

TEXAS BUSINESS ORGANIZATIONS CODE UPDATE

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I. Introduction

The Business Organizations Code (“BOC”) was adopted in the 2003 legislative session and became effective January 1, 2006. The BOC reorganizes and combines in one code the provisions of the following business entity statutes:

- Texas Business Corporation Act
- Texas Miscellaneous Corporation Laws Act
- Texas Non-Profit Corporation Act
- Texas Professional Corporation Act
- Texas Professional Association Act
- Texas Revised Partnership Act
- Texas Revised Limited Partnership Act
- Texas Limited Liability Company Act
- Texas Real Estate Investment Trust Act
- Texas Cooperative Association Act
- Texas Uniform Unincorporated Nonprofit Association Act

The process of reorganizing, standardizing, and modernizing the statutory provisions for the various business entities resulted in some substantive changes in the law in this area. The pre-BOC statutes continue to govern domestic entities formed prior to January 1, 2006, until January 1, 2010, unless an entity elects to be governed by the BOC before that date. Entities formed on or after January 1, 2006, are governed by the BOC from their inception. The pre-BOC statutes will expire, and all entities, regardless of their date of formation, will be governed by the BOC as of January 1, 2010.

In the 2005 legislative session, the legislature passed H.B. 1319, making technical corrections to the BOC and incorporating into the BOC changes that conformed the BOC with amendments made to the pre-BOC statutes during the 2003 session. In 2007, H.B. 1737 made additional corrections, clarifications, and refinements to the BOC. The BOC was further amended during the 2009 legislative session by S.B. 1442. These amendments became effective September 1, 2009, and include a number of significant substantive amendments in addition to technical and clarifying amendments.

II. Amendments to Business Organizations Code Effective September 1, 2009

S.B. 1442 was passed in the 2009 legislative session and signed by the governor. The bill contains both technical and substantive amendments of the BOC. An overview of the amendments to the BOC is set forth below.

Conversion Definitions. The definition of a “conversion” was amended to make clear that a transaction denominated by a different term in another jurisdiction (such as a domestication, continuance, or transfer) may fall within the term “conversion” as used under the BOC. Additionally, the definitions of “conversion,” “converted entity,” and “converting entity” were amended to change “foreign entity” and “entity” references to “non-code organization” and signify that a conversion can occur with respect to any kind of organization.

Comptroller Certificates Required for Additional Entities (i.e., Limited Partnerships and Professional Associations). Due to the expanded scope of the franchise tax, a number of provisions of the BOC (as well as provisions of the Texas Professional Association Act and Texas Revised Limited Partnership Act) were amended to require tax clearance letters or certificates to be furnished by entities that were not previously required to do so when making various types of filings with the secretary of state.

Railroad Companies. S.B. 1442 deleted a provision prohibiting the formation of railroads under the BOC. In prior legislative sessions, there was a failure to coordinate amendments to the railroad statutes and the BOC resulting in a situation where there was no statutory means to form railroad companies under Texas law. This situation was rectified by amending the BOC to permit the formation of railroads under the BOC (though railroads continue to be regulated by other Texas statutes).

Prohibition of Bearer Certificates. Section 3.202 of the BOC was amended to prohibit ownership interest certificates from being issued in bearer form. Bearer form certificates have no registered owners and have been criticized by federal law enforcement agencies. The concern is that such certificates may be used as a means to avoid disclosure of actual ownership of an entity thereby preventing discovery of the persons responsible for illegal activities by an entity. The amendment does not affect ownership interest certificates held by nominees.

Emergency Governance Provisions. S.B. 1442 added a new Subchapter F to Chapter 3 of the BOC authorizing the governing documents of an entity to contain governance provisions triggered by a catastrophic event. The provisions are modeled on similar provisions found in the Model Business Corporation Act.

Certificates Issued by Secretary of State. S.B. 1442 added new subsections to Section 4.005 of the BOC to clarify that a certification by the secretary of state that a domestic entity is in existence or that a foreign filing entity is registered may be relied upon as conclusive evidence of that fact.

