

**MINUTES OF THE SUBCOMMITTEE OF THE
SENATE COMMITTEE ON JUDICIARY**

**Seventy-Eighth Session
April 6, 2015**

The subcommittee of the Senate Committee on Judiciary was called to order by Chair Greg Brower at 1:01 p.m. on Monday, April 6, 2015, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

SUBCOMMITTEE MEMBERS PRESENT:

Senator Greg Brower, Chair
Senator Tick Segerblom

SUBCOMMITTEE MEMBERS ABSENT:

Senator Becky Harris, Vice Chair (Excused)
Senator Michael Roberson (Excused)
Senator Scott Hammond (Excused)
Senator Ruben J. Kihuen (Excused)
Senator Aaron D. Ford (Excused)

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Nick Anthony, Counsel
Julia Barker, Committee Secretary

OTHERS PRESENT:

Robert Kim, Chair, Executive Committee, Business Law Section, State Bar of Nevada

Chair Brower:

I open the Senate Subcommittee on Judiciary with the hearing on Senate Bill (S.B.) 446.

SENATE BILL 446: Revises provisions relating to businesses. (BDR 7-1088)

Robert Kim (Chair, Executive Committee, Business Law Section, State Bar of Nevada):

Senate Bill 446 stems from recommendations for changes to Nevada's business law statutes by State Bar of Nevada members on the Executive Committee of the Business Law Section. This is a recurring effort every Legislative Session. Our design and goal is to make Nevada's laws conform with changes in the marketplace, model acts, different caselaw and discussions by members of the Executive Committee. This bill request has been approved by the State Bar's Board of Governors and is presented on behalf of the Business Law Section of the State Bar. I have submitted a memorandum giving background to each revision in the bill ([Exhibit C](#)). Nevada is a place for non-Nevada based business to call home for incorporation or organization. We make serious efforts to keep our laws up to date, comporting with different trends in the marketplace. The bill makes changes to *Nevada Revised Statute* (NRS) 78.020 regarding private corporations.

Section 1 of S.B. 446 is a new section to NRS 78.020 providing for the ratification of corporate actions. This addresses situations where normal ratification by a board and stockholders is insufficient to properly address items viewed as unauthorized in the past such that stakeholders are not positioned to comfortably approve or ratify the state of affairs. When a new corporation issues shares in excess of the amount authorized or stated in the charter, by the time the error is identified, years have passed. Shares may have changed hands, making it hard to locate and obtain approval of stockholders who should have approved that action. This occurs a couple times a year when a corporation on the verge of significant financing with a transaction are stalled because of this irregularity. Section 1 provides the board and stockholders the ability to provide a clear ratification of an action that has a retroactive effect. This requires the board or corporation to send notice of that ratification or validation action to all stockholders and third parties with a stake in that correction.

Chair Brower:

Is this proposed change based on Delaware law?

Mr. Kim:

Conceptually, yes. Title 8, chapter 1, subchapter VI, sections 204 and 205 of the Delaware General Corporation Law address different contexts. The

Executive Committee decided that approach was cumbersome and hard to follow. We created our own language and process similar in terms of action and notice of stockholders. It allows a window through which those affected or potentially affected may bring an action to court if they believe it was an improper ratification or validation.

Chair Brower:

Is the substance the same?

Mr. Kim:

Yes.

Section 2 of S.B. 446 ensures corporations can be used for trust companies. This corrects an oversight from 1999.

Section 3 clarifies maintenance of records. It puts the burden on a company to update stockholders on an annual basis. The revisions clarify the list to be maintained is only required to identify stockholders of record.

Section 4 deals with authorized officers. With concerns over apparent authority, it was appropriate to eliminate specific references to any vice presidents or assistant officers. This clears up apparent authority concerns with officers other than the president, secretary and treasurer. The bylaws are a sufficient place for governance to be located. Board resolutions identifying a particular personal officer will empower said person to take action if authorized to do so.

Section 5 cleans up awkward language to related party transaction approvals and voidable contracts. The substance of this section is still the same.

Section 6 clarifies the manner of rights relative to voting powers, designations, preferences and limitations to a class or series of stock can be assigned, adopted or adjusted by the board of directors.

