarifying that an assignee of a membership interest, like a member, does not have an interest in any specific property of the company.

Revised Law

Sec. 101.107. WITHDRAWAL OR EXPULSION OF MEMBER PROHIBITED. A member of a limited liability company may not withdraw or be expelled from the company. (TLLCA 5.05.)

Source Law

5.05.A. A member may withdraw or be expelled from a limited liability company at the time or on the occurrence of events specified in the regulations.

Revisor's Note

No substantive change is intended. This section of the revised law may be modified or waived by the company agreement or certificate of formation. See the revisor's note to Section 101.052 explaining the change in structure of the code.

Revised Law

Sec. 101.108. ASSIGNMENT OF MEMBERSHIP INTEREST. (a) A membership interest in a limited liability company may be wholly or partly assigned.

(b) An assignment of a membership interest in a limited liability company:

(1) is not an event requiring the winding up of the company; and

(2) does not entitle the assignee to:

(A) participate in the management and affairs of the company;

(B) become a member of the company; or

(C) exercise any rights of a member of the company. (TLLCA 4.05.A (part).)

Source Law

A. . . .

(1) a membership interest is assignable in whole or in part;

(2) an assignment of a membership interest does not of itself dissolve the limited liability company or entitle the assignee to participate in the management and affairs of the limited liability company or to become or exercise any rights of a member;

. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 101.109. RIGHTS AND DUTIES OF ASSIGNEE OF MEMBERSHIP INTEREST BEFORE MEMBERSHIP. (a) A person who is assigned a membership interest in a limited liability company is entitled to:

(1) receive any allocation of income, gain, loss, deduction, credit, or a similar item that the assignor is entitled to receive to the extent the allocation of the item is assigned;

(2) receive any distribution the assignor is entitled to receive to the extent the distribution is assigned;

(3) require, for any proper purpose, reasonable information or a reasonable account of the transactions of the company; and

(4) make, for any proper purpose, reasonable inspections of the books and records of the company.

(b) An assignee of a membership interest in a limited liability company is entitled to become a member of the company on the approval of all of the company's members.

(c) An assignee of a membership interest in a limited liability company is not liable as a member of the company until the assignee becomes a member of the company. (TLLCA 4.05.A (part), C, 4.07.A.)

Source Law

[4.05]

A. . . .

(3) an assignment entitles the assignee to be allocated income, gain, loss, deduction, credit, or similar items, and to receive distributions, to which the assignor was entitled, to the extent those items are assigned, and, for any proper purpose, to

require reasonable information or account of transactions of the limited liability company and to make reasonable inspection of the books and records of the limited liability company; and

. . . .

C. Until an assignee of the interest of a member in a limited liability company is admitted as a member, the assignee does not have liability as a member solely as a result of the assignment.

[4.07]

A. An assignee of a membership interest may become a member if and to the extent that:

- (1) the regulations provide; or
- (2) all members consent.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 101.110. RIGHTS AND LIABILITIES OF ASSIGNEE OF MEMBERSHIP INTEREST AFTER BECOMING MEMBER. (a) An assignee of a membership interest in a limited liability company, after becoming a member of the company, is:

(1) entitled, to the extent assigned, to the same rights and powers granted or provided to a member of the company by the company agreement or this code;

(2) subject to the same restrictions and liabilities placed or imposed on a member of the company by the company agreement or this code; and

(3) except as provided by Subsection (b), liable for the assignor's obligation to make contributions to the company.

(b) An assignee of a membership interest in a limited liability company, after becoming a member of the company, is not obligated for a liability of the assignor that:

(1) the assignee did not have knowledge of on the date the assignee became a member of the company; and

(2) could not be ascertained from the company agreement. (TLLCA 4.07.B.)

Source Law

B. An assignee who becomes a member has, to the extent assigned, the rights and powers and is subject to the restrictions and liabilities of a member under the regulations and this Act. Unless otherwise provided by

regulations, an assignee who becomes a member also is liable for the obligations of the assignor to make contributions but is not obligated for liabilities unknown to the assignee at the time the assignee became a member and which could not be ascertained from the regulations.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 101.111. RIGHTS AND DUTIES OF ASSIGNOR OF MEMBERSHIP INTEREST. (a) An assignor of a membership interest in a limited liability company continues to be a member of the company and is entitled to exercise any unassigned rights or powers of a member of the company until the assignee becomes a member of the company.

