

**SUPPLEMENT NO. 6 TO THE REPORT OF THE LEGAL
OPINIONS COMMITTEE REGARDING LEGAL OPINIONS
IN BUSINESS TRANSACTIONS:**

**STATEMENT ON CHANGES TO THE PROCEDURE FOR
GOOD STANDING CERTIFICATES ISSUED BY
THE TEXAS COMPTROLLER OF PUBLIC ACCOUNTS**

Legal Opinions Committee of the Business Law Section
of the State Bar of Texas

This Statement (this “Supplement No. 6”) by the Legal Opinions Committee of the Business Law Section of the State Bar of Texas (the “Committee”)¹ addresses the recent announcements of the Texas Comptroller of Public Accounts (the “Comptroller”) that the Comptroller has revised the definition of “good standing” for franchise tax purposes and that

¹ This Statement has been prepared by a Subcommittee of the Legal Opinions Committee of the Business Law Section of the State Bar of Texas consisting of the following members: Stephen C. Tarry (Chair), Bruce A. Cheatham, Byron F. Egan, Frank T. Garcia, Roderick A. Goyne, David R. Keyes, Gail Merel, Scott G. Night, Stan Pieringer, Daryl B. Robertson, Richard A. Tulli, and Geoffrey K. Walker. This Statement was approved by the Committee on July 25, 2013.

The Committee has published a report and a statement regarding third-party legal opinions under Texas law. See Legal Opinions Committee of the Business Law Section of the State of Texas, *Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions*, BULLETIN OF THE BUSINESS LAW SECTION OF THE STATE BAR OF TEXAS, (Special Issue) June—September 1992, at 1 (the “Texas Legal Opinions Report”). The Texas Legal Opinions Report has been supplemented on five occasions (collectively, the “Supplements”): Legal Opinions Committee of the Business Law Section of the State Bar of Texas, *Supplement No. 1 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions*, BULLETIN OF THE BUSINESS LAW SECTION OF THE STATE BAR OF TEXAS, December 1994, at 1 (addressing certain Texas usury law issues); Legal Opinions Committee of the Business Law Section of the State Bar of Texas, *Supplement No. 2 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions*, BULLETIN OF THE BUSINESS LAW SECTION OF THE STATE BAR OF TEXAS, Spring 2001, at 1 (addressing Texas opinions regarding security interests in investment property collateral); Legal Opinions Committee of the Business Law Section of the State Bar of Texas, *Supplement No. 3 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions: Statement on Legal Opinions Regarding Indemnification and Exculpation Provisions under Texas Law*, 41 TEX. J. BUS. L. 271 (Winter 2006) (addressing Texas legal opinions regarding indemnification and exculpation provisions); Legal Opinions Committee of the Business Law Section of the State Bar of Texas, *Supplement No. 4 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions: Statement on ABA Principles and Guidelines*, 43 TEX. J. BUS. L. 1 (Spring 2009) (addressing the *Legal Opinion Principles* and the *Guidelines for the Preparation of Closing Opinions* published by the Committee on Legal Opinions of the Business Law Section of the American Bar Association); and Legal Opinions Committee of the Business Law Section of the State Bar of Texas, *Supplement No. 5 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions: Statement on Entity Status, Power and Authority Opinions Regarding Pre-Code Texas Entities and Pre-Code Registered Foreign Entities under the Texas Business Organizations Code*, 45 TEX. J. BUS. L. 1 (Fall 2012) (addressing whether the application of the Texas Business Organizations Code has affected certain legal opinions commonly given in commercial transactions as such opinions relate to entities formed or registered to transact business in Texas prior to January 1, 2010). The Committee also published a statement regarding the Texas Supreme Court’s decision in 1999 concerning the liability of Texas lawyers for negligent misrepresentation, *Limiting Negligent-Misrepresentation Liability for Third-Party Legal Opinions*, 38 TEX. J. BUS. L. 20 (Winter 2003). The Texas Legal Opinion Report and the Supplements are available electronically at the website of the Business Law Section of the State Bar of Texas at <http://www.texasbusinesslaw.org/committees/legal-opinions>.