Waiver of Notice of Subject Matter of Meeting. Section 6.052 of the BOC was amended to clarify that a person's participation in or attendance at a meeting constitutes waiver of notice of a matter addressed at a meeting that is not within the purposes or business described in the meeting notice unless the person objects to considering the matter when presented.

Electronic Transmission of Consents. Section 6.205 of the BOC was amended to clarify that an electronic transmission of a consent by an owner, member, or governing person is considered signed if the transmission contains or is accompanied by information from which it can be determined that the transmission was transmitted by the person and the date of the transmission. The amendments are based on similar provisions in Article 9.10B of the Texas Business Corporation Act.

Registration by Foreign Series LLC. New Section 9.005 of the BOC requires supplemental information in an application for registration by a foreign limited liability company ("LLC") whose company agreement establishes or provides for the establishment of designated series of members, managers, membership interests, or assets.

Amendment of Foreign Limited Partnership Registration. Section 9.009(a) of the BOC was amended to add a requirement that a foreign limited partnership amend its registration if there is a change in its general partner. This change is consistent with the requirement that a domestic limited partnership amend its certificate of formation if there is a change in the general partner.

Simplification of Filings Upon Conversion of Foreign Entity. A new section 9.012 was added to the BOC to eliminate an unnecessary filing instrument in connection with a conversion of a foreign filing entity or foreign LLP into a domestic filing entity. A formal withdrawal of the registration of the foreign entity is no longer required upon conversion into a domestic entity because the certificate of conversion evidences the status of the converting foreign entity. This provision also applies to a conversion and continuance (a new type of transaction further discussed below).

Mere Ownership of Property in Texas Not Transaction of Business. The list of activities in Section 9.251 that do not constitute transacting business in Texas by a foreign entity for purposes of the requirement to register to do business in Texas was expanded to include "owning, without more, real or personal property" in Texas. This provision is based on a provision in the Model Business Corporation Act.

Conversion and Continuance. S.B. 1442 amended the BOC to authorize a new type of conversion transaction referred to as a "conversion and continuance" whereby a non-United States entity may be domesticated in Texas and retain its status as an entity formed under and governed by the laws of a foreign jurisdiction outside the United States. The provisions are only available to a non-United States entity converting into a Texas entity of the same organizational form or a Texas entity that is converting into a non-United States entity of the same organizational form. The new conversion and continuance provisions of the BOC are in new Sections 10.1025 and 10.109, new subsection (c) of Section 10.154, and amended Section 10.103(a). Definitions for the new terms "non-United States entity" and "non-United States jurisdiction" were also added to the BOC.

Dissenters' Rights. A new provision in Section 10.361 of the BOC permits a beneficial owner of an ownership interest entitled to dissenter's rights to file a petition for appraisal. If a dissenting record owner is the trustee of a voting trust or a nominee for a beneficial owner, the new provision allows the beneficial owner to pursue dissenter's rights, and the voting trustee or nominee need not serve as plaintiff in the appraisal action. This provision is based upon a provision recently added to the Delaware General Corporation Law.

Section 10.367(b) has been amended to more clearly describe the rights of a dissenting owner if the right of dissent is terminated. The clarifications are in response to an incorrect interpretation of the source law provisions in the Texas Business Corporation Act by the court of appeals in *Sembera v. Petrofac Tyler, Inc.*, 253 S.W.3d 815 (Tex.App.–Tyler 2008, pet. denied). The amendments more clearly provide that a dissenting owner's status as an owner of the ownership interest is restored if the right to dissent is terminated.

Authority of Secretary of State to Issue Certificates. Section 12.001 of the BOC was amended to confirm the authority of the secretary of state to issue certificates evidencing filing of a filing instrument, a letter acknowledging the filing of an instrument, or both

a certificate and a letter. Section 12.001 was also amended to clarify that certain sections addressing the authority of the secretary of state do not apply to real estate investment trusts since a real estate investment trust files instruments with the county clerk of the county in which its principal place of business is located rather than the secretary of state.

