

Fall 2022

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**BUSINESS
LAW SECTION**
OF THE STATE BAR OF TEXAS

Fall Newsletter 2022

Message from the Chair



I want to thank all of you for participating in the Section this year. I particularly want to welcome and thank our new Section members who are joining us. As we all know, we have all dealt with substantial disruptions to our practices and lives over the last few years. Nonetheless, the work of the Business Law Section has continued, and we are looking forward to a great Bar year. I am very grateful and excited to serve as Chair of the Section and look forward to working with you.

For those of you who may be new to the Section, I want to briefly describe the services the Section provides to its members:

- **Drafting and Monitoring Legislation.** In connection with the biennial sessions of the Texas Legislature, the Section leadership and the Committee Chairs draft proposed legislation, such as the recent amendments to the Texas Business Organizations Code that are described below in the *Business Law Legislative Update*.
- **CLE Programs.** The Section presents three CLE programs: the Essentials of Business Law Course, the Advanced Business Law Seminar, and a CLE course at the State Bar's Annual Meeting that we co-sponsor with the Corporate Counsel Section. Our CLE courses are designed to cover cutting-edge topics, such as cybersecurity.
- **Texas Journal of Business Law.** For many years, the Section has published the *Texas Journal of Business Law*, which contains articles about topics of interest to business lawyers. Current and certain past issues of the *Journal* can be found on the Section's website.
- **Website.** We are continuing to improve and update the Section's website. The site now contains, among other things, materials for the CLEs presented by the Section, including a back catalog of selected CLE papers; current and prior issues of the *Texas Journal of Business Law*; forms (including LLC operating agreements) of use to business lawyers; and information about the Section's current events, webinars, and Committees. **Please login to our website (<https://www.texasbusinesslaw.org/>) and**

Message from the Chair Continued

have a look around; you may login by entering your Texas state bar number and your TexasBar.com password.

□ **Committees.** The Section conducts much of its activities through its Committees; the Committees are described on our website, and you may join selected Committees through the website.

The Section leadership is committed to providing services of value to our members and to looking for new opportunities as the practice of business law evolves. To make good on that commitment, the Section Council is conducting a strategic review of our Committees and activities. The purpose of this effort is to improve and streamline our work and services to Section members. If you have any suggestions regarding the Section's activities, we would very much like to hear from you.

I'm thrilled and honored to be the Chair of this Section and look forward to working with you during the coming year.

Brent Benoit

Chair of the Business Law Section 2022-2023

Business Courts in Texas?

By F. John Podvin, Jr., Otteson Shapiro LLP

The Texas House of Representatives Judiciary and Civil Jurisprudence Committee ("Committee") invited the Texas Business Law Foundation ("TBLF") to testify at an Interim Charge Hearing held on August 23, 2022 regarding two issues: (1) study potential solutions to improve the judicial efficiency of state courts of appeal; and (2) study the operation of specialty courts, including whether additional specialty courts should be considered to address needs within specific populations, and review methods and best practices that have been implemented in other states that impacted judicial efficiency. See, <https://capitol.texas.gov/tlodocs/87R/schedules/html/C3302022082309001.HTM>.

Mike Tankersley, the Immediate Past Chair of the TBLF, testified in person at the hearing before the Committee at the State Capital in Austin, in support of the TBLF's long-term efforts over the last 4 Legislative Sessions to establish business courts in Texas. A recording of the hearing can be heard at: https://tlchouse.granicus.com/MediaPlayer.php?view_id=46&clip_id=23430

Opponents to business courts in Texas also testified at the hearing, including, the Texas American Board of Trial Advocates and the Texas Trial Lawyers Association, who questioned whether appointed judges were constitutional under Texas law and who testified that the business courts bill did not provide for trial by jury. Tankersley, among other speakers, corrected this inaccuracy by pointing to language in the bill that preserves the right of trial by jury in the business courts in Texas. In response to the constitutional question, Tankersley also testified that Article V, Section 1 of the Texas Constitution authorizes the Texas Legislature to establish specialty courts, such as business courts, and that the Texas Supreme Court in Jordan vs. Crudgington, 231 S.W.2d 641 (Tex. 1950) specifically stated that the language in Article V, Section 1 evidences an intent to leave the power to create additional specialized courts as well as the power of appointment within the discretion of the Legislature.

The Committee will issue a report concerning the Interim charge in the coming months.

