# The Basics from the Secretary of State's Office

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## I. NAME AVAILABILITY

One of the first hurdles a practitioner must overcome is the secretary of state's review of the business entity name selected by the client. The availability of an entity name remains the most frequently deliberated, and heavily contested, reason for rejection of a filing instrument.

### A. Entity Name Standards

1. Section 5.053 of the Business Organizations Code (BOC) sets forth the general standards for name availability, namely, that a filing entity may not have a name that is the same as, or that the secretary of state determines to be deceptively similar or similar to a name of another existing filing entity or an entity name that is reserved or registered with the secretary of state. The administrative rules used to determine the availability of entity names are contained in §§79.30-79.54 of Title 1, Part Four of the Texas Administrative Code (TAC) and may be viewed at www.sos.state.tx.us/tac/index.html.

2. Chapter 79 rules apply to all name availability determinations made for foreign and domestic corporations (for-profit, professional, and nonprofit), limited liability companies, limited partnerships, as well as professional associations. See 1 TAC §§79.30 and 79.50 to 79.52.[1] These sections do not apply to limited liability partnerships. Section 5.063 of the BOC does not require the secretary of state to determine the availability of a limited liability partnership's name.

3. There are three categories of name similarity:[2]

a. Names that are the same; that is, a comparison of the names reveals no differences. (1 TAC §79.36)

b. Names that are deceptively similar; that is, a comparison of the names reveals an apparent difference but the difference is such that the names are likely to be confused. (1 TAC §79.37) In accordance with 1 TAC §79.39, if any of the following conditions exist a proposed name is deceptively similar to that of an existing entity:

(1) The difference in the names consists in the use of different words or abbreviations of incorporation or organization[3] (e.g., *China Silk Ltd., LLC* vs *China Silk, LP*);

(2) The difference in the names consists in the use of different articles, prepositions, or conjunctions (e.g., *El Matador Inc.* vs *Matador Ltd.*);

(3) The difference in the names consists in the appearance of periods, spaces, or other spacing symbols that do not alter the names sufficiently to make them readily distinguishable (e.g., *ABC Co.* vs *A/B•C LLC*);

(4) The difference in names consists of the use of common abbreviations or acronyms for the same term (e.g., *DFW Rentals, LLC* vs *Dallas-Ft. Worth Rentals, Ltd.*);

(5) The names are spelled differently or use alternative symbols, but are phonetically similar or equivalent (*L8R G8R Ltd.* vs *Later Gator LLC*); or

(6) The difference in the name consists in the presence or absence of letters that do not alter the names sufficiently to make them readily distinguishable. This may include the use of singular, plural or possessive terms. (e.g., *Cole Cabinets LLC* vs *Cole's Cabinets Co.*)

c. Names that are similar and require the written consent of another entity or person; that is, a comparison of the names reveals similarities that may tend to mislead as to the identity or affiliation of the entity. (1 TAC §79.40) In accordance with 1 TAC §79.43, if any of the following conditions exists, a name is similar and a written consent is required:

(1) The proposed name is the same as or deceptively similar to another name except for a geographical designation at the end of the name (e.g., *Acme LLC* vs *Acme Southwest Ltd.*);

(2) The first two words of the proposed name are the same as or deceptively similar to another name and those words are not frequently used in combination (e.g., *Summit Energy Co.* vs *Summit Energy Resources LP*);

(3) The proposed name is the same as or deceptively similar to another name except for a numerical expression that implies that the proposed name is an affiliate or in a series with another entity (e.g., *United Co.* vs *United II LLC*);

(4) The proposed name uses the same words as another name but the words are in a different order (e.g., *Ballet Austin* vs *Austin Ballet*);

(5) The proposed name is the same as or deceptively similar to another name except for an Internet locator designation at the end or at the beginning of the name (e.g., *www.Business Solutions LLC* vs *Business Solutions Co.*); or

(6) The difference in names consists of words or contractions of words that are derived from

the same root word and there is no other distinguishing word in the name (e.g., *ABC Electric Co* vs *ABC Electrical LLC*).