Procedures for Dealing with Beneficial Shareholders. Section 21.201 was amended to authorize a for-profit corporation to adopt a procedure for recognizing and dealing directly with a beneficial owner of shares instead of dealing only with the record or registered owner. The extent to which a corporation recognizes a beneficial owner is left to the discretion of the corporation, and the procedure for recognition is also within the corporation's discretion except that the procedure must specify the extent to which a beneficial holder will be recognized and require the nominee to file with the corporation a statement containing information about the beneficial owner. The definitions of "shareholder" and "holder of shares" were amended accordingly. These amendments are based on provisions in the Model Business Corporation Act.

Designation of Rights of Classes and Series of Shares. Sections 21.152 and 21.153 were amended to clarify that a for-profit corporation's certificate of formation must include a designation of rights of each class or series of shares only if more than one class or series is authorized. Section 21.152 of the BOC was amended to state the requirement (which was implied in Chapter 21 of the BOC and in the Texas Business Corporation Act) that the authorized class or classes and series of shares collectively have general voting rights and the right to the residual assets upon winding up and termination. If more than one class or series is authorized, these two rights need not be in a single class or series. Section 21.171 was amended to clarify the meaning of "outstanding" and the requirement that there always be outstanding shares of one or more classes that collectively have general voting rights and the right to the residual assets upon winding up and termination. If more than one class or series is authorized, these two rights need not be in a single class or series. These provisions are based upon provisions in the Model Business Corporation Act.

Variations in Voting Rights of Directors. Section 21.406 of the BOC was amended to permit a for-profit corporation's certificate of formation to grant directors different voting rights without the requirement that the directors be elected by the holders of separate classes or

series of shares. Further, the provision clarifies that the different voting rights apply to votes by board committees unless the certificate of formation provides otherwise. These amendments are based upon provisions in the Delaware General Corporation Law.

Issuance of Shares into Escrow. Section 21.157 of the BOC was amended to clarify that a for-profit corporation is permitted to issue shares into escrow or make other arrangements to restrict the transfer of shares when the consideration for the shares is a contract for future services or benefits or a promissory note. The provision is based on a provision of the Model Business Corporation Act.

Contracts or Transactions With Interested Governing Persons. Section 21.418(b) was amended to make explicit the relationship between subsection (a) and subsection (b) and to clarify that the involvement of an interested director or officer in the approval of a contract or transaction in accordance with the specified statutory procedure does not impair the validity of the contract or transaction. As amended, subsection (b) also makes explicit that board approval of an interested director transaction under subsection (b) may be accomplished by a unanimous written consent. The analogous provisions in the LLC and real estate investment trust contexts, *i.e.*, Sections 101.255(b) and 200.317(b), were similarly amended.

Enforceability of Transfer Restrictions in Partnership and LLC Agreements. Section 101.106 of the BOC and Sections 9.406 and 9.408 of the Business and Commerce Code were amended to clarify that Sections 9.406 and 9.408 do not apply to membership interests in an LLC and do not interfere with the enforceability of transfer restrictions imposed on membership interests in a company agreement. Sections 9.406 and 9.408 of the Business and Commerce Code contain limitations on the enforceability of contractual provisions restricting transfer of general intangibles and payment intangibles. The amendment addresses concerns raised by some commentators and practitioners that the provisions of Section 9.406 and 9.408 could impair transfer restrictions on membership interests commonly included in a company agreement. Similar amendments to Section 154.001 of the BOC and Sections 9.406 and 9.408 of the Business and Commerce Code clarify that Sections 9.406 and 9.408 do not apply to partnership interests and do not interfere with the enforceability of transfer restrictions imposed on partnership interests in a partnership agreement. The amendments to the BOC and Sections 9.406 and 9.408 of

the Business and Commerce Code are based on similar provisions in the Delaware and Virginia LLC and partnership statutes and the Delaware and Virginia versions of Article 9 of the UCC.

Charging Order Liens. Sections 101.112(c) and 153.256(c) of the BOC were amended to clarify that a charging order lien on an LLC or partnership interest cannot be foreclosed under the BOC or any other statute. Under Sections 101.112 and 153.256 of the BOC, a judgment creditor of a member or partner may obtain a charging order requiring the LLC or partnership to pay the judgment creditor any distribution otherwise payable to the judgment debtor, but the charging order confers no other rights on the judgment creditor and is the exclusive remedy available to a judgment creditor of a member or partner.

