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Texas Legislature Passes More Legislation Affecting Texas Entities

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Several weeks ago, we published a Legal Update regarding Senate Bills 29 and 1057 relating to governance of Texas entities that were passed by the Texas Legislature and signed by Governor Abbott. This Legal Update focuses on two additional significant bills that were passed by the Texas Legislature -- Senate Bill 2411 and Senate Bill 2337. Both bills apply to Texas entities, and SB 2337 also affects publicly traded entities with their principal place of business in Texas. SB 2411 has been signed by Governor Abbott and will take effect on September 1, 2025. SB 2337 has not yet been signed by the Governor and, if not vetoed by the Governor, will become effective on September 1, 2025.

Senate Bill 2411

Senate Bill 2411, which was authored by Sen. Charles Schwertner, and sponsored in the House by Rep. Oscar Longoria, was drafted by the State Bar Business Law Section's TBOC Committee through careful consideration, drafting and discussions by committee members during several dozen meetings since the fall of 2023. This bill amends a wide variety of provisions of the Texas Business Organizations Code ("TBOC"); many of these amendments were derived from recent changes in the Model Business Corporation Act and Delaware entity statutes. Some of the more substantive amendments are summarized below.

- Specifying that a reference or grant of jurisdiction to a "district court" in the TBOC also constitutes a reference or grant of concurrent jurisdiction to the new Texas business court.
- Authorizing notice of an action by less than unanimous written consent of owners of a Texas entity to the nonconsenting owners through a publicly available electronic resource.
- Authorizing Texas corporations, and other organizations to which TBOC Sec. 7.001(a) – (c) applies, to include provisions in the certificate of formation that exculpates officers from monetary liability for breaches of duty of due care to the same extent that governing persons

can be exculpated.
- Specifying that a properly adopted plan of conversion may authorize additional entity action to be taken by the converted entity without further approvals being required.
- Specifying that for-profit and nonprofit Texas corporations may retroactively ratify a transaction that was ineffective because of a failure to file with the Texas Secretary of State; a filing instrument that was required to complete the effectiveness of the transaction.
- Simplifying the information required for a certificate of validation and limiting the circumstances under which a certificate of validation must be filed under the ratification provisions for for-profit and nonprofit corporations.
- Eliminating redundant annual reporting requirements for cooperative associations and the requirement for larger cooperative associations to file their annual reports with the Secretary of State.
- Authorizing the board of directors of a for-profit corporation, without shareholder approval, to effect certain limited amendments to the corporation's certificate of formation, including forward and reverse stock splits, subject to specified conditions.
- Authorizing the governing authority to approve a plan, agreement, instrument, or other document in substantially final form and subsequently to ratify, with retroactive effect, the final form of such document before the effectiveness of the filing of such document, or a certificate referencing it, with the Secretary of State.
- Recognizing that owners in a domestic entity that is party to a merger or interest exchange, may appoint a representative to represent them in enforcing the plan of merger or exchange.

Senate Bill 2337

Senate Bill No. 2337, which was authored by Senator Bryan Hughes, and sponsored in the House by Representative Jeff Leach, purports to regulate professional proxy advisors through a new Chapter 6A added to the TBOC. New Chapter 6A, if not vetoed by the Governor, would apply to any "proxy advisory service" provided by a "proxy advisor" to owners of any publicly traded for-profit corporation, limited liability company, partnership or other business entity that (1) is organized or created under Texas law, (2) has its principal place of business in Texas or (3) is a foreign entity proposing to become a domestic Texas entity by merger, conversion or otherwise. "Proxy advisory service" means (a) advice or recommendation on how to vote on an owner proxy proposal or a company proposal, (b) proxy statement research and analysis regarding a proposal, (c) a rating or research regarding corporate governance, or (d) development of proxy voting recommendations or policies. "Proxy advisor" is defined as a person who, for compensation, provides a proxy advisory service to owners of a publicly traded entity or to other persons with authority to vote on behalf of owners of the publicly traded entity.

Pursuant to SB 2337, if a proxy advisory service is not provided "solely in the financial interest of" the "shareholders" of the publicly traded entity, the proxy advisor must make specific disclosures to the recipient of the services and the affected publicly traded entity and on the proxy advisor's website. The term, "shareholder," is defined to include a shareholder, unitholder, limited partner or other equity owner. Under new Section 6A.101(a), a proxy advisory service is not provided solely in the financial interest of shareholders if it (1) involves a voting recommendation against the board's recommendation on a shareholder-sponsored proposal and does not include a written economic analysis of the financial impact of the proposal on shareholders, (2) is wholly or partly based on, or otherwise takes into account, nonfinancial factors, such as ESG or DEI principles, social credit or sustainability scores and other similar criteria, (3) is not based solely on financial factors and subordinates the shareholders' financial interests to other objectives, or (4) advises against a company proposal to elect a governing person unless the proxy advisor affirmatively states that the

proxy advisory service solely considered the financial interests of the shareholders in making such advice.

In connection with providing any such proxy advisory service, the proxy advisor who is required to make the disclosures must conspicuously state that the service is not being provided solely in the financial interest of shareholders and explain with particularity the basis of the proxy advisor's advice concerning each recommendation and that the advice subordinates the financial interests of shareholders to other objectives. Section 6A.101(b)(3) would also require disclosure on the home page of the advisor's public website that its proxy advisory services include advice and recommendations that are not based solely on the financial interests of shareholders.

Section 6A.102 provides that if a proxy advisor provides to different clients (who have not expressly requested services for a nonfinancial purpose) any advice on how to vote on a proposal that is "materially different" from the advice provided to another client, the advisor must provide notice of the conflicting advice to each shareholder (or the shareholder's representative) receiving the advice, the entity that is the subject of the proposal and the Texas Attorney General, and must disclose which of the conflicting advice is provided solely in the financial interest of the owners. The proxy advisor must also comply with the disclosure requirements for nonfinancial proxy advisor services described above, if applicable,

Under new Section 6A.201, a violation of the new provisions would be deemed to be a deceptive trade practice actionable under Subchapter E of Texas Business & Commerce Code Chapter 17. The new provisions authorize an affected party to bring an action seeking a declaratory judgment or injunctive relief against a proxy advisor who violates the new provisions, and the Texas Attorney General may intervene in the action.

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