

**SUMMARY OF SELECTED
2003 TEXAS LEGISLATION
RELATING TO BUSINESS LAW**

**STATE BAR OF TEXAS
LEGISLATIVE UPDATE**

**PREPARED AND COPYRIGHT
2003 RESERVED BY:**

**DARYL B. ROBERTSON
JENKENS & GILCHRIST, P.C.
1445 ROSS AVENUE, SUITE 3200
DALLAS, TEXAS 75202
(214) 855-4500
drobertson@jenkens.com**

SUMMARY OF SELECTED
2003 TEXAS LEGISLATION
RELATING TO BUSINESS LAW
Copyright 2003 by Daryl B. Robertson⁽¹⁾

INTRODUCTION

The following discussion summarizes some of the bills that were passed in the 2003 Texas Legislature relating to business law. As a caveat, other bills may exist that affect business law or are of interest to business lawyers. Interested persons should always review the provisions of the actual bill itself rather than rely on the following summaries.

ENTITY BILLS

Business Organizations Code, H.B. No. 1156, by Giddings (D – DeSoto); Senate Sponsor: Fraser (R - Marble Falls).

H.B. 1156 by Representative Helen Giddings adopted the Business Organizations Code (the "Code"). The Code is a substantive codification of the various for-profit and nonprofit, private sector entity governing laws, including the Texas Business Corporation Act, the Texas Nonprofit Corporation Act, the Texas Limited Liability Company Act, the Texas Revised Limited Partnership Act, the Texas Revised Partnership Act, the Texas Real Estate Investment Trust Act, and other existing Texas statutes.

The bill, which is the result of almost a decade's worth of work by representatives of the State Bar's Business Law Section and the Office of the Texas Secretary of State, represents the final stage of the legislative mandate to reorganize all Texas statutes into codes. The Texas Legislative Council provided drafting and editing assistance. The bill is over 800 pages long and, while the vast majority of the content of the bill represents re-codification of current statutory provisions, there are some substantive revisions to existing Texas law contained in the Code. For the most part, however, these substantive changes involve modernizing, simplifying or standardizing provisions, procedures and filing requirements. It is not practical to list the substantive changes effected by the Code in this paper.

Title 1 of the Code contains provisions common to all domestic entities including provisions governing powers, purposes, formation, filings, names, meeting and voting procedures, registered agents and offices, indemnification powers, foreign entities, procedures for mergers, conversions, interest exchanges and asset sales, procedures for winding up and termination, and administrative procedures. Following proposed Title 1, the various additional titles of the Code deal separately with the different types of entities.

The drafting committee prepared a Revisor's Report containing the entirety of the Code with a section-by-section description of the source law and an analysis of any intended changes from existing law. This Report is available on the Texas Legislative Council website (www.tlc.state.tx.us) and on the Business Law Section website (www.texasbusinesslaw.org).

⁽¹⁾ Shareholder with Jenkens & Gilchrist, a Professional Corporation, Dallas, Texas.

The interim report from the House Sub-Committee studying the Code, which contains a listing of changes to current law affected by the Code, is available at www.house.state.tx.us.

The Code is effective January 1, 2006 except that then existing entities are not subject to the Code until January 1, 2010. Then existing entities may elect after January 1, 2006 for the Code to apply prior to the later date.

Texas Business Corporation Act Amendments, H.B. No. 1165, by Solomons (R – Carrollton); Senate Sponsor: Janek (R-Harris)

Because the Code will not go into effect until 2006, H.B. 1165 was filed to provide immediate amendments paralleling many of the changes effected by the Code to the Texas Business Corporation Act and the Texas Miscellaneous Corporation Laws Act ("TMCLA"). The last updating of these statutes occurred in 1997. H.B. 1165 is effective September 1, 2003. The bill also standardizes certain filing requirements as suggested by the Office of the Texas Secretary of State. Some significant amendments contained in this bill (as well as the Code) are:

1. reverses the rules on shareholders' preemptive and cumulative voting rights to deny them unless provided in the articles of incorporation, with special grandfathering of existing rights of shareholders;
2. removes the requirement for \$1,000 minimum capitalization before commencing business;
3. eliminates specific statements of voting results in articles of amendment;
4. repeals various antiquated provisions of the TMCLA;
5. clarifies the power of the board of directors to authorize shareholder rights plans;
6. authorizes electronic proxies and meeting notices;
7. eliminates outmoded filing requirements for share cancellations and reductions of share capital; and
8. authorizes the board of directors to amend the terms of a series of preferred shares if it unilaterally created the series under authority in the articles of incorporation and if there are no outstanding shares of that series.

Other modernizing changes resulting from the bill (but not by the Code) include:

1. authorizes provision in the articles of incorporation that permits a board of directors to renounce a business opportunity;
2. confirms the enforceability of restrictions on share ownership imposed for tax purposes;

3. allows the board of directors to submit a plan of merger for a shareholder vote while recommending that shareholders vote against it; and
4. clarifies that the holders of depositary receipts have the same rights of dissent and appraisal as the underlying shares.