Compensation Payments Not Subject to Limitations on LLC and Limited Partnership Distributions. Sections 101.206 and 153.210 were amended to clarify that the limitations on “distributions” by an LLC or limited partnership under those sections do not apply to payments for reasonable compensation for services or payments made in the ordinary course of business under a bona fide retirement plan or other benefits program. These amendments are based on similar provisions in the Delaware LLC and limited partnership statutes. Sections 101.206 and 153.210 were also amended to make clear that the limitations on distributions in a winding up context are qualified by the provisions of Chapter 11, which allow an entity that is winding up to make distributions of the remaining assets although there are still unpaid liabilities so long as reasonable provision for payment of the liabilities has been made. A minor amendment to Section 101.206(d) was made to conform the language in that section to the source law provision in the Texas Limited Liability Company Act.

Record Date for Allocations and Distributions by LLC. Section 101.208 was added to the BOC clarifying that a company agreement may establish or provide for the establishment of record dates for the purpose of determining members entitled to allocations and distributions by the LLC. The provision is based on a provision in the Delaware LLC statute.

Series LLCs. Subchapter M (consisting of Sections 101.601-101.621) was added to Chapter 101 of the BOC to permit an LLC’s company agreement to establish “series” of members, managers, membership interests, or assets. These provisions in the BOC are

similar to provisions in the Delaware LLC statute, and they essentially permit an LLC to be structured so that it has separate divisions, i.e., “series” of assets and liabilities, that can have different ownership, management, and activities from other series. If certain statutory requirements are met, the liabilities and obligations of a particular series are enforceable only against the assets of that series, and the liabilities or obligations of the LLC generally or any other series are not enforceable against the assets of that series. For this limitation on liability to apply, (1) the LLC’s certificate of formation must contain a notice of the limitation of liability with respect to the LLC’s series, (2) the company agreement must contain a statement to the effect of the limitation on liability with respect to the series, and (3) the LLC’s records maintained for a series must account for the assets associated with the series separately from the other assets of the LLC or any other series. The records requirement is met if records are maintained in a manner so that the assets of the series can be reasonably identified by specific listing, category, type, quantity, or computational or allocational formula or procedure, including a percentage or share of any assets, or by any other method under which the identity of the assets can be objectively determined. BOC § 101.603(b). An LLC need not yet have established any series when a notice regarding limitation of liability of series is included in the certificate of formation, and the notice need not make reference to a specific series. Thus, a general notice tracking the statutory language describing the limitation of liability of series may be included in an LLC’s certificate of formation even though the LLC is not initially structured with series, and the LLC would then have the flexibility in the future to establish series without the necessity of any amendment to its certificate of formation. BOC § 101.604.

Assets of a series may be held directly or indirectly in the name of the series, the LLC, through a nominee, or otherwise. BOC § 101.603. A series is not explicitly defined as a separate entity, but a series has the power and capacity in its own name to sue or be sued, contract, hold title to assets, and grant liens in its assets. BOC § 101.605. A member or manager associated with a series is protected from liability for the debts and obligations of the series in the same manner as a member or manager is protected generally from liability for the debts and obligations of the LLC. BOC § 101.606(a). The duties of a member, manager, officer, or other person associated with a series may be expanded or restricted in the company agreement. BOC § 101.606(b).

The governance provisions applicable to series are quite flexible. Notwithstanding any conflicting provision in the LLC's certificate of formation, the governing authority of a series consists of managers or members associated with the series as provided in the company agreement. BOC § 101.608(a). If the company agreement does not provide for the governing authority of the series, the company's certificate of formation determines whether the series is manager-managed or member-managed. BOC § 101.608(b). A company agreement may give special rights, powers, and duties to classes or groups of members or managers associated with a series, including voting rights. BOC § 101.607. An event that causes a manager or member to cease to be a manager or member with respect to any series does not, in and of itself, cause the manager or member to cease to be a manager or member of the LLC or another series or require the winding up of the series. BOC § 101.610. Subchapter M contains rules concerning distributions with respect to a series that are adapted from the general provisions on distributions of an LLC. BOC §§ 101.611-101.613.