(b) An assignor of a membership interest in a limited liability company is not released from the assignor's liability to the company, regardless of whether the assignee of the membership interest becomes a member of the company. (TLLCA 4.05.A (part), 4.07.C.)

Source Law

[4.05]

A. . . .

(4) until the assignee becomes a member, the assignor member continues to be a member and to have the power to exercise any rights or powers of a member, except to the extent those rights or powers are assigned.

[4.07]

C. Whether or not an assignee of a membership interest becomes a member, the assignor is not released from the assignor's liability to the limited liability company.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 101.112. JUDGMENT CREDITOR; CHARGE OF MEMBERSHIP INTEREST. (a) On application by a judgment creditor of a member of a limited liability company or any other owner of a membership interest in a limited liability company, a court may charge the membership interest of the member or owner, as appropriate, with payment of the unsatisfied amount of the judgment.

(b) If a court charges a membership interest with payment

of a judgment as provided by Subsection (a), the judgment creditor has only the rights of an assignee of the membership interest.

(c) This section may not be construed to deprive a member of a limited liability company or any other owner of a membership interest in a limited liability company of the benefit of any exemption laws applicable to the membership interest of the member or owner. (TLLCA 4.06.)

Source Law

4.06.A. On application to a court of competent jurisdiction by a judgment creditor of a member or any other owner of a membership interest, the court may charge the membership interest of the member or other owner with payment of the unsatisfied amount of the judgment. Except as otherwise provided in the regulations to the extent that the membership interest is charged in this manner, the judgment creditor has only the rights of an assignee of the interest. This Section does not deprive any member of the benefit of any exemption laws applicable to that member's membership interest.

Revisor's Note

No substantive change is intended. Subsection (c) of the revised law clarifies that the membership interest of an "other owner," in addition to a member, has the benefit of any exemption laws, which is implied in the source law.

Revised Law

Sec. 101.113. PARTIES TO ACTIONS. A member of a limited liability company may be named as a party in an action by or against the limited liability company only if the action is brought to enforce the member's right against or liability to the company. (TLLCA 4.03.C.)

Source Law

[TLLCA 4.03]

C. Parties to actions. A member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object is to enforce a member's right against or liability to the limited liability company.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 101.114. LIABILITY FOR OBLIGATIONS. Except as and to the extent the company agreement specifically provides otherwise, a member or manager is not liable for a debt, obligation, or liability of a limited liability company, including a debt, obligation, or liability under a judgment, decree, or order of a court. (TLLCA 4.03.A.)

Source Law

A. Except as and to the extent the regulations specifically provide otherwise, a member or manager is not liable for the debts, obligations or liabilities of a limited liability company including under a judgment decree, or order of a court.

Revisor's Note

No substantive change is intended.

[Sections 101.115-101.150 reserved for expansion]

SUBCHAPTER D. CONTRIBUTIONS

Revised Law

Sec. 101.151. REQUIREMENTS FOR ENFORCEABLE PROMISE. A promise to make a contribution or otherwise pay cash or transfer property to a limited liability company is enforceable only if the promise is:

- (1) in writing; and
- (2) signed by the person making the promise. (TLLCA 5.02.A.)

Source Law

A. A promise by a member to make a contribution to, or otherwise pay cash or transfer property to, a limited liability company is not enforceable unless set out in writing and signed by the member.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 101.152. ENFORCEABLE PROMISE NOT AFFECTED BY CHANGE IN CIRCUMSTANCES. A member of a limited liability company is obligated to perform an enforceable promise to make a contribution or otherwise pay cash or transfer property to the company without regard to the death, disability, or other change in circumstances of the member. (TLLCA 5.02.B (part).)

Source Law

B. Except as otherwise provided by the articles of organization or regulations, a member or the member's legal representative or successor is obligated to the limited liability company to perform an enforceable promise to make a contribution to or otherwise pay cash or transfer property to a limited liability company, notwithstanding the member's death, disability, or other change in circumstances. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 101.153. FAILURE TO PERFORM ENFORCEABLE PROMISE; CONSEQUENCES. (a) A member of a limited liability company, or the member's legal representative or successor, who does not perform an enforceable promise to make a contribution, including a previously made contribution, or to otherwise pay cash or transfer property to the company, is obligated, at the request of the company, to pay in cash the agreed value of the contribution, as stated in the company agreement or the company's records required under Sections 3.151 and 101.501, less:

- (1) any amount already paid for the contribution; and
- (2) the value of any property already transferred.