Private Causes of Action under the Recodified Texas Securities Act®

By John R. Fahy, Whitaker Chalk Swindle Schwartz PLLC

The Texas Legislature passed the Texas Securities Act recodification in the 2019 regular session with an effective date of January 1, 2022.¹ The Legislature amended the recodified Texas Securities Act's private cause of action provisions through SB 1280 during the 2021 regular session by deleting cross-references imposing liability for violations as to six Texas Securities Act provisions that imposed no duties on private actors and thus had no potential for violations by private actors.² Business attorneys should have some familiarity with the recodified Texas Securities Act's private causes of action and remedies in order to properly advise clients of potential pitfalls in securities transactions. Business attorneys should also relearn the Texas Securities Act statutory structure, which has significantly changed. The previous Texas Securities Act had had 64 sections. The recodified Texas Securities Act ("Recodified TSA") has 248 sections - almost 400% more. Click [HERE](#) to read the full article.

¹ HB 4171 (86th Texas Legislature, Regular Session, 2019).

² SB 1280 (87th Texas Legislature, Regular Session, 2021).

New Business Organizations Code Amendments Being Drafting By BOC Committee

By Daryl B. Robertson, Hunton Andrews Kurth, LLP

The Business Organizations Code ("BOC") Committee of the Business Law Section has had numerous meetings during 2022 to review drafts of various amendments to the Texas BOC that have been drafted by various members of the Committee. It is anticipated that the amendments will be introduced in one or more bills for adoption at the 2023 Texas Legislature. In working of the draft amendments to the BOC, the Committee reviewed recent amendments adopted in 2021 and 2022 to the Delaware General Corporation Law and Delaware's alternative entities statutes. The Committee then determined to make various amendments to the BOC based on the Delaware precedent amendments. In addition, there were a number of amendments that were merely corrections or clarifications of provisions adopted in the 2021 Texas Legislature or other provisions of the BOC. Other amendments drafted and approved by the Committee were based on ideas generated by Committee members and outside Texas legal practitioners. The Committee always welcomes ideas for new amendments and improvements to the BOC. Click [HERE](#) to read the full article.

Commercial Code Committee Working on Texas Version of 2022 UCC Amendments

By Daryl B. Robertson, Hunton Andrews Kurth, LLP

The Business Law Section's Commercial Code Committee has been very busy in the last several months reviewing the 2022 Amendments to the Uniform Commercial Code ("UCC") which have been approved by the American Law Institute ("ALI") and Uniform Law Commissioners("ULC"). The approved amendments would add a new Article 12 to the UCC and make corresponding and additional amendments to UCC Article 9 relating to secured transactions for Article 12 property as well as other Articles in the UCC. Adoption of these amendments in most, if not all, states is expected over the next two to three years. Click [HERE](#) to read the full article.

A Boost to Your Business Law Career?

By Irene Kosturakis, CIPP/US

How would you like to breathe new life into your current career path in business law? If your answer is yes, your next question will be, "how do I do that?" After years of working as an attorney, I can recite to you the various things you can do to boost your career; things you know and have heard, but maybe you haven't done. Things like, you should network by going to events, working the room, taking cards, then following up with those folks to keep in touch. This is something we'd all like to do, but though many claim great career benefits from this, actual results from doing this in my opinion are serendipitous at best and dubious at worst.

Another way to improve your career is to volunteer at your place of work for more responsibility, whether that be in a firm or in-house. The problems with that suggestion are that you may already be stretched too thin at work to take on a big important project, you may currently lack the experience to do so, or your supervisor may not be willing to give you a more exciting project at the moment.

I have an idea that will definitely boost your career. Obtain official certification for an entirely new skill, one that is current and pertinent. The one I am thinking of is certification as a Certified Information Privacy Professional (CIPP/US for short). Privacy is a timely topic that has become so necessary in a business law practice that it touches upon every area you are involved in. The more time that passes, the more you need to learn about privacy because we live in a data-driven world, and clients don't know enough about it, are subject to compliance with laws that they don't understand, and they may be violating them. Not knowing enough or knowing too little about privacy and data protection can be dangerous if you fail to recognize the issues when they come up. In my opinion privacy is a timely topic for which clients with potential legal issues outnumber attorneys to support them. In fact, law schools have recently started adding data privacy classes in their curriculums. Furthermore, becoming certified as a CIPP/US will lead to the knowledge necessary to become involved in cybersecurity, which involves data protection, the fraternal twin of privacy. Surely, you can agree that cybersecurity is a timely and exciting area of the law.