Subchapter M contains provisions addressing the winding up and termination of a series, and certain provisions of Chapter 11 are incorporated by reference and made applicable in the series context. BOC §§ 101.614-101.621. To the extent not inconsistent with Subchapter M, the provisions of Chapter 101 apply to a series and its managers and members on a series by series basis. BOC § 101.609.

Most state LLC statutes do not contain provisions addressing series. Thus, there is a question as to whether these other states would recognize the internal liability shield associated with a series. Other unsettled questions relating to series include the federal income tax treatment of a series and how a series would be treated under bankruptcy law (e.g., whether the internal liability shield would be effective in a bankruptcy context).

Partnership Officers. Section 151.004 was added to the BOC to clarify that a partnership may have officers as provided in Section 3.103 of the BOC. Section 153.103(1)(A) was also amended to add a specific reference to serving as an officer of the limited partnership so that it is clear that a limited partner who serves as an officer of the limited partnership does not thereby "participate in the control" of the business and risk incurring liability under Section 153.102.

Liability Protection of Partners in LLP. Section 152.801(a) of the BOC was amended to clarify that a

partner in a limited liability partnership ("LLP") is not liable for a debt or obligation of the partnership to any person, including another partner. New York's highest court held that the New York LLP statute only protects partners from liability for debts and obligations of the partnership to persons other than partners, so that partners in an LLP could be held personally liable on an obligation of the partnership to buy out a withdrawn partner's interest. This amendment to the BOC confirms that the Texas statute was intended to provide protection from all partnership liabilities. The amendment also clarifies that the partnership agreement may provide that a partner is liable for a debt or obligation of the partnership even though the partnership is an LLP.

Limited Partner's Liability Protection Not Affected by Forfeiture of Right to Transact Business or Termination of Certificate. Sections 153.309(c) and 153.311(d) of the BOC were amended to conform to the source law provisions in the Texas Revised Limited Partnership Act and clarify that the secretary of state's forfeiture of a limited partnership's right to transact business or termination of its certificate of formation or registration to do business (which occurs when a domestic or foreign limited partnership fails to file its required periodic report) does not affect the liability protection of a limited partner under the BOC.

III. Amendments to Business Organizations Code Effective January 1, 2010 (Registered Agent Consent Provisions)

H.B. 1787, which was passed in the 2009 legislative session and signed by the governor, amends the registered agent provisions of the BOC in some significant respects. Effective January 1, 2010, the BOC is amended to provide that the designation or appointment of a registered agent by the organizer or managerial official of an entity in a registered agent filing constitutes an affirmation that the person named as registered agent has consented to serve in that capacity. BOC § 5.2011(a). A "registered agent filing" includes a certificate of formation, application for registration by a foreign filing entity, statement of change of registered agent, certificate of merger, certificate of conversion, and various other filing instruments in which a registered agent is appointed or designated. BOC § 5.200(1). A registered agent's consent to serve in that capacity must be set forth in a written or electronic form to be developed by the secretary of state. BOC § 5.201(b). Thus, beginning in 2010, the registered agent's consent on the prescribed form must be obtained whenever a certificate of formation, registration to do business in

Texas, change of registered agent, or other registered agent filing is filed. The consent does not have to be filed with the secretary of state, but the consent should be maintained in the minute book or other permanent records of the entity so that compliance with this provision can be verified. Furthermore, documentation of a registered agent's consent to continue to serve should be obtained whenever there is a sale, acquisition, or transfer of a majority-in-interest or majority interest of the outstanding ownership or membership interest of an entity because the amended statute provides that a registered agent's continuation as registered agent following a sale, acquisition, or transfer of a majority-in-interest or majority interest of the outstanding ownership or membership interests of an entity constitutes an affirmation by the entity's governing authority that it has verified that the person consented to continue to serve in that capacity. BOC § 5.2011(b).