4. Written consent to use of a similar name is only an option when the proposed name and the entity name on file are considered *similar*. The secretary of state will not file a proposed name that is the same as or deceptively similar to an existing entity even if the existing entity is a related entity or an entity willing to provide written consent.[4]

5. An oral consent is not acceptable; however, an e-mail consenting to the use of a similar name will be accepted in the same manner as a letter or attachment containing an original signature. An acceptable e-mail consent must identify in some way that it is from the consenting entity (URL, e-mail address, name and address beneath the signature block, etc.) and include the typed signature of an officer or authorized agent of the consenting entity.

6. Consent can be given in any written format; however, SOS form 509 may be used by the holder of an existing name to consent to the use of a similar name. Use of this form is permissive.

**B. Name Clearance—A Trap for the Unwary**

1. Formation under a given name does not give the newly organized entity the right to use the name in violation of another person's rights. In fact, the certificate issued by the secretary of state to a domestic filing entity under the BOC specifically includes a statement that the issuance of the certificate of filing for the formation of an entity or the reservation of an entity name does not authorize the use of the entity name in this State in violation of the rights of another under the federal Trademark Act of 1946 (15 U.S.C. Section 1501 et. seq.), the Texas trademark law (Chapter 16, Texas Business & Commerce Code), or the common law. This restatement of the common law[5] is codified in section 5.001 of the BOC.

2. When the secretary of state is requested to give advice about the availability of an entity name, the secretary of state is reviewing only the names of active domestic and foreign filing entities, as well as name reservations and name registrations on file with the secretary of state. The secretary of state does not consider state or federal trademark registrations, assumed names filed with the county or the secretary of state under chapter 71 of the Texas Business & Commerce Code, names of limited liability partnerships registered with the secretary of state, or other sources that might indicate common law usage or reveal possible trade name or trademark infringement.

**C. Troublesome Words**

Not all entity name issues involve an existing conflicting entity name. Other statutory provisions may prohibit or place restrictions on the use of terms within a business name.

1. Words that might imply a purpose for which the entity could not be organized should not be included in a business entity name.[6] These troublesome words include:

a. *Insurance* must be accompanied by other words, such as *agency*, that remove the implication that the purpose of the entity is to be an insurer.[7]

b. *Bail bonds* and *surety* imply that the entity has insurance powers and should be formed under the Texas Insurance Code.

c. *Bank* and derivatives of that term may not be used in a context that implies the purpose to exercise the powers of a bank.[8] The Department of Banking can advise you on the use of the words *bank*, *banc* and the like and will issue you a letter of no objection for use when filing documents with the secretary of state.[9]

(1) Persons seeking a letter of no objection are to contact the Corporate Activities Division of the Texas Department of Banking.

(2) Submission of a written request and provision of certain information, together with a $100 filing fee, is required for consideration of the proposed name regardless of whether approval is granted. Please note that submission of the materials and fee is not a guarantee that the name will be approved. You may wish to contact the Corporate Activities Division of the Department of Banking for current processing time for a letter of no objection.

d. *Trust* generally implies that the entity has trust powers; accordingly, prior approval of the Department of Banking is required. A foreign business trust or foreign real estate investment trust registering under the provisions of the BOC that utilizes the term *trust* in its name is not required to obtain a letter of no objection for purposes of filing the application for registration.

e. *Cooperative* and *Co-op* should be used only by an entity operating on a cooperative basis.[10] A firm or business that uses such terms in its business name or that represents itself as conducting business on a cooperative basis when not authorized by law to do so commits an offense. The offense is classified as a misdemeanor that is punishable by the imposition of fines or by confinement in the county jail or both.