Sections 6 through 9 and section 12 clarify references to certificates of designation with respect to preferred or different classes of stock. Different rights to any class of stock can be in the articles of incorporation or provided separately in a certificate of designation filed with the Secretary of State. This is part of the articles of incorporation. There was awkward wording and

references to the resolution of the board of directors versus the certificate of designation, which is the operative document.

Chair Brower:

Does this change "resolution" to "certificate of designation?"

Mr. Kim:

Yes.

Section 12 clarifies adjournments and postponements that can be taken of meetings.

Chair Brower:

Does the language delete "resolution" and include "certificate of designation?"

Mr. Kim:

Yes.

Section 10 makes clear that a board of directors can reference external factors or circumstances in proper consideration for shares issued by a corporation. It clarifies shares issued as "outstanding shares" unless deemed or classified as treasury shares.

Chair Brower:

Does this keep up with Delaware law?

Mr. Kim:

Yes. The first item conforms with Delaware corporate law and the Model Business Corporations Act. Clarifying issue shares with representing outstanding shares tracks language from the Model Business Corporation Act.

Section 11 permits a corporation to hold stockholder meetings through remote means only. Nevada law does require a physical location which is consistent with the Model Business Corporation Act. Delaware law determined it was not necessary to have stockholder meetings secured by a physical location. We want to introduce this concept to Nevada corporate law if it is provided for specifically in the articles of incorporation or bylaws. Stockholders or investors involved in a company typically review the bylaws and articles of incorporation

as part of the decision to become a stockholder of a company. One should be aware of those articles or bylaws.

Sections 12 and 13 had overlap in terms of postponement. There was only reference to adjournment of a meeting in NRS 78, so we added postponement versus formal adjournment of a meeting.

Sections 14 through 19 relate to Nevada's antitakeover statutes prohibiting combinations with certain interested stockholders. We made significant changes to this section in 2011 to modernize. Antitakeover provisions are typically opted out by many corporations given the nature and stockholder activity. Additional revisions make it clear that if the board and stockholders agreed certain combinations were appropriate and in the best interest of the corporation, a transaction could proceed notwithstanding the limitations of antitakeover statutes. This leaves an out just in case the board and stockholders want to proceed with a transaction even though it falls within sections of the antitakeover statutes.

Chair Brower:

Is this a trend in the corporate world? Are we following the lead of Delaware or other states in this regard, or is this somewhat novel?

Mr. Kim:

This is through our own initiative. When we have counseled corporations incorporated in Nevada, they find these statutes cumbersome and a nuisance. With stockholder activism, many groups recommend these statutes be removed from the articles and bylaws. There are additional ways to approve of a transaction. If a corporation must deal with these sections because it has not opted out, it could be limited by these statutes.

In the 77th Session, we attempted to conform the use of the words "articles of incorporation" instead of "certificate of incorporation." Articles of incorporation is a term used in Nevada. References in NRS 78A were not captured when we made that change. Sections 20 through 31 change "certificate" to "articles."

Chair Brower:

Is that the only change in sections 20 through 31?

Mr. Kim:

Yes.

Sections 32 and 34 through 35 span three separate chapters of NRS 89, 87A and 88. They relate to a formation document which can be filed with a later stated effective date. For example, you may have a joint venture or project to use or house in a limited liability company. You include a future effective date within 90 days of when the LLC was formed because you feel the deadline gives you more pressure and incentive to make a deal. We found an issue with the fact that an initial list must be filed within 60 days of forming an LLC. In speaking with the Nevada Secretary of State, the use of a later effective date was not commonly availed by people using LLC partnerships. We eliminated that ability so given entities can be filed in short order. There is no need for a later effective date in terms of having a formation document for LLCs.

Chair Brower:

Was that opportunity being utilized?

Mr. Kim:

The later effective date is a useful feature for different business combination documents such as mergers, other conversions or issues where there is an impact to having a specified effective date for tax purposes. In terms of formation, there was no rule benefit.

Section 33 clarifies obligations to operating agreements and what can be done with them. This should have been part of our amendments in the 77th Session.