Certificates of Account Status (sometimes referred to as Certificates of Good Standing) will no longer be available from the Comptroller's Office. Instead of issuing Certificates of Account Status, the Comptroller will now provide information regarding an entity's franchise tax status through an online search mechanism, which will no longer set out a specified future date through which the information so provided will remain valid.

In summary, the Committee has concluded that, without further inquiry and without obtaining any additional certificate or other writing (other than a Certificate of Fact from the Texas Secretary of State showing that the entity is in existence) and without taking any related qualification or exception in a legal opinion, an opinion giver may rely on the Comptroller's online search mechanism to determine the status of an entity's Texas franchise tax account and to render a good standing opinion if the search mechanism expressly states that the entity's right to transact business in Texas is "active".

A. Rendering a Good Standing Opinion Under the Comptroller's New Procedure

Prior to the recent changes, under the Comptroller's prior procedure, "being 'in good standing' . . . meant that all franchise tax filing requirements had been met and no franchise tax was due".² Under the Comptroller's new procedure, "being 'in good standing' for franchise tax [purposes] will mean that [a taxable entity's] right to transact business in Texas is intact".³ Pursuant to the Texas Tax Code, for franchise tax purposes, a taxable entity's right to transact business in Texas is intact if that right has not been forfeited as a result of the entity's failure to file a franchise tax report or to pay a franchise tax. The Texas Tax Code also provides that the Comptroller is required to forfeit a taxable entity's right to transact business in Texas if the entity does not file its franchise tax reports or pay its franchise taxes within forty-five days after the date on which the Comptroller mails a notice of delinquency to the entity.⁴

² *Franchise Tax Account Status*, TAX POLICY NEWS (April 2013). *Tax Policy News* is the Comptroller's newsletter. For a more detailed description of the changes to the Comptroller's good standing procedure, *see Part B, infra*.

³ "Good Standing" Account Status – Changes are Coming, TAX POLICY NEWS (January 2013). The Comptroller's updated definition of "good standing" is consistent with the typical meaning of the term "good standing" as described in the TriBar Closing Opinions Report (as hereinafter defined) and the Texas Legal Opinions Report. TriBar Opinion Committee, *Third-Party "Closing" Opinions*, 53 BUS. L.W. 592, 646 (Feb. 1998) (hereinafter, the "TriBar Closing Opinions Report") ("[g]ood standing opinions have been said to provide the opinion recipient comfort that a corporation's charter is not subject to revocation for failure to keep its state filings current"); Texas Legal Opinions Report, *supra* note 1, at 83 ("[a]n opinion with respect to the 'good standing' of a corporation means that the entity is in existence and is not delinquent in its filings of franchise tax returns to the extent that the State is entitled to revoke its corporate status").

⁴ Under Sections 171.251 and 171.2515 of the Texas Tax Code, the Comptroller is required to forfeit the rights of a taxable entity to transact business (or, in the case of a corporation, to forfeit the corporation's corporate privileges) in Texas if the entity (a) does not file, in accordance with Chapter 171 of the Texas Tax Code and within 45 days after the date on which the Comptroller mails a notice of forfeiture to the taxable entity, a report required by Chapter 171, or (b) does not pay, within 45 days after the date on which the Comptroller mails a notice of forfeiture to the taxable entity, a tax imposed by Chapter 171 or a penalty imposed by Chapter 171 relating to such tax. Under the provisions of Section 171.252, if the privileges of a corporation are forfeited (x) the corporation shall be denied the right to sue or defend in a Texas court, and (y) each director and officer of the corporation becomes liable for certain debts of the corporation. As to entities other than corporations, Section 171.2515(b) of the Texas Tax Code provides that the provisions that apply to the forfeiture of corporate privileges also apply to the forfeiture of a taxable entity's right to transact business in Texas.

Prior to the recent changes in procedure, the Comptroller issued Certificates of Account Status in response to inquiries about the status of the franchise tax account of a taxable entity. Each Certificate of Account Status contained a statement that the Certificate was valid through a specified future date on which the entity's next franchise tax report would be due.

