

## Assessing New Changes to Texas Officer Exculpation Law

Article

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Texas continues to position itself as a business-friendly jurisdiction of choice with the passage of S.B. 2411, signed by Governor Greg Abbott on May 27.

Effective September 1, the new law amends the Texas Business Organizations Code to allow officer exculpation, streamline certificate of formation amendments, authorize shareholder representatives to act on behalf of shareholders in mergers, permit boards to approve substantially final forms of agreements and clarify the enforceability of preformation equity subscriptions, among other things.

### Advancing Texas' Recent Pro-Business Legislative Agenda

S.B. 2411 is part of a sweeping pro-business overhaul of the TBOC that includes **S.B. 29** and S.B. 1057, both signed into law earlier in May.

S.B. 29, which became effective immediately, strengthens protections for directors and officers against shareholder litigation in a number of significant ways, including by codifying the business judgment rule and allowing certain corporations to adopt minimum ownership thresholds for derivative lawsuits.

It also introduces other significant reforms, such as allowing advance court determinations of director independence, permitting exclusive forum and jury trial waiver provisions in governing documents, limiting books and records demands, and eliminating certain class voting requirements.

S.B. 1057, also effective September 1, enables public companies with a Texas nexus to opt into a statute that imposes minimum ownership thresholds and solicitation requirements for submitting shareholder proposals.

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Collectively, these legislative developments reflect a strong commitment to modernizing Texas corporate law and reinforcing the state as the jurisdiction of choice for entity formation and redomestication.

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## Exculpation of Officers

A notable feature of S.B. 2411 is the ability to exculpate officers to the same extent as directors and other governing persons under existing provisions of the TBOC.

Section 7.001 of the TBOC currently provides that Texas entities may eliminate or limit, to the extent provided in the entity's certificate of formation, the monetary liability of directors and other governing persons to the organization or its owners or members for acts or omissions in their official capacity, provided that the individual is not found liable for:

1. A breach of the duty of loyalty;
2. An act or omission not in good faith that constitutes a breach of a duty owed to the organization, or involves intentional misconduct or a knowing violation of law;
3. A transaction in which the person received an improper benefit; or
4. An act or omission for which the liability of a director or other governing person is expressly provided by statute.

S.B. 2411 amends this section to allow Texas entities to provide for the exculpation of officers to the same extent as directors and other governing persons. Texas entities that wish to take advantage of the new provision will need to adopt an amendment to their certificate of formation.

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## Amendments to Certificate of Formation Without Shareholder Approval

S.B. 2411 expands the circumstances in which the board of directors of a corporation may adopt amendments to its certificate of formation without shareholder approval.

Under amended Section 21.503, shareholder approval is not required (1) to remove provisions from a certificate of formation specifying the name and address of initial directors or organizers, which are required provisions in an initial certificate of formation; and (2) if the corporation has only one class of outstanding stock that is not divided into series, to effect a stock split or a reverse stock split, so long as the primary purpose of the reverse stock split is to maintain listing eligibility on a national securities exchange.

## **Laws of Other Jurisdictions**

S.B. 2411 introduces new Section 1.057 of the TBOC, which expressly authorizes an officer, director or other governing person of a Texas entity to consider the laws and judicial decisions of other states, and the practices observed by entities formed in those other states, in exercising their powers. But it also provides that the failure or refusal to consider or conform to such laws, judicial decisions or practices does not constitute or imply a breach of the TBOC or any duty existing under Texas law.

Section 1.057 also clarifies that the plain meaning of the TBOC may not be supplanted, contravened, or modified by the laws or judicial decisions of another state.

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## **Authorized Representatives in Fundamental Transactions**

S.B. 2411 expressly authorizes the appointment of a representative to act on behalf of owners or members in a merger or interest exchange. It also expressly allows a plan of merger or exchange to delegate to the representative the sole and exclusive authority to take action on behalf of the owners or members under the plan of merger or exchange, including to enforce or settle the rights of the owners or members under the plan of merger or exchange.

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## **Approval of “Substantially Final” Forms And Treatment of Disclosure Schedules**

New TBOC Section 3.106 clarifies that any plan, agreement, instrument or other document requiring the approval of directors under the TBOC may be approved in either final or “substantially final” form.

Additionally, Section 10.002 was amended to provide that disclosure schedules, disclosure letters, and similar documents delivered in connection with a plan of merger or exchange are not considered part of the plan of merger or exchange unless otherwise stated in such plan.

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## **Preformation Equity Subscriptions**

S.B. 2411 adopts new provisions to the TBOC that clarify that a subscription to purchase an interest in a limited liability company or limited partnership that is in the process of being formed is irrevocable if it is in writing and signed by the subscriber, and the subscription states that it is irrevocable.

While these provisions help clarify a potential gap, practitioners will need to keep in mind the requirement to include express language addressing irrevocability in any subscription agreement or other equity purchase agreements entered into prior to entity formation.

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## Texas Business Courts

Section 1.056 states that references in Texas code to “district courts” now include the Texas Business Courts. This further clarifies that the business courts share jurisdiction with Texas district courts.

Additionally, S.B. 2411 provides that Texas entities may specify in their governing documents that certain courts within the state shall have exclusive jurisdiction over internal entity claims.

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## Big-Picture Implications: Texas as a Credible Delaware Alternative

Taken together, S.B. 2411, S.B. 29 and S.B. 1057 significantly modernize Texas corporate law, offering corporations a framework that presents a credible alternative to Delaware in terms of flexibility and the protection afforded to management.

While Delaware continues to rely heavily on judge-made law, Texas is pursuing a more codified, statutory model that will appeal to companies seeking greater clarity, consistency, and cost-efficiency in corporate governance and litigation.

It remains to be seen whether these reforms will prompt a wave of conversions from Delaware to Texas, but they undeniably will lead founders and boards to strongly consider Texas as an alternative.

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