f. *Perpetual care* or *endowment care*, or any other terms that suggest "perpetual care" or "endowment care" standards, should only be used in the name of a cemetery that operates as a perpetual care cemetery in accordance with chapter 712 of the Health & Safety Code.[11]

2. Use of some words in an entity name may require that a licensed professional be associated with the entity.

a. Entities using *engineer, engineering,* or *engineered* in the entity name should be engaged in the practice of engineering and its engineering services performed by an individual licensed by the Texas Board of Professional Engineers.[12]

b. Entities using *architect, architecture, landscape architect*, or *landscape architecture* should determine from the Texas Board of Architectural Examiners whether such use is in violation of the statues applicable to architects.[13]

c. Entities using *public surveying* in their name should determine from the Texas Board of Professional Land Surveying whether such use complies with the statutes applicable to surveyors.[14]

3. Some words require prior approval.

a. Entities desiring to use the terms *college, university, school of medicine, medical school, health science center, school of law, law school, law center, and words of similar meaning* must obtain prior approval of the Texas Higher Education Coordinating Board.[15]

b. Entities desiring to use the terms *veteran, legion, foreign, Spanish, disabled, war* or *world war* in a manner that might imply that the entity is a veterans organization should obtain written approval from a Congressionally recognized veterans organization.[16]

4. The use of some words is prohibited.

a. A domestic or foreign filing entity may not use the term *lotto* or *lottery* in its entity name.[17]

b. State and federal law generally precludes the use of the words *olympic, olympiad, olympian,* and *olympus* unless authorized by the United States Olympic Committee.[18]

## D. Limited Partnership Name Issues

1. The BOC does not prohibit the name of a limited partnership from containing a word or phrase indicating or implying that it is a corporation as did the prior provision in the Texas Revised Limited Partnership Act.[19] While the secretary of state will not reject a limited partnership name on the grounds that it contains a word or abbreviation indicating or implying corporate status (i.e., "Incorporated," "Corporation," "Inc.," and "Corp."), be aware that section 17.46(b)(25) of the Texas Business & Commerce Code (commonly referred to as the Texas Deceptive Trade Practices-Consumer Protection Act) prohibits such use by an unincorporated entity.

2. A common reason for rejection of a limited partnership name is the similarity between the name of the partnership and the name of its general partner. An entity name is deemed deceptively similar if the only difference between the names is a difference in organizational designations. (For example, ABC LP is deceptively similar to ABC LLC.) A deceptively similar name *cannot* be filed even if written consent can be provided.

3. If a limited partnership registers as a limited liability partnership, the name of the partnership must comply with the requirements of section 5.055 of the BOC rather than section 5.063. This means that the partnership name must contain the word "limited" or the phrase "limited partnership," or an abbreviation of that word or phrase, in addition to the phrase "limited liability partnership" or an abbreviation of that phrase. However, under section 5.055(c), the name of a limited partnership that registers as a limited liability partnership complies with the naming requirements of section 5.055(a) and (b) if the name of the limited partnership contains the phrase "limited liability limited partnership" or an abbreviation of that phrase. The names "ABC, Ltd., LLP and "ABC, LLLP" comply with the requirements of section 5.055.

## E. Name Reservations

If you anticipate a delay between the client's name selection and your submission of the filing instrument, submit an application to reserve the name.

1. The BOC provisions relating to name reservations apply to all filing entity types; consequently, a name reservation may be used in connection with a document submitted by any foreign or domestic filing entity.

a. Although a name reservation is not limited to a specific entity type, the selection of a specific entity type when submitting a name reservation application in person or by mail will facilitate review of the entity name. A proposed entity name for one entity type may imply or indicate an unlawful purpose for another entity type. For example, the entity name *Derma Medical Services* implies an unlawful purpose for a for-profit

corporation, but does not imply an unlawful purpose for a professional limited liability company.

b. The filing fee for a name reservation is a standard fee of $40.

