

# Memorandum

## Texas Adopts Significant Amendments to the Texas Business Organizations Code

May 15, 2025

Yesterday, Texas Governor Greg Abbott signed into law bipartisan legislation (the “New Legislation”) enacting significant amendments to the Texas Business Organizations Code (TBOC). The New Legislation is part of a broader, concerted effort by Texas to compete with Delaware as the “jurisdiction of choice” in which to domicile public and private business organizations. The New Legislation follows on the heels of the formation of the Texas Business Court, a specialized trial court created to resolve certain complex business disputes which commenced operations in September 2024, and anticipates the expected launch of the Texas Stock Exchange in early 2026. According to its sponsors, the New Legislation “shields directors from frivolous suits, sets fair thresholds for shareholder actions, and streamlines disputes through the Texas Business Courts, balancing economic growth with accountability for shareholders and everyday Texans.” In particular, the New Legislation seeks to address critiques of recent Delaware caselaw regarding publicly traded corporations, and the legislation can be understood as Texas’ attempt to capitalize on companies considering leaving Delaware (so-called “DExit”) over concerns about the litigation environment. A more detailed summary of the amendments is set forth below.

***Codification of the Business Judgment Rule.*** Texas has long recognized a common law business judgment rule with respect to decision-making by a corporation’s directors and officers. The New Legislation codifies the business judgment rule in Texas with respect to publicly traded corporations and other entities which affirmatively opt in and provides that directors and officers are presumed to act: (i) in good faith; (ii) on an informed basis; (iii) in furtherance of the interests of the corporation; and (iv) in a manner consistent with the law and the corporation’s governing documents. Furthermore, it provides that neither the corporation nor its shareholders have a cause of action against the corporation’s officers and directors unless: (i) one or more of the foregoing presumptions are rebutted by the claimant; and (ii) the claimant proves both a breach of duty and that the breach involved fraud, intentional misconduct, an ultra vires act or a knowing violation of law. The New Legislation further clarifies that the foregoing protections are supplemental to any other presumption arising under common law or the TBOC in favor of a Texas corporation’s officers and directors. Finally, the New Legislation applies the same standards to any claims against directors or officers for breach of fiduciary duty because of their authorization or performance of any conflicted transaction. The new Texas codification is similar to that of Nevada’s statutory business judgment rule which explicitly requires malfeasance to rebut the presumption.

***Heightened Requirements for Derivative Proceedings.*** Derivative proceedings have become an area of increasing focus by plaintiff's attorneys in recent years. In the New Legislation, Texas takes an innovative approach to reduce the number of frivolous derivative proceedings brought against publicly traded Texas corporations and prevent individuals with minimal stakes from pursuing claims that may not align with the broader interests of the company. The TBOC now permits publicly traded Texas corporations to include minimum beneficial ownership requirements (not to exceed 3% of the corporation's outstanding shares) to institute a derivative proceeding in its organizational documents, thereby limiting derivative lawsuits to material shareholders.

***Advance Determination of Director Independence.*** The New Legislation expressly empowers boards of directors of publicly traded Texas corporations to form "special committees" of independent and disinterested directors to review and approve conflicted transactions. It further provides that following the establishment of such a committee, the corporation may petition a court of appropriate jurisdiction to validate the independence of the directors on said committee. Notably, the corporation must also notify each of its shareholders (to give them the opportunity to provide input to the court in the validation process), which the New Legislation provides can be done via filing with the Securities and Exchange Commission, limiting the ability of publicly-traded corporations to keep the advance determination process confidential. In the event a court validates the directors' independence, such finding shall be dispositive as to such directors' independence in the absence of facts, not presented to the court, constituting evidence sufficient to prove that one or more of those directors is not independent and disinterested with respect to a particular conflicted transaction. The New Legislation also provides for a similar advance determination with respect to "demand" or "special litigation" committee directors involved in the decision to pursue a derivative claim on behalf of the corporation. The ability to obtain an advance determination of director independence is a novel innovation on the part of Texas to stave off challenges regarding conflicted transactions (one of the more frequent sources of derivative proceedings), and it remains to be seen whether Texas corporations take advantage of it given the public nature of the process.

***Choice of Venue and Waiver of Jury.*** The New Legislation authorizes Texas entities to include provisions in their governing documents which: (i) designate the newly established Texas Business Court or another specific court in Texas as the exclusive forum for resolving internal claims; and (ii) waive jury trials in connection with internal disputes. These changes align Texas more closely with Delaware, which has long permitted exclusive forum provisions and where the established Court of Chancery determines corporate disputes without the assistance of juries. While the ability to waive jury trials is intended address one of the primary concerns voiced by companies considering Texas incorporation, challenges to this provision under the Texas Constitution, which enshrines a strong right to jury trials, are expected.

***Access to Books and Records.*** The New Legislation makes it even more challenging to use books and records demands as a prelude to litigation. Although Texas law already provided meaningful restrictions regarding access to books and records (*e.g.*, only shareholders who have held shares for at least six months or who hold at least five percent of all outstanding shares may make a demand for inspection), the New Legislation further limits

shareholder inspection rights to a Texas corporation’s electronic communications (e.g., emails and text messages) and bars demands made in connection with a derivative proceeding (either active or contemplated) or an active or pending civil lawsuit in which the requesting party or its affiliate is an adverse party.

**Consideration of Other States’ Laws.** The New Legislation provides that the plain meaning of the language in the TBOC may not in litigation be supplanted, contravened, or modified by the laws or judicial decisions of any other state. Texas has now followed the example of Nevada, which in 2017 updated its corporate code to disclaim reliance on the laws or judicial decisions of other jurisdictions over concerns that Nevada courts were giving undue weight to Delaware case law.

**No Recovery of Attorney’s Fees in Disclosure-Only Settlements.** The New Legislation attempts to reduce frivolous strike suits by specifying that a “substantial benefit” does not include additional or amended disclosures made to shareholders, regardless of materiality, for purposes of determining whether plaintiff’s attorneys may be awarded fees and expenses. This will reduce the attractiveness of vexatious proceedings over minor technical violations.

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