(b) The company agreement of a limited liability company may provide that the membership interest of a member who fails to perform an enforceable promise to make a payment of cash or transfer property to the company, whether as a contribution or in connection with a contribution already made, may be:

- (1) reduced;
- (2) subordinated to other membership interests of nondefaulting members;
- (3) redeemed or sold at a value determined by appraisal or other formula; or
- (4) made the subject of:
 - (A) a forced sale;
 - (B) forfeiture;
 - (C) a loan from other members of the company in an amount necessary to satisfy the enforceable promise; or
 - (D) another penalty or consequence. (TLLCA 5.02.B (part), C.)

Source Law

B. . . . If a member or a member's legal representative or successor does not

make a contribution or other payment of cash or transfer of property required by the enforceable promise, whether as a contribution or with respect to a contribution previously made, that member or the member's legal representative or successor is obligated, at the option of the limited liability company, to pay to the limited liability company an amount of cash equal to that portion of the agreed value, as stated in the regulations or in the limited liability company records required to be kept under Article 2.22 of this Act, of the contribution represented by the amount of cash that has not been paid or the value of the property that has not been transferred.

C. The regulations may provide that the interest of a member who fails to make a payment of cash or transfer of property to the limited liability company, whether as a contribution or with respect to a contribution previously made, required by an enforceable promise is subject to specified consequences. A consequence may take the form of a reduction of the defaulting member's percentage or other interest in the limited liability company, subordination of the member's interest to that of nondefaulting members, a forced sale of the member's interest, forfeiture of the member's interest, the lending of money to the defaulting member by other members of the amount necessary to meet the defaulting member's commitment, a determination of the value of the defaulting member's interest by appraisal or by formula and redemption or sale of the interest at that value, or other penalty or consequence.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 101.154. CONSENT REQUIRED TO RELEASE ENFORCEABLE OBLIGATION. The obligation of a member of a limited liability company, or of the member's legal representative or successor, to make a contribution or otherwise pay cash or transfer property to the company, or to return cash or property to the company paid or distributed to the member in violation of this code or the

company agreement, may be released or settled only by consent of each member of the company. (TLLCA 5.02.D (part).)

Source Law

D. Unless otherwise provided by the regulations, the obligation of a member or a member's legal representative or successor to make a contribution or otherwise pay cash or transfer property or to return cash or property paid or distributed to the member in violation of this Act or the regulations may be compromised or released only by consent of all of the members. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 101.155. CREDITOR'S RIGHT TO ENFORCE CERTAIN OBLIGATIONS. A creditor of a limited liability company who extends credit or otherwise acts in reasonable reliance on an enforceable obligation of a member of the company that is released or settled as provided by Section 101.154 may enforce the original obligation if the obligation is stated in a document that is:

- (1) signed by the member; and
- (2) not amended or canceled to evidence the release or settlement of the obligation. (TLLCA 5.02.D (part).)

Source Law

D. . . . Notwithstanding the compromise or release, a creditor of a limited liability company who extends credit or otherwise acts in reasonable reliance on that obligation, after the member signs a writing that reflects the obligation and before the writing is amended or canceled to reflect the compromise or release, may enforce the original obligation. . . .

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 101.156. REQUIREMENTS TO ENFORCE CONDITIONAL OBLIGATION. (a) An obligation of a member of a limited liability company that is subject to a condition may be enforced by the company or a creditor described by Section 101.155 only if the condition is satisfied or waived by or with respect to the member.

(b) A conditional obligation of a member of a limited liability company under this section includes a contribution payable on a discretionary call of the limited liability company before the time the call occurs. (TLLCA 5.02.D (part).)

Source Law

D. . . . A conditional obligation may not be enforced unless the conditions of the obligation have been satisfied or waived as to or by the applicable member. Conditional obligations include contributions payable on a discretionary call of a limited liability company, prior to the time the call occurs.

Revisor's Note

No substantive change is intended.

[Sections 101.157-101.200 reserved for expansion]

SUBCHAPTER E. ALLOCATIONS AND DISTRIBUTIONS

Revised Law

Sec. 101.201. ALLOCATION OF PROFITS AND LOSSES. The profits and losses of a limited liability company shall be allocated to each member of the company in accordance with the member's percentage or other interest in the company on the date of the allocation as stated in the company's records required under Sections 3.151 and 101.501. (TLLCA 5.02-1.)

Source Law

5.02-1.A. The profits and losses of a limited liability company shall be allocated among the members and among classes of members in the manner provided in the regulations. If the regulations do not otherwise provide, the profits and losses shall be allocated in accordance with the then current percentage or other interest in the limited liability company of the members stated in limited liability company records of the kind described in Section A of Article 2.22 of this Act.