Limited Liability Company Act Amendments, H.B. No. 1637, by Oliveira (D – Brownsville); Senate Sponsor: Averitt (R-Waco)

H.B. 1637 provides amendments to the Texas Limited Liability Company Act, the Texas Revised Limited Partnership Act and the Texas Revised Partnership Act. The bill is effective September 1, 2003. The bill eliminates certain causes of dissolution of a limited liability company to conform to federal tax laws and the practice of most other states. The bill permits admission of members to a limited liability company without making a capital contribution and admission as a general partner to a limited partnership without making a capital contribution. In a change also made by the Code, the bill eliminates certain inconsistent voting provisions in the Texas Limited Liability Company Act. Less formal decision making in limited liability companies is also recognized through authorization of consent by knowing silence and by any manner specified in the articles of organization or regulations. The bill also provides for improvements to provisions dealing with the filing procedures of foreign limited liability companies as suggested by the Office of the Texas Secretary of State and amends the partnership acts to clarify the authorization of the abbreviations "LP" and "LLP" (without periods). Finally, the bill amends the Government Code to require the Secretary of State to maintain a public record of instruments filed with it evidencing the organization of any Texas entity in order to clarify the interaction with the definition of "registered organization" in chapter 9 of the Uniform Commercial Code as adopted in Texas. This crucial definition establishes the office in which financial statements must be filed to perfect a security interest for entities formed by a filing of an organizational document.

BUSINESS & COMMERCE CODE BILLS

Revised Uniform Commercial Code Article 1, H.B. No. 1394, by Elkins (R – Houston); Senate Sponsor: Williams (R – The Woodlands)

H.B. 1394 adopts revised Uniform Commercial Code Article I as proposed, with one exception, by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Law Institute ("ALI"). Article 1 contains the "General Provisions" of the UCC. Most of the remainder of the Texas version of the UCC in the Texas Business & Commerce Code ("TBCC") has been substantially revised in the past decade in accordance generally with the uniform revised version of the UCC approved by NCCUSL and ALI. The bill, however, retains and does *not* amend the existing choice of law provisions in the TBCC and rejects the more liberal choice of law provisions contained in the uniform version.

The bill clarifies the interaction between the UCC and the federal Electronic Signatures in Global and National Commerce Act. The definition of "good faith" is revised, except as otherwise provided in Chapter 5 of the TBCC, to add the objective standard of "observance of reasonable commercial standards of fair dealing" to the existing subjective standard of "honesty

in fact." This conforms the definition with revised Articles 3, 4, 4A, 8 and 9 of the UCC. The statute of frauds provision in former UCC Article 1 was deleted because the subsequent articles of the UCC already addressed that issue. The definition of "record" is added to cover information stored, transmitted or displayed through electronic media. Finally, the bill integrates the "course of performance" concept from UCC Articles 2 and 2A into the "course of dealing" and "usage of trade" concepts of existing UCC Article 1.

Uniform Commercial Code Article 9 Amendment, S.B. No. 995, by Williams (R – The Woodlands); House Sponsor: Solomons (R – Carrollton)

This bill made technical amendments to Chapter 9 of the Uniform Commercial Code as recommended by NCCUSL. One additional substantive amendment is intended to restore prior law that provided a deed of trust covering as-extracted collateral or timber to be cut does not require a continuation statement to be refiled every five years to maintain its effectiveness as a financing statement.

Financing Statements, H.B. No. 3414, by Marchant (R – Carrollton); Senate Sponsor: Brimer (R - Tarrant)

H.B. 3414 is effective January 1, 2004. The bill deletes TBCC Section 9.521 which specified the exact standard forms the filing office could not refuse to file. It replaces that section with new nonuniform Section 9.5211 to require a filing office to accept for filing an "industry standard form," including a national standard form or a form approved by the International Association of Commercial Administrators. The form must be adopted by rule by the Secretary of State. TBCC Section 9.516(b) is amended by the bill to authorize the Secretary of State to refuse to file a record that is not on an industry standard form adopted by rule of the Secretary of State.

Unsolicited Electronic Mail Messages, H.B. No. 1282, by McCall (R – Plano); Senate Sponsor: Duncan (R – Lubbock)

H.B. 1282 is effective September 1, 2003. The bill adds new Chapter 46 to the Business & Commerce Code to regulate unsolicited commercial electronic messages, or "e-mails." Unsolicited commercial e-mails may not be sent under another person's domain name without that domain name owner's permission, and must include the letters "ADV," or if the e-mail includes obscene material, the phrase "ADV: Adult Advertisement," at the first part of the subject line of the message. Criminal penalties are introduced for sending messages containing obscene material or material depicting sexual conduct in violation of this law. The bill adds civil penalties and confirms that a violation constitutes an actionable deceptive trade practice. The sender of the unsolicited e-mail must remove the person's e-mail if a person requests removal and must provide a functioning return e-mail address for the recipient to request the removal.