2. *Practice Tip*: Once an application for name reservation is filed, the name reservation is recorded exclusively in the name of the person named as the applicant. An application for name reservation that names the practitioner, a service company, or law firm as the applicant may result in the unexpected rejection of the certificate of formation if the secretary of state cannot determine the connection between the submitter, or parties named in the certificate of formation, and the applicant shown in the existing name reservation. Consequently, consider who should be named as the applicant of the name reservation. Pursuant to section 5.101(b) of the BOC, the application for name reservation may be signed by the applicant *or* by the agent or attorney of the applicant.

3. Section 5.105 of the BOC permits the renewal of a current name reservation. The reservation may be renewed for an additional 120-day period by filing a new application for name reservation during the 30-day period preceding the expiration of the current reservation. The BOC filing fee for a renewal of name reservation is $40.

3. The applicant of record must submit the name reservation renewal. If the renewal of reservation lists an applicant other than the applicant of record with the secretary of state, a transfer of the name reservation will be required. The fee for a transfer of name reservation is $15.

4. An applicant seeking to terminate a name reservation before the expiration of its 120-day term would file a withdrawal of the name reservation pursuant to section 5.104(2) of the BOC. There is no fee for filing a withdrawal of a name reservation. (Sec. 5.1041 BOC)

5. In general, the date of filing of a filing instrument that conforms to law is the date of its receipt by the secretary of state. (1 TAC §79.9(b)) This general rule does not apply however to an application for name reservation or to a withdrawal of name reservation. The file date of record for these filings reflects the date the secretary of state actually processed the application or withdrawal and entered the filing into the business entity database.

**F. Assumed Names**

Section 5.051 of the BOC authorizes the use of an assumed name by a domestic or foreign entity having authority to transact business in Texas.

1. The secretary of state does not check an assumed name for purposes of availability; however, the secretary of state will reject an assumed name certificate if the name shown in the certificate does not meet the definition of an assumed name. Pursuant to section 71.002(2) of the Business & Commerce Code, an assumed name is defined as:

a. for a corporation, any name other than the name stated in its certificate of formation or comparable document;

b. for a limited partnership, any name other than the name stated in its certificate of formation;

c. for a limited liability company, any name other than the name stated in its certificate of formation or comparable document, including the name of any series of the limited liability company established by its company agreement; and

d. for a limited liability partnership, any name other than the name on its application for registration or comparable document.

For this reason, a foreign filing entity that must obtain its registration under an assumed name (a/k/a "fictitious name") should not submit an assumed name certificate that attempts to list the entity's legal name as its "assumed name." Although the BOC may bar the foreign entity from obtaining a registration under its legal name, the legal name of the entity in its jurisdiction of organization is not an assumed name as defined by section 71.002(2) of the Business & Commerce Code.

3. The filing requirements for assumed name certificates for limited partnerships, limited liability companies, limited liability partnerships, and foreign filing entities are similar to filing requirements for assumed name certificates filed by an incorporated business or profession.

4. The execution requirements for assumed name certificates filed with the secretary of state differ from county level filing requirements. The execution requirements are similar to the execution requirements for other documents filed with the secretary of state. Chapter 71, Business & Commerce Code, authorizes the secretary of state to accept photocopies of originally signed assumed name documents and eliminates the notarization requirement for assumed name documents filed with the secretary of state.

5. Dual filing of the assumed name certificate is required when the entity is a corporation, limited liability company, limited partnership, limited liability partnership or foreign filing entity. An assumed name

certificate is filed with the secretary of state *and* with the county clerk.

6. An entity that maintains a registered office in this state is required to file its assumed name certificate with the secretary of state and with the county clerk of the county in which the entity's:

a. registered office is located, if the entity's principal office is not located in Texas; or

b. principal office is located, if the entity's principal office is located in Texas.

7. An entity that is not required to or that does not maintain a registered office address, such as a domestic general partnership registered as a limited liability partnership, would file its county level assumed name certificate in the county in which the entity maintains its office address.