Revisor's Note

No substantive change is intended. This section of the revised law may be modified or waived by the company agreement or certificate of formation. See Revisor's Note to Section 101.052.

Revised Law

Sec. 101.202. DISTRIBUTION IN KIND. A member of a limited

liability company is entitled to receive or demand a distribution from the company only in the form of cash, regardless of the form of the member's contribution to the company. (TLLCA 5.07.)

Source Law

5.07.A. Except as provided by the articles of organization or regulations, a member, regardless of the nature of the member's contribution, may not demand or receive a distribution from a limited liability company in any form other than cash.

Revisor's Note

No substantive change is intended. This section of the revised law may be modified or waived by the company agreement or certificate of formation. See Revisor's Note to Section 101.052.

Revised Law

Sec. 101.203. SHARING OF DISTRIBUTIONS. Distributions of cash and other assets of a limited liability company shall be made to each member of the company according to the agreed value of the member's contribution to the company as stated in the company's records required under Sections 3.151 and 101.501. (TLLCA 5.03.)

Source Law

5.03.A. Distributions of cash or other assets of a limited liability company shall be made to the members in the manner provided by the regulations. If the regulations do not otherwise provide, distributions shall be made on the basis of the agreed value, as stated in the records required to be kept under Article 2.22 of this Act, of the contributions made by each member.

Revisor's Note

No substantive change is intended. This section of the revised law may be modified or waived by the company agreement or certificate of formation. See Revisor's Note to Section 101.052.

Revised Law

Sec. 101.204. INTERIM DISTRIBUTIONS. A member of a limited liability company, before the winding up of the company, is not entitled to receive and may not demand a distribution from the

company until the company's governing authority declares a distribution to:

- (1) each member of the company; or
- (2) a class or group of members that includes the member. (TLLCA 5.04.)

Source Law

5.04.A. Except as otherwise provided by this Article, a member is entitled to receive distributions from a limited liability company before the member's withdrawal from the limited liability company and before the winding up of the limited liability company to the extent and at the times or on the occurrence of the events specified in the regulations.

Revisor's Note

Section 101.204 provides that until the company is wound up, no member of a limited liability company is entitled to receive or demand a distribution from the company until the company's governing authority declares a distribution to each of the members or to a class or group that includes the member in question. Existing law leaves the determination and timing of such distributions to the company's regulations. This change provides a new default rule.

Revised Law

Sec. 101.205. DISTRIBUTION ON WITHDRAWAL. A member of a limited liability company who validly exercises the member's right to withdraw from the company granted under the company agreement is entitled to receive, within a reasonable time after the date of withdrawal, the fair value of the member's interest in the company as determined as of the date of withdrawal. (TLLCA 5.06.)

Source Law

5.06.A. Except as otherwise provided by this Act, the articles of organization or the regulations, on withdrawal, any withdrawing member is entitled to receive, within a reasonable time after withdrawal, the fair value of that member's interest in the limited liability company as of the date of withdrawal.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 101.206. PROHIBITED DISTRIBUTION; DUTY TO RETURN. (a) A limited liability company may not make a distribution to a member of the company if, immediately after making the distribution, the company's total liabilities, other than liabilities described by Subsection (b), exceed the fair value of the company's total assets.

(b) For purposes of Subsection (a), the liabilities of a limited liability company do not include:

(1) a liability related to the member's membership interest; or

(2) except as provided by Subsection (c), a liability for which the recourse of creditors is limited to specified property of the company.

(c) For purposes of Subsection (a), the assets of a limited liability company include the fair value of property subject to a liability for which recourse of creditors is limited to specified property of the company only if the fair value of that property exceeds the liability.

(d) A member of a limited liability company who receives a distribution from the company in violation of this section is required to return the distribution to the company if the member had knowledge of the violation.

(e) This section may not be construed to affect the obligation of a member of a limited liability company to return a distribution to the company under the company agreement or other state or federal law. (TLLCA 5.09.)

Source Law

5.09.A. A limited liability company may not make a distribution to its members to the extent that, immediately after giving effect to the distribution, all liabilities of the limited liability company, other than liabilities to members with respect to their interests and liabilities for which the recourse of creditors is limited to specified property of the limited liability company, exceed the fair value of the limited liability company assets, except that the fair value of property that is subject to a liability for which recourse of creditors is limited shall be included in the limited liability company assets only to the extent that the fair value of that property exceeds that liability.