Under the new changes in procedure, the Comptroller has indicated that, as of May 5, 2013, the Comptroller's Office will respond to inquiries regarding franchise tax account status for taxable entities by providing the status of the taxable entity's right to transact business in Texas through an online search mechanism that is available on the Comptroller's website.⁵ In response to such an online search as to a specific entity, the Comptroller's website produces a printable page bearing the heading "Franchise Tax Account Status", which is dated as of a particular date and time. If a taxable entity's right to transact business in Texas has not been forfeited as a result of the entity's failure to file a franchise tax report or to pay a franchise tax, the page shows that the taxable entity's right to transact business in Texas is "active". The printable page that results from such an online search is herein referred to as a "Statement of Franchise Tax Account Status". Unlike the prior Certificate of Account Status, the new Statement of Franchise Tax Account Status does not specify that the Statement is valid through a future date. In addition, the new Statements of Franchise Account Status are not acceptable for filings with the Texas Secretary of State.⁶

It is common for legal opinions rendered in connection with the closing of business transactions to include a statement that an entity is "in good standing" under the laws of its state of organization. As to the meaning of the term "good standing", the TriBar Closing Opinions Report concludes that while the meaning varies from state to state, there is a commonly accepted definition:

When used in an opinion, the term "good standing" is understood as a matter of customary usage to cover the matters addressed by the certificates of government

Section 171.256 of the Texas Tax Code provides that if the Comptroller proposes to forfeit the rights of a taxable entity to transact business in Texas, the Comptroller must notify the entity that the forfeiture will occur without a judicial proceeding unless, within the time periods established by Section 171.251, the entity files the overdue franchise tax reports or returns and/or pays the delinquent taxes, penalties or interest. Under the provisions of Section 171.258 of the Texas Tax Code, the Comptroller must revive the rights of a taxable entity to transact business in Texas if the taxable entity, before the forfeiture of its charter or certificate of authority, pays any tax, penalty, or interest due under Chapter 171.

Subchapter G of Chapter 171 of the Texas Tax Code contains the procedures by which the Comptroller may cause the forfeiture of a taxable entity's charter or certificate of authority if the taxable entity does not pay, within 120 days after its right to transact business in Texas is forfeited under Sections 171.251 and 171.2515, the amount necessary to revive its right to transact business as provided in Section 171.258 of the Texas Tax Code.

⁵ For information regarding the Comptroller's changes in procedure, see the following statement on the Comptroller's website: <http://www.window.state.tx.us/taxinfo/coasintr.html> (hereafter referred to as the "Comptroller's Information on Good Standing"). The online franchise tax account status search mechanism that is now available on the Comptroller's website can be found at the following web address: <https://ourcpa.cpa.state.tx.us/coa/Index.html>.

⁶ To obtain a Comptroller's certificate of account status for filing with the Texas Secretary of State, which is required when an entity intends to terminate its legal existence, Comptroller's Form 05-359 (*Request for Certificate of Account Status to Terminate a Taxable Entity's Existence in Texas or Registration*) must be completed and transmitted to the Comptroller's Office.

officials that lawyers in the jurisdiction in question customarily obtain to support the opinion.⁷

The TriBar Closing Opinions Report also provides that “[g]ood standing opinions customarily are based solely on certificates of government officials . . .”⁸ The Committee agrees with and adopts the forgoing conclusions of the TriBar Closing Opinions Report. The Committee also agrees with the conclusion of the TriBar Closing Opinions Report that “because opinion preparers customarily do nothing more than rely on certificates of government officials (which are normally presented at closing), good standing opinions usually add little of value analytically” and that “[i]n situations in which the benefits of good standing opinions are marginal, . . . the opinion process could be streamlined if opinion recipients were to refrain from requesting them and relied on the certificates alone.”⁹

In the information provided by the Comptroller regarding the changes in the good standing procedure, the Comptroller indicates that the online search procedure and the resulting Statement of Franchise Tax Account Status are intended to be responsive “to inquiries about the status of an entity’s franchise tax account” and “accomplish the same purposes” as the prior Certificate of Account Status, although the Statement is neither expressly presented nor formulated as a certificate.¹⁰ In light of the Comptroller’s explanation of the changes in procedure, the Committee believes that, as to a taxable entity that is subject to Texas franchise taxes:

- (1) an opinion giver may use the Comptroller’s online search mechanism to determine the status of the entity’s franchise tax account as of the date, or shortly before the date, on which the good standing opinion is rendered; and
- (2) if the resulting Statement of Franchise Tax Account Status expressly states that the entity is “active”, the opinion giver may, without further inquiry and without obtaining any additional certificate or other writing (other than a Certificate of Fact from the Office of the Texas Secretary of State showing that the “entity status in Texas is in existence”)¹¹ and without taking any related qualification or