8. Due to differences in filing requirements, the assumed name certificate form promulgated by the secretary of state (SOS form 503) should not be used to file an assumed name certificate on the county level.

9. Chapter 71 authorizes the secretary of state to accept and file an assumed name certificate for a foreign REIT, foreign business or statutory trust, or for a foreign entity that is not characterized as a corporation, limited partnership, limited liability company, or limited liability partnership. A domestic REIT is not authorized to file its assumed name certificate with the secretary of state. A domestic REIT doing business under an assumed name would follow county filing requirements established under sections 71.051-71.054 of the Business & Commerce Code.

10. Chapter 71 does not provide for the filing of a correction to an assumed name certificate. If the assumed name certificate filed contains incorrect information or a typographical error, the assumed name certificate may be abandoned and a new assumed name certificate filed.

## II. SERIES LLCS

### A. What is a Series LLC?

1. A series LLC is an LLC that provides in its governing documents for the establishment of a series of members, managers, membership interests, or assets that have separate rights, obligations, and liabilities and business purposes from the general ("master") LLC. Each individual series has the ability to sue and be sued, enter into contracts, hold title to assets, and grant liens or security interests in its assets; however, the individual series is not a separate domestic entity or organization.[20] The provisions governing a domestic series LLC may be found in subchapter M of Chapter 101, Title 3 of the BOC.

2. In order to receive the benefits of a series LLC, separate records for the assets of each series must be maintained, the company agreement must contain a statement to the effect of the limitations provided by section 101.602(a) of the BOC, and the LLC's certificate of formation must include a notice of the limitations provided by section 101.602(a).

3. The computer records of the secretary of state do not categorize or identify those LLCs that are authorized to establish a series. Consequently, the only means of determining whether a particular LLC is authorized to establish a series is to review its certificate of formation or any amendment to its certificate of formation for the notice of limitations required.

### B. Notice of Limitations

1. Notice of the limitations does not need to make reference to a specific series. The notice contained in the certificate of formation of a series LLC must state that:

a. The debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to a particular series shall be enforceable against the assets of that series only and shall not be enforceable against the assets of the LLC generally or any other series; and

b. None of the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to the LLC generally, or any other series shall be enforceable against the assets of a particular series.

2. *Practice Tip*: The authorization to establish a series is an optional provision that would be included in the certificate of formation. Because it is not a statement required for formation of the limited liability company, the secretary of state *does not* review the notice of limitations to determine whether the notice complies with section 101.602(a) of the BOC. This means that the secretary of state will not reject a certificate of formation for correction if the notice of limitations language is missing even when it appears that the submitting party may have intended to form a series LLC.

3. The secretary of state does not have a "form" for a domestic series LLC. If a practitioner decides to use

the secretary of state's general LLC form for the purpose of forming a series LLC, the notice of limitations required may be included in the "Supplemental Information" section.

### C. Other Series Issues

1. No further notice or filing is required when the LLC actually establishes a series. Nevertheless, the secretary of state will not reject a certificate of amendment that amends the certificate of formation of a series LLC to add provisions that relate to the establishment of specific series. However, as noted earlier, the secretary of state records will not reflect how many series have been established by a series LLC or whether the LLC has actually established a series under a particular name.

2. House Bill 1624, effective September 1, 2013, amended section 71.002(2) of the Business & Commerce Code to clarify that the name of a series established by a series LLC is an assumed name of the LLC. The master or parent LLC would file an assumed name certificate with the secretary of state and with the appropriate county clerk in compliance with chapter 71 of the Business & Commerce Code.

3. *Practice Tip:* When completing SOS Form 503 enter only the legal name of the parent/master LLC in item 2 of the form; do not include the name of the individual series. Inclusion of an individual series name (e.g., "*Master Development, LLC Series A"*) as the entity name of the assumed name registrant will result in a rejection of the assumed name certificate. If you wish to include the name of the individual series associated with the assumed name within the assumed name certificate, you may draft your own assumed name certificate form and include that information in a separate numbered paragraph.