Effective January 1, 2010, the BOC is amended to provide a new process by which a person appointed or designated as a registered agent in a filing without the person's consent may terminate the appointment or designation by filing a statement of rejection of appointment with the secretary of state without payment of any filing fee. BOC § 5.205. When such a statement is filed, the secretary of state notifies the represented entity of the termination and the need to designate or appoint a new registered agent. BOC § 5.205(d).

The amendments to the registered agent provisions of the BOC specify that the only duties of a registered agent are (1) to receive or accept and forward to the represented entity at its most recently furnished address, or otherwise notify the entity at that address regarding, any process, notice, or demand served on or received by the registered agent, and (2) to provide the notices required or permitted by law to be given to the represented entity to the address most recently provided to the registered agent by the represented entity. BOC § 5.206(a). A person named as a registered agent without the person's consent is not required to perform these duties. BOC § 5.206(b). A new provision specifies that a registered agent is not liable, solely because of the person's designation or appointment as such, for the debts, liabilities, or obligations of the represented entity, and a person designated or appointed as a registered agent without the person's consent may not be held liable in any manner for a debt, obligation, or liability of the represented entity or to the represented entity or to a person who reasonably relied upon the unauthorized designation or appointment solely because of the person's failure or refusal to perform the duties of a registered

agent. BOC § 5.208. The amended registered agent provisions confirm that the rules regarding civil and criminal liability apply with respect to false statements in a registered agent filing. BOC § 5.207.

IV. Expiration of Pre-BOC Statutes Effective January 1, 2010

Straddling Provisions. As a general rule, acts, contracts, or transactions that occur on or after the date the BOC becomes applicable to an entity are governed by the BOC, and those occurring before that date are governed by pre-BOC law. *See* BOC § 402.006. There are a number of specific provisions in Chapter 402 addressing situations or transactions that “straddle” the date on which the BOC becomes applicable to an entity. The following are examples of such provisions:

Indemnification. The indemnification provisions of Chapter 8 of the BOC will govern a proposed indemnification by a domestic entity after the BOC becomes applicable to the entity regardless of whether the events on which indemnification is based occurred before or after the date the BOC became applicable to the entity. BOC § 402.007.

Meetings and Consents. Generally, the BOC applies to a meeting of an entity's owners, members, or governing authority, and any vote cast at the meeting, if the meeting is held on or after the date the BOC becomes applicable to the entity; however, pre-BOC law will govern the meeting, and any vote cast at the meeting, if the meeting was initially called for a date before the BOC became applicable to the entity and notice of the meeting was given to those entitled to vote. The BOC governs a written consent of an entity's owners, members, or governing authority if the consent takes effect on or after the date the BOC becomes applicable to the entity. BOC §§ 402.008, 402.009.

Sale of Assets, Merger, Exchange, Conversion. The BOC applies to a fundamental business transaction consummated after the date the BOC becomes applicable to the entity except that pre-BOC law governs such a transaction if the required approval of the owners was given before the date the BOC became applicable to the entity, or was given after the date the BOC became applicable to the entity but at a meeting that was initially called for a date prior to the ate

the BOC became applicable to the entity. BOC § 402.010. (Though the pre-BOC and BOC provisions governing asset sales, mergers, conversions, and interest exchanges are generally similar, there are a number of subtle differences. Note, for instance, that Chapter 10 of the BOC includes a provision based on Article 5.10B of the Texas Business Corporation Act negating successor liability in an asset sale so that the provision expressly applies to an asset sale by any type of domestic entity under the BOC. *See* BOC § 10.254.)

Winding Up and Termination. Pre-BOC law governs an action for involuntary or judicial winding up and termination that is pending on the date the BOC becomes applicable to the entity and a voluntary winding up and termination initiated before the date the BOC becomes applicable to the entity. BOC § 402.011. (Significant differences between the pre-BOC statutes and the BOC in the winding up and termination context include the application of provisions regarding liability for claims and survival of a terminated entity for three years to limited partnerships under the BOC. *See* BOC §§ 11.351-11.359.)