⁷ TriBar Closing Opinions Report, *supra* note 3, at 645. *See also* Donald W. Glazer, Scott FitzGibbon and Steve O. Weise, *GLAZER AND FITZGIBBON ON LEGAL OPINIONS* 231 (3rd ed. 2008) (a good standing opinion “normally is based entirely on a certificate presented at closing, and as a matter of customary practice, the opinion is understood to mean whatever the certificate means”).

⁸ *Id.* The Texas Legal Opinions Report reaches the same conclusion:

The “good standing” opinion is usually rendered based solely on recently dated certificates of public officials. It is not necessary to state in the opinion that the attorney has relied solely on those certificates in rendering the “good standing” opinion since that is the customary practice and the recipient of the opinion is entitled to no further investigation on this point.

Texas Legal Opinions Report, *supra* note 1, at 84.

⁹ *Id.* at 645-646.

¹⁰ Comptroller’s Information on Good Standing, *supra* note 5.

¹¹ If the Office of the Texas Secretary of State will not issue a Certificate of Fact indicating that an entity is in existence, then prior to rendering a good standing opinion as to that entity, an opinion giver will need to address appropriately the matters that resulted in the entity’s existence no longer being recognized by the Secretary of State.

exception in a legal opinion, rely upon such Statement in rendering an opinion that the entity is in good standing under the laws of State of Texas as of the date of such Statement.

To the extent that the Texas Legal Opinions Report is inconsistent in any respect with the foregoing, the Texas Legal Opinions Report is hereby amended by the provisions of this Supplement No. 6.

If, notwithstanding the foregoing, an opinion giver wants to include an express qualification in a legal opinion regarding reliance on a Statement of Franchise Tax Account Status, an opinion giver might consider language similar to the first sentence set forth below. If, for any reason, an opinion giver also wants to further explain the recent changes in the Comptroller's good standing procedure, the opinion giver might consider the language in the second sentence.

In rendering our opinion in paragraph [insert paragraph number] above as to the good standing of [insert name of entity] in Texas, we have relied solely upon a statement of Franchise Tax Account Status dated as of [insert date of Statement of Franchise Tax Account Status] obtained through the website of the Office of the Comptroller of Public Accounts of Texas, which statement expressly states that, as of the date thereof, the right of [insert name of entity] to transact business in Texas is "active". We note that effective as of May 5, 2013, the Comptroller's Office changed its procedure so that the terms "good standing" and "active" now mean that a relevant taxable entity's right to transact business in Texas has not been forfeited by the Comptroller's Office because of the entity's failure to file franchise tax reports or pay franchise taxes; prior to this change in procedure, the term "good standing" meant that all franchise tax filing requirements had been met and no franchise tax was due.

However, for the reasons outlined above, the Committee believes that the inclusion of either or both of these sentences in a Texas good standing opinion is unnecessary since such an opinion is customarily rendered solely on the basis of information provided by government officials without the need for any further qualification or explanation.

B. Description of Changes to Comptroller's Good Standing Procedure

Opinion givers and opinion recipients may want to know more about the specifics of the changes in the good standing procedure that the Comptroller has implemented. Knowledge of the effects of these changes may, among other things, be of concern in drafting representations and warranties in transaction documents regarding the filing of Texas franchise reports and the payment of Texas franchise taxes.¹² Set forth below is a description of the Comptroller's procedure both before and after giving effect to the recent changes.

In the Committee's experience, it is rare for an opinion to cover the good standing of an entity without also covering the existence of the entity.