B. A member who receives a distribution that is not permitted under Section A of this Article has no liability under this Act to return the distribution unless the member knew that the distribution violated the prohibition of Section A. This Section does not affect any obligation of the members under the regulations or other applicable law to return the distribution.

Revisor's Note

No substantive change is intended.

Revised Law

Sec. 101.207. CREDITOR STATUS WITH RESPECT TO DISTRIBUTION. Subject to Sections 11.053 and 101.206, when a member of a limited liability company is entitled to receive a distribution from the company, the member, with respect to the distribution, has the same status as a creditor of the company and is entitled to any remedy available to a creditor of the company. (TLLCA 5.08.)

Source Law

5.08.A. Subject to Articles 5.09 and 6.04 of this act, at the time that a member becomes entitled to receive a distribution, with respect to the distribution, that member has the status of and is entitled to all remedies available to a creditor of the limited liability company.

Revisor's Note

No substantive change is intended.

[Sections 101.208-101.250 reserved for expansion]

SUBCHAPTER F. MANAGEMENT

Revised Law

Sec. 101.251. MEMBERSHIP. The governing authority of a limited liability company consists of:

(1) the managers of the company, 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's certificate of formation states that the company will not have managers. (TLLCA 2.12 (part).)

Source Law

2.12.A. Except and to the extent the articles of organization or the regulations shall reserve management of the limited

liability company to the members in whole or in part, and subject to provisions in the articles of organization, the regulations, or this Act restricting or enlarging the powers, rights, and duties of any manager or group or class of managers, the powers of a limited liability company shall be exercised by or under the authority of, and the business and affairs of a limited liability company shall be managed under the direction of, the manager or managers of the limited liability company. If management of the limited liability company is fully reserved to the members, the limited liability company need not have managers. . . . The regulations may prescribe other qualifications for managers. If the management of the limited liability company is reserved in whole or in part to the members, Articles 2.17, 2.18, 2.19, and 2.20 of this Act apply to the members who manage the limited liability company to the same extent as those articles would otherwise apply to managers of a limited liability company.

Revisor's Note

The term "governing authority" in the revised law refers to both managers of a manager-managed limited liability company and members of a member-managed limited liability company. Therefore, the provisions of the code that carry forward the provisions found in Articles 2.17, 2.18, 2.19, and 2.20, Texas Limited Liability Company Act, apply to managers or to members, as the case may be, by virtue of use of the term "governing authority."

The source law specifically provides that the regulations may prescribe other qualifications for managers, which is implicit in Section 101.052. See Revisor's Note to Section 101.052.

Revised Law

Sec. 101.252. MANAGEMENT BY GOVERNING AUTHORITY. The governing authority of a limited liability company shall manage the business and affairs of the company as provided by:

- (1) the company agreement; and
- (2) this title and the provisions of Title 1

applicable to a limited liability company to the extent that the company agreement does not provide for the management of the company. (TLLCA 2.12.)

Source Law

2.12.A. Except and to the extent the articles of organization or the regulations shall reserve management of the limited liability company to the members in whole or in part, and subject to provisions in the articles of organization, the regulations, or this Act restricting or enlarging the powers, rights, and duties of any manager or group or class of managers, the powers of a limited liability company shall be exercised by or under the authority of, and the business and affairs of a limited liability company shall be managed under the direction of, the manager or managers of the limited liability company. If management of the limited liability company is fully reserved to the members, the limited liability company need not have managers. Managers need not be residents of this State or members of the limited liability company unless the regulations so require. The regulations may prescribe other qualifications for managers. If the management of the limited liability company is reserved in whole or in part to the members, Articles 2.17, 2.18, 2.19, and 2.20 of this Act apply to the members who manage the limited liability company to the same extent as those articles would otherwise apply to managers of a limited liability company.

Revisor's Note

The revised law does not state, as does the Texas Limited Liability Company Act, that a limited liability company is managed by managers unless management is reserved to the members because, even under the Texas Limited Liability Company Act, the matter must be addressed in one way or the other in the articles of organization. The articles of organization must either designate initial managers or state that there are no managers and that management is reserved to the

members. Thus, there is in effect no default rule because the form of management must be addressed in the articles of organization. The revised law also clarifies that a limited liability company, whether member-managed or manager-managed, is governed first by its company agreement and second by the Code to the extent the company agreement does not provide for management of the company. The revised law also omits references to both members and managers managing the company, referring to both simply as the "governing authority."