CORPORATE FRAUD BILLS

S.B. 1059, by Ellis (D – Houston); House Sponsor: Marchant (R – Carrollton)

S.B. 1059 is effective September 1, 2003. This bill was originally a much larger bill, but various portions of the bill were objectionable to a number of parties and were deleted from the

final bill. The bill creates a "corporate integrity unit" within the office of the attorney general to assist in the enforcement of the laws relating to corporate fraud or other similar illegal activities. Another provision amends the Government Code to require state governmental entities to establish ethics and disclosure requirements for outside financial advisors or service providers who provide financial services or advise the state governmental entity on the management or investment of state funds.

H.B. 2040, by Marchant (R – Carrollton); Senate Sponsor: Ellis (D – Houston)

H.B. 2040 was effective on signing by the Governor on June 20, 2003. This bill authorizes information sharing by Texas governmental agencies for investigative purposes. The affected agencies are the Attorney General, the Texas Department of Insurance, the Texas State Board of Public Accountancy, the Public Utility Commission of Texas, and the State Securities Board. The information being shared must relate to a person who is licensed or otherwise regulated by any of those state agencies. The state agency that receives the shared information must keep the information secure and limit access to the information within the agency to personnel who need access for investigative purposes. There are other restrictions imposed on the information disclosures.

S.B. 1060, by Ellis (D – Houston); House Sponsor: Marchant (R – Carrollton)

S.B. 1060 was effective on signing by the Governor on May 20, 2003. This bill provides various enforcement tools for improper investment securities sales. The definition of security is clarified to apply regardless of whether the security is evidenced by a written instrument. The Securities Commissioner is authorized to provide assistance to a securities regulator of another jurisdiction who requests assistance in conducting an investigation about a violation of the other jurisdiction's securities laws. The Commissioner may assist by investigating or using any other power conferred on the Commissioner as he or she determines is necessary or appropriate. The bill creates a new crime for rendering services as an investment advisor without being registered as required by the Securities Act. The offense is a felony and subject to a fine of not more than \$5,000 and imprisonment for not less than two or more than 10 years. For violations of the Securities Act, the remedies available to the Attorney General or a court have been expanded to include any equitable relief in addition to restitution. The Attorney General may also seek the disgorgement of any economic benefit gained by the defendant through fraudulent conduct, including a bonus, fee, commission, option, proceeds, profit from or loss avoided through the sale of a security or any other tangible benefit.

OTHER BILLS

Required Notice in Deeds or Deeds of Trust, H.B. No. 2930, by Lewis (D – Fort Worth); Senate Sponsor: Madla (D – San Antonio)

H.B. 2930 is effective September 1, 2003; however, the provisions of the bill only apply to a deed, mortgage, or deed of trust executed on or after January 1, 2004. The bill requires the following notice to be inserted on the first page of any deed, mortgage or deed of trust to or from an individual in 12-point bold face or uppercase type: "Notice of Confidentiality Rights: If you are a natural person, you may remove or strike any of the following information from this

instrument before it is filed for record in the public records: Your social security number or your driver's license number." Failure to include the notice will be cause for the county clerk to reject the recordation of the instrument.

**Conditional Payment of Delinquent Taxes, H.B. No. 2148, by Gattis (R – Georgetown);
Senate Sponsor: Wentworth (R – San Antonio)**

H.B. 2148 was effective upon its signing by the Governor on June 20, 2003. The bill voids any restriction or condition placed on a check in payment of delinquent taxes by the maker that purports to limit the amount of delinquent taxes, penalties or interest owed. Thus, taxpayers cannot tender a "full payment" check to resolve a dispute with a taxing authority in Texas.

**Repurchase of Eminent Domain Property, S.B. No. 1708, by Wentworth (R – San Antonio);
House Sponsor: Baxter (R – Austin)**

S.B. 1708 is effective January 1, 2004. The bill permits an owner or the owner's heirs, successors or assigns to repurchase a property acquired by a governmental entity through eminent domain proceedings if the public use for which it was acquired was canceled before the 10th anniversary of the date of acquisition. The right does not apply to a right-of-way under the jurisdiction of a county, municipality or the Texas Department of Transportation. The property must be repurchased at fair market value at the time the public use was canceled. Certain notices and time limits are specified by the bill.

**Electronic Communications with Appraisal Districts, S.B. No. 340 and 1833, by Staples (R -
Palestine); House Sponsor: Christian (R – Center)**

S.B. 1833 authorizes electronic communications between taxpayers and appraisal districts, taxing units or other tax officials. This bill is a short version of S.B. 340, which also was passed. S.B. 340 contains many changes to the Tax Code to permit notices and communications between taxpayers and appraisers to be in electronic media. The Comptroller is given the authority to prescribe formats and means of communication. Most of the provisions of this bill take effect on January 1, 2005, except that in counties with population of 500,000 or less, the bills take effect on January 1, 2006. Several amendments contained in S.B. 340 take effect on September 1, 2003.