Updating pre-BOC Governing Documents. A domestic entity formed under pre-BOC law that becomes subject to the BOC on January 1, 2010 is not considered to have failed to comply with the BOC if its certificate of formation does not comply with the BOC, but the entity must conform its certificate of formation to the requirements of the BOC when it next files an amendment to its certificate of formation. BOC § 402.005(a)(2), (3). The secretary of state's office has indicated that it does not generally view articles of incorporation, articles of organization, certificates of limited partnership, etc. that were filed under and comply with prior law as non-conforming with the BOC. Certainly, the fact that a formation document is not entitled "certificate of formation" is not a matter of non-compliance because the BOC generally deems a reference to "articles of incorporation" or other terms used for a certificate of formation under prior law to be a reference to a certificate of formation. *See* BOC § 1.006. There are, however, certain respects in which it may be prudent to consider amendments to a pre-BOC certificate of formation to avoid questions regarding compliance with the BOC or potential interpretation issues. For instance, the BOC requires a statement in the certificate of formation of the type of filing entity that is being formed.

The secretary of state's office has taken the position that, if this information can be gleaned from other provisions of the certificate, a separate explicit statement in this regard is not required; however, it is probably preferable to include a specific provision in this regard.

Other amendments to consider include amendments to provisions in the certificate of formation that reference pre-BOC statutes. It is common to find references to the governing statute in a certificate of formation, such as references to the Texas Business Corporation Act in articles of incorporation filed prior to 2006. A recital that a corporation is formed under the Texas Business Corporation Act can be viewed as an accurate recital of historical fact and may not be problematic, but an operative provision that ties the corporation's purposes, indemnification or exculpation obligations, or other governance issues to pre-BOC statutes may present interpretation issues after the expiration of the pre-BOC statutes. The BOC provides that a reference in *a law* to a statute or part of a statute revised by the BOC is considered a reference to the part of the BOC that revises that statute or part of the statute (*see* BOC § 1.052), but there is no comparable explicit provision that deems references to pre-BOC statutes in *governing documents* to be references to the comparable BOC provisions.

Amendments to governing documents beyond the certificate of formation should also be considered in connection with the application of the BOC to an entity formed prior to 2006. References to expired pre-BOC governing statutes in corporate bylaws, LLC regulations, partnership agreements, etc. may lead to problems in interpreting some of these provisions. Also, certain terminology has changed or is no longer used in the BOC.

Updating governing documents so that they employ terminology consistent with the BOC is generally advisable. Though some changes in terminology do not create substantive issues (such as the BOC's use of the term "company agreement" instead of "regulations" in the LLC context), other variations may bear on the operative effect of a provision. For example, the BOC does not use the term "dissolution," and the term is not included in the synonymous terms addressed in Section 1.006 of the BOC because its meaning varies under the pre-BOC statutes. In fact, the variation in usage of the term "dissolution" under the pre-BOC statutes is what led the drafters of the BOC to dispense with the term entirely and adopt the terms "event requiring winding up" and "termination." In the context of certain entities,

such as LLCs and limited partnerships, the substantive rules in the dissolution context, as well as the terminology, have undergone significant changes in the last few years. Thus, special attention should be given to the dissolution/winding up provisions in the governing documents of these entities.

A special transition provision regarding indemnification states that “[i]n a case in which indemnification is permitted but not required under Chapter 8, a provision relating to indemnification contained in the governing documents of a domestic entity on the mandatory application date that would otherwise have the effect of limiting the nature or type of indemnification permitted by Chapter 8 may not be construed after the mandatory application date as limiting the indemnification authorized by Chapter 8 unless the provision is intended to limit or restrict permissive indemnification under applicable law.” BOC § 402.007. This provision will be helpful in interpreting some pre-BOC indemnification provisions, but its application will not always be clear; therefore, a careful review of indemnification provisions in pre-BOC governing documents is advisable.

Inasmuch as the Texas business entity statutes are amended in some respects virtually every legislative session, periodic review of an entity’s governing documents to identify the impact of such amendments has always been a “best practice” in entity governance. In view of the impending mandatory application of the BOC to entities formed prior to 2006, a thorough review of an entity’s governing documents is particularly appropriate at this time.