



KEN ARMBRISTER
District 18

The Senate of
The State of Texas
Austin 78711

February 6, 2002

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OPINION COMMITTEE

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I.D. # 42420

The Honorable John Cornyn
Office of the Attorney General
Opinion Committee
209 W. 14th Street, Floor 6
P.O. Box 12548
Austin, Texas 78711-2548

Re: Opinion request, and brief in support thereof, concerning the right of duly licensed Texas accounting firms with less than 100% CPA ownership to be formed under the Texas Business Corporation Act and the Texas Limited Liability Company Act, as intended under the Texas Public Accountancy Act of 1991.

Dear Attorney General Cornyn:

BACKGROUND

The practice of public accountancy is regulated by the Texas Public Accountancy Act of 1991 (the "TPAA"). During the 74th Legislative Session, I sponsored Senate Bill 1358, which revised the ownership requirements for individuals wishing to form an accounting firm in Texas. The TPAA now allows accounting firms licensed in Texas to have non-CPA owners. The intent of Senate Bill 1358 was to bring Texas closer to the ownership requirements provided for under the Uniform Accountancy Act, thereby joining thirty one (31) other states permitting accounting firms to have non-CPA owners (as long as CPAs own a majority interest in the accounting firm).¹

Prior to the enactment of Senate Bill 1358, Texas accounting firms had to be 100% owned by CPAs. Therefore, accounting firms wishing to incorporate in Texas were forced to form professional corporations under the Texas Professional Corporation Act (the

¹ The Uniform Accountancy Act (the "UAA") is the product of a joint effort by the American Institute of Certified Public Accountants and the National Association of State Boards of Accountancy. The UAA is intended to serve as a model for public accountancy legislation by all states.

"TPCA") or professional limited liability companies under Section eleven of the Texas Limited Liability Company Act (the "TLLCA").² As stated above, Senate Bill 1358 radically changed the TPAA by permitting non-CPAs to acquire an ownership interest in accounting firms as of September 1, 2001. The problem is that the Secretary of State's office has stated that it will not accept articles of incorporation submitted by accounting firms wishing to incorporate or form a limited liability company under any Texas statute, if the accounting firm has non-CPA owners as permitted by Senate Bill 1358.

Therefore, the amendments instituted pursuant to Senate Bill 1358 permitting Texas accounting firms the right to have non-CPA owners will be rendered totally meaningless if there is no way for these firms to incorporate or form limited liability companies under any Texas statute.³

ANALYSIS

Why Accounting Firms with Non-CPA Owners Cannot Form Professional Corporations or Professional Limited Liability Companies

Professional corporations formed under the TPCA for the purpose of rendering professional services can only consist of shareholders that are duly licensed or authorized in Texas to render the same professional services as the corporation.⁴ Under the TPCA, a

² Op. Tex. Att'y Gen. No. M-551 (1970).

³ The regulations governing the practice of public accountancy also permits the formation of partnerships and registered limited liability partnerships. Accounting firms with non-CPA owners should form partnerships and registered limited liability partnerships, as is the current practice with CPA-owned accounting firms. See 22 TEX. ADMIN. CODE § 501.84 (1999). Further, accounting firms with 100% CPA ownership should continue incorporating under the TPCA and forming limited liability companies under Section eleven of the TLLCA. The scope of this request only includes issues relating to the incorporation of accounting firms who have non-CPA owners as contemplated by Senate Bill 1358. The term 'incorporation' as used herein also includes formation of limited liability companies under the TLLCA.

⁴ TEX. REV. CIV. STAT. ANN. art. 1528e, § 3(b) (Vernon Supp. 2001).

professional corporation can only be organized for the purpose of rendering *one* specific type of professional service and services ancillary to that profession.⁵ Similarly, a professional limited liability company formed under Section eleven of the TLLCA can only consist of members that are licensed to offer services in the same profession.⁶ Licensed accounting firms in Texas (with non-CPA owners) as contemplated under Senate Bill 1358 may now provide a myriad of services and, for this reason, cannot incorporate or form professional limited liability companies because of the express prohibitions of the TPCA and Section eleven of the TLLCA as outlined above.

Why Accounting Firms with Non-CPA Owners Should be Permitted to Incorporate Under the Texas Business Corporation Act (the "TBCA") and Form Limited Liability Companies Under the TLLCA

Licensed Texas accounting firms with non-CPA owners should be permitted to incorporate under the TBCA and form limited liability companies under the general provisions of TLLCA because: (i) the TPAA permits the issuance of a license to a corporation thereby excluding accounting firms from the prohibitions of article 2.01B(2) of the TBCA;⁷ (ii) the TPAA does not require an accounting firm to incorporate under a specific statute such as the TPCA or Section eleven of the TLLCA; and (iii) accounting firms with less than 100% CPA ownership (as permitted by Senate Bill 1358) may not incorporate under the TPCA or form professional limited liability companies under Section eleven of the TLLCA. The following discusses each point in greater detail.

⁵ TEX. REV. CIV. STAT. ANN. art. 1528e, § 6 (Vernon Supp. 2001).