To become a Certified Information Privacy Professional (CIPP/US) is not that difficult but does require focus and study. To start, check out the iapp.org website, from the International Association of Privacy Professionals (IAPP). This organization provides resources, certification programs, and resources. Becoming certified can help you boost your career because certification allows you to market yourself as a CIPP/US professional. After a few months of study, in which you will learn about the fascinating subject of privacy and data protection law in the U.S. and around the world, you can take the exam online and obtain that distinction. For more information check out, www.iapp.org.

A final suggestion to improve your career is to get involved with the State Bar of Texas. If you are receiving this, you can check that one off the list because you are already a member of the Business Law Section, so kudos to you! Now, it's just a matter of getting really involved by joining the Business Law Section's committees in your areas of practice and interest.

Compliance with the new SEC Marketing Rule for Private Fund Managers

Beginning November 4, 2022, all SEC registered investment advisers will be required to comply with the SEC's new "Marketing Rule."¹ The Marketing Rule governs both "advertising" and solicitation of clients and investors in private funds. It replaces a hodgepodge of ambiguous SEC rules and guidance with a single principles-based rule.²

The SEC recently issued a [Risk Alert](#) that upcoming examinations of investment advisers will focus on compliance with the new Marketing Rule. Accordingly, advisers should review their written policies and procedures, and update them to cover the requirements of the new rule.³

This high-level summary outlines the Marketing Rule as it applies to SEC registered advisers to private funds only.⁴ It does not cover advertising of other advisory services, such as those provided to separately managed accounts. Furthermore, it does not cover other federal or state securities laws that still apply to private fund marketing.⁵ Finally, this summary is not meant as legal advice and you should consult your legal advisor for further guidance.

KEY TAKEAWAYS

1. The Marketing Rule covers both advertisements and third-party solicitation of clients and investors.
2. "Testimonials" and "endorsements" are now permitted subject to adviser oversight and disclosure requirements.
3. Placement Agents and other persons paid to solicit new investors must provide certain written disclosures and the adviser must have a reasonable belief that these disclosure are being provided.
4. The adviser must be able to show the SEC that it has a reasonable basis for believing that it can substantiate each statement of material fact and keep records backing up such belief.
5. Advertising of "gross performance" and "hypothetical performance" are permitted subject to certain conditions.
6. New policies and procedures, including oversight and record keeping procedures, must be in place by November 4, 2022.

Commercial/Consumer Law Update

By Jackie Akins

Welcome to Fall. Elections are next month but already bills are beginning to fall like leaves for the next session of the Texas Legislature to start the new year. The Business Law Section will keep you up to date with the fate of various bills as they progress (or not) through the legislative process.

Items of Interest:

1. Earlier the Consumer Financial Protection Bureau (CFPB) announced it would treat discrimination as an unfair, deceptive or abusive act or practice (UDAAP) and updated its examination manual accordingly. (CFPB Supervision and Examination Manual, UDAAP at 2[v. 3 March 2022]). A group of trade associations and the Longview Chamber of Commerce filed suit challenging the action in US Federal District Court for the Eastern District of Texas (Case No. 6:22cv381)
2. The CFPB has made its annual announcement of Regulation Z and Regulation M credit and lease thresholds (\$86,000.00 or less although student and mortgage loans are subject to Regulation Z regardless of amount).
3. The CFPB took action against a remittance transfer company for failure to adequately disclose its terms and other violations. [CFPB Takes Action Against Choice Money for Remittance Failures | Consumer Financial Protection Bureau \(consumerfinance.gov\)](#).
4. The CFPB also issued a circular on data security practices for financial institutions which will impact service providers to those institutions either directly or indirectly. [CFPB Takes Action to Protect the Public from Shoddy Data Security Practices | Consumer Financial Protection Bureau \(consumerfinance.gov\)](#)

For information on major changes to the Uniform Commercial Code dealing with digital assets, please see the Commercial Code newsletter.

For changes to the Business Organizations Code, please see that section's newsletter.



Newsletter Submissions

If you would like to submit an article for inclusion in the Business Law Section's Newsletter, please email it to Lori Wilkins At lori@amc-texas.com

The Newsletter Committee reserves the right to edit contributions for clarity and content.



Keeping Your Email Address Updated

With the electronic distribution of the newsletter, it will be important for every Section member to keep an updated email address with the State Bar of Texas since that agency will distribute the email on behalf of the Section. You may update your email address at the [MyBarPage](#) of the State Bar's website. Please note that the Section will not sell or distribute your email address to anyone, including the State Bar's CLE Division.