¹² It is not unusual for credit agreements and other transaction documents to contain general representations regarding the filing of tax returns and the payment of taxes. If the parties desire to include more specific language

As is noted above, the Comptroller's change in its good standing procedure reflects a modification of the Comptroller's views regarding the definition of the term "good standing". Under the procedure in effect prior to May 5, 2013, the Comptroller concluded that an entity was "in good standing" and could therefore obtain a Certificate of Account Status when all of the entity's franchise tax filing requirements had been met and no franchise tax was due from the entity.¹³ Under the Comptroller's old procedure, during the peak franchise report filing periods, the Comptroller changed the status of all franchise tax accounts to "Temporary Good Standing" in order to allow the Comptroller's office sufficient time to process all of the franchise tax reports. While an entity was in "Temporary Good Standing", the Comptroller would not generally issue a Certificate of Account Status stating that the entity was in good standing.¹⁴ Once the franchise tax report for an entity was processed, the entity's status would then change to either "good standing" or "not in good standing". The "not in good standing" status meant, among other things, that the entity's required franchise tax reports had not been properly filed or the appropriate amount due (tax, penalty or interest) had not been paid. Once an entity was placed into the "good standing" category, that entity would have remained in good standing through the date on which the entity's next franchise tax report or payment was due. Thus, under the old procedure, the Comptroller would not generally issue a Certificate of Account Status for an entity if that entity had failed to file its franchise tax reports when such reports were due or had failed to pay any amounts owed in connection with such reports.¹⁵

In the Comptroller's newsletter published in January of 2013, the Comptroller announced that "changes are coming" to the Comptroller's "good standing" account status procedure:

Businesses have been reporting under the revised franchise tax since 2008. Due largely to the complications of combined reporting, companies can be "not in good standing" due to a reporting error, not a tax delinquency. A "not in good

regarding Texas franchise taxes, the following representations could be considered to take account of the Comptroller's changes in procedure:

- (a) the company has not received a notice from the Texas Comptroller of Public Accounts or any other governmental official stating that the company's right to transact business in Texas has been terminated or that the Texas Comptroller of Public Accounts or such other official intends or proposes to terminate the company's right to transact business in Texas;
- (b) no law suit or other legal proceeding has been filed in the State of Texas seeking to terminate or revoke the company's charter or certificate of authority; and
- (c) the company has duly and timely filed all franchise tax reports and returns required under Texas law and has duly and timely paid all franchise taxes that are due and owing under Texas law, in each case on or before the due date thereof.

¹³ *Franchise Tax Account Status*, TAX POLICY NEWS (April 2013).

¹⁴ In the case of an entity that had filed its franchise tax reports and paid all amounts owed thereunder, but was still shown to be in "Temporary Good Standing" because the Comptroller had not processed the entity's franchise tax reports, the Comptroller did offer assistance to the entity when a Certificate of Status was necessary in order to close a transaction or receive a license or permit.

¹⁵ The description of the Comptroller's old procedure for good standing matters as set forth in this paragraph is based upon various documents that have been posted on the Comptroller's website.

standing” status can be costly to a company conducting a business or financial transaction.

The Comptroller took another look at good standing in light of concerns from businesses. The result of that review is that being “in good standing” for franchise tax will mean that the company’s right to transact business in Texas is intact.

The Comptroller further noted that “[b]eing in good standing has evolved over the years, as we made changes to accommodate processing times and filing requirement changes” and that “this new definition means that a business will receive a written notice of any issues with its franchise tax filing and will have at least 45 days to cure those issues, before the business is not in good standing”.¹⁶

In summary, under the old procedure, the Comptroller’s issuance of a Certificate of Account Status certifying that an entity was “in good standing” meant that the entity’s franchise tax reports had been filed and that all franchise taxes owed by the entity had been duly paid. Under the new procedure, a Statement of Franchise Tax Account Status procured from the Comptroller’s website will show that an entity’s right to transact business in Texas is “active” even if the entity has failed to file its franchise tax reports or failed to pay the franchise taxes it owes, so long as the Comptroller has not forfeited the entity’s right to transact business in Texas. Under the relevant provisions of the Texas Tax Code, the Comptroller may forfeit the entity’s right to transact business no earlier than 45 days after the Comptroller sends a notice of the proposed forfeiture to the entity stating that the entity continues to be delinquent in filing its franchise tax reports or in paying its franchise taxes.

¹⁶ “Good Standing” Account Status – Changes are Coming, TAX POLICY NEWS (January 2013). As is discussed in greater detail in footnote 4 above, in the case of an entity that fails to timely file a franchise tax report or to pay franchise taxes when due, the Comptroller may forfeit that entity’s right to transact business in Texas only if 45 days have passed since the Comptroller gave the entity notice of the proposed forfeiture.