⁶ TEX. REV. CIV. STAT. ANN. art. 1528n, 11.03 A, 11.04 (Vernon Supp. 2001).

⁷ Article 2.01B(2) provides that "[n]o corporation may adopt this Act or be organized under this Act or obtain authority to transact business in this State under this Act . . . [i]f any one or more of its purposes for the transaction of business in this State is to engage in any activity which cannot lawfully be engaged in without first obtaining a license under the authority of the laws of this State to engage in such activity and such a license cannot lawfully be granted to a corporation."

The TBCA prohibits the incorporation of a group of individuals who wish to engage in an activity for which a license must be obtained in the state of Texas, unless such a license can be granted to a corporation.⁸ Under the TPAA, an accounting firm is required to obtain a license and this license may be granted to a corporation. Specifically, an accounting firm may be formed as a corporation, and incorporation may be accomplished where: "a corporation [is] authorized by a statute applicable to this state . . . including [but not limited to] a professional public accounting corporation organized under the Texas Professional Corporation Act."⁹ Accordingly, the TPAA does not specifically limit the types of corporations that may be licensed.¹⁰

The drafters of the TPAA anticipated the formation and existence of an accounting firm that included non-CPA owners. For this reason, the TPAA does not limit accounting firms to a specific business entity statute; rather, the TPAA permits accounting firms to incorporate under 'a statute applicable to this state,' which clearly includes the right to incorporate under the TBCA and form limited liability companies under the TLLCA.¹¹ If it had intended otherwise, the Legislature would have expressly limited an accounting firm's right to incorporate or form limited liability companies. It could have easily accomplished

⁸ TEX. BUS. CORP. ACT art. 2.01B(2) (Vernon Supp. 2001).

⁹ TEX. OCC. CODE § 901.354 (Vernon 2000).

¹⁰ In response to the recent revisions to the TPAA, the regulations governing the practice of public accountancy in Texas are undergoing massive revision. The regulations still provide that only a proprietorship, a partnership, a limited liability company, a registered limited liability partnership, and a professional public accounting corporation organized under the laws of the State of Texas may practice public accountancy in Texas. See 22 TEX. ADMIN. CODE § 501.84 (1999). However, the Texas State Board of Public Accountancy has passed on first reading a revised version of this rule to allow for the formation of corporations and limited liability companies as urged in this letter request. Additionally, Chapter 513 dealing with the registration of public accounting firms was repealed effective December 6, 2001. See 22 TEX. ADMIN. CODE Chapter 513 (1999)(provisions concerning the registration of partnerships, corporations, practice units, and sole proprietorships were repealed).

¹¹ The TPAA did not intend for the TBCA and the TPCA to be mutually exclusive; rather, to give the TPAA full effect licensed accounting firms with non-CPA owners should be permitted to incorporate under the TBCA and firms with 100% CPA ownership may continue forming professional corporations under the TPCA. See Op. Tex. Att'y Gen. No. MW-99 (1979).

this task had it intended to do so by defining the term 'corporation' in the TPAA to include only those entities formed under Texas professional corporation statutes such as the TPCA and Section eleven of the TLLCA. The amendments instituted pursuant to Senate Bill 1358 bolster this position.

Public Policy Supports Interpretation of the TBCA and TLLCA to Permit Formation by Accounting Firms Who Have Non-CPA Owners

If the Secretary of State will not accept filings by licensed Texas accounting firms (with non-CPA owners) who seek to form business entities under the TBCA or the general provisions of the TLLCA, these firms will be effectively denied the right to do business as a Texas corporation or limited liability company. The Legislature certainly did not intend to permit accounting firms to associate with non-CPAs while robbing these firms of the right to form Texas entities. Without permitting such incorporation under the TBCA, the new revisions to the TPAA pursuant to Senate Bill 1358 cannot be implemented.

While it is true that prior to Senate Bill 1358, accountants desiring to incorporate or form limited liability companies were required to do so under the TPCA or under Section eleven of the TLLCA, the recent amendments to the TPAA do not contemplate amending the TPCA or the TLLCA. Therefore, it makes sense to require licensed Texas accounting firms owned 100% by CPAs to continue utilizing the TPCA and Section eleven of the TLLCA consistent with the current practice. However, the TBCA and general provisions of the TLLCA should be utilized by licensed accounting firms in Texas (with non-CPA owners) seeking to incorporate or form limited liability companies as contemplated by the new revisions to the TPAA.

CONCLUSION

Texas accounting firms have been left with a disparity in the laws surrounding the practice of public accountancy and the laws regulating the process of entity formation. Senate Bill 1358 cannot be effectively implemented, and Texas citizens wishing to form accounting firms with non-CPA owners will be deprived of the privilege of conducting business in Texas as Texas business entities should they be prohibited from incorporating under the TBCA or forming limited liability companies under the general provisions of TLLCA. In sum, I respectfully request an opinion clarifying that duly licensed Texas accounting firms with less than 100% CPA ownership may be formed under the Texas Business Corporation Act and the Texas Limited Liability Company Act as intended under the TPAA.

Please feel free to contact me if you have any questions concerning this issue. I appreciate your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ken Armbrister', written over a horizontal line.

Ken Armbrister
State Senator