Chair Brower:

Was that an oversight from last Session the bill intends to fix?

Mr. Kim:

Yes.

Section 36 obligates a copy of the plan of merger be provided. Whenever two entities merge, a copy of the entire plan may be included as part of the articles of merger. A copy can also be made available by the surviving corporation. *Nevada Revised Statute* 92A.180 deals with short-form mergers. Those are mergers between parent subsidiaries. The statute reads that the parent subsidiary shall mail a copy of the plan, if requested. Since short-form

mergers permit merges to go in both directions, it makes sense that it is the surviving entity versus the parent subsidiaries because there may be an instance when the parent subsidiary no longer exists.

Chair Brower:

Are you substituting "surviving entity" for "parent" in section 36, subsection 4?

Mr. Kim:

Yes.

Section 37 deals with the effect of a merger under NRS 92A.250. This closes the loophole that could occur if someone wants to use merger sections to merge from a partnership to an LLC or corporation. Under the limited partnership contract, a general partner possesses all obligations of a limited partnership, which is a unique aspect of that limited partnership-type entity. If you merge into a LLC, where every party has limited liability, it would relieve people who obligated themselves to obligations of the former limited partnership. Language was added saying the obligations to an entity before a merger do not absolve because a merger was entered into when the resulting entity was a limited liability entity.

Section 38 is a minor revision on notary requirements. Last Session, changes were made to notary requirements, requiring a notary's signature be on file with the Secretary of State. That is an obligation requirement of a Nevada notary. Section 38 makes it so an out-of-state notarized document is not invalidated.

Chair Brower:

Most of this bill is largely cleanup.

Mr. Kim:

We have submitted proposed amendments ([Exhibit D](#) and [Exhibit E](#)) for clarification. [Exhibit D](#) is a proposed amendment by members of the State Bar's Executive Committee. Page 1 of [Exhibit D](#) requests a revision making clear the new ratification section is not meant to be exclusive or the only means to ratify.

Chair Brower:

Is this change in the bill in the Legislative Counsel's Digest?

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Mr. Kim:

Yes.

Chair Brower:

Does the note say, "additional, nonexclusive?"

Mr. Kim:

Yes.

Chair Brower:

Does the second change on page 1 of [Exhibit D](#) change "shareholders" to "stockholders?"

Mr. Kim:

Yes. The convention under Nevada corporate law is to reference shareholders as stockholders.

Page 2 of [Exhibit D](#) on line 33 changes the "the" to "these matters must be set forth in the."

Chair Brower:

Did that result in the corresponding deletion of the language, "rather than the resolution of the board of directors must describe these matters?"

Mr. Kim:

Yes.

The language on line 37 of page 2 of [Exhibit D](#) that says "approving the certificate of designation" relates to the resolution of the board of directors to approve the certificate of designation.

Page 3, line 9 of [Exhibit D](#) changes the word "does" to "shall." On page 4, line 3 replaces the words "must not be" with "is not." The request on page 5 of [Exhibit D](#) on line 8 uses the same language "pursuant to subsection 1 of NRS 78.1955" that appears on line 39.

[Exhibit E](#) proposes amendments to pages 24 and 25 of the bill. We propose removing the words "or certificate" on page 1, line 40 of [Exhibit E](#). There was

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oversight on our part not to capture one of the references to certificates. The same applies to page 2, line 10 of [Exhibit E](#).

Page 6, line 14 of [Exhibit D](#) removes the reference to "incurred after the time of the merger."

Remainder of page intentionally left blank; signature page to follow.

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Chair Brower:

I will close the hearing on S.B. 446 and adjourn the subcommittee of the Senate Committee on Judiciary at 1:31 p.m.

RESPECTFULLY SUBMITTED:

Julia Barker,
Committee Secretary

APPROVED BY:

Senator Greg Brower, Chair

DATE: _____

EXHIBIT SUMMARY				
Bill	Exhibit		Witness or Agency	Description
	A	2		Agenda
	B	1		Attendance Roster
S.B. 446	C	5	Robert Kim	Memorandum
S.B. 446	D	6	Robert Kim	Proposed Amendments
S.B. 446	E	2	Robert Kim	Proposed Amendments