4. Only a small minority of states authorize a series LLC; consequently, a person forming a series LLC should contact the filing office and tax office in the state in which the LLC contemplates transacting business to determine how the jurisdiction treats series LLCs for purposes of registration and taxation.

## III. REGISTERED AGENTS—CONSENT AND REJECTION

### A. Consent Required

1. Pursuant to section 5.201(b), a person designated as a registered agent on and after January 1, 2010 must have consented, in a written or electronic form, to act as registered agent.

2. Section 5.201(b) of the BOC requires the secretary of state to develop the form of the written or electronic consent. Pursuant to 1 TAC §79.29, an electronic or written consent should contain the following elements:

a. The name of the represented entity;
b. An express statement of consent to serve as the entity's registered agent;
c. The name of the registered agent;
d. The signature of the registered agent; and
e. The date of execution.

3. The appointment of a person as registered agent by an organizer or managerial official of an entity is an affirmation by that organizer or managerial official that the person has consented to serve in the capacity of registered agent.

4. Before the sale, acquisition, or transfer of a majority-in-interest or majority interest of the outstanding ownership or membership interests of a represented entity, the governing authority of the entity must verify whether the person designated as registered agent prior to the sale, acquisition or transfer has consented to continue to serve the represented entity in that capacity.

5. Section 5.207 provides that the liabilities and penalties imposed by sections 4.007 and 4.008 of the BOC will apply with respect to a false statement in a filing instrument that designates and appoints a person as the registered agent of an entity without that person's consent. Section 4.007 provides for damages, court costs, and reasonable attorney's fees if a person incurs a loss caused by the false statement. An offense under section 4.008 is a Class A misdemeanor unless the person's intent is to harm or defraud another, in which case, the offense is a state jail felony.

### B. Filing Not Required But Permitted

1. The signed consent of the registered agent should be sent to and retained by the represented entity. Unless otherwise required by the provisions of the BOC or other law applicable to the represented entity,[21] the consent of the registered agent is not required to be submitted with or included as part of the filing designating the registered agent ("registered agent filing").

2. The secretary of state will not reject a filing that includes the consent of agent. When a consent of registered agent is submitted with or included as part of the registered agent filing, the consent of agent will be imaged as part of the original document.

3. A consent of registered agent that is submitted separately for purposes of filing with the secretary of state will be indexed in the filing history of the represented entity if the consent is accompanied by a fee of $15, unless the consent is submitted on behalf of a nonprofit corporation or cooperative association, in which case the fee is $5.

### C. Rejection of Appointment

1. Section 5.206 of the BOC permits a person designated as a registered agent on and after January 1, 2010 to reject the appointment as agent if the person was named as registered agent without that person's consent. A person who has been named as the registered agent of an entity without that person's consent is not required to perform the duties of a registered agent. SOS form 428 may be used to file a rejection of appointment of agent. There is no fee for filing a rejection of appointment.

2. The filing of a rejection of appointment by the secretary of state *immediately* terminates the appointment of the agent and the registered office address. On filing, the secretary of state will notify the organizer or managerial official of the entity of the need to appoint a new registered agent and registered office. Failure to appoint a new registered agent and registered office will result in the involuntary termination of the domestic filing entity or the revocation of the foreign filing entity's registration to transact business in Texas.

3. A person who was appointed without consent before January 1, 2010 would file a statement of resignation of agent pursuant to section 5.204, which is effective on the 31st day after the date the secretary of state receives the notice of resignation. There is no fee for filing a resignation of registered agent.

## IV. FOREIGN ENTITIES—REGISTRATION ISSUES

### A. Entities Required to Register

Chapter 9 of the BOC governs the registration of foreign entities. A foreign entity is required to register with the secretary of state before transacting business in Texas.

1. The BOC registration requirements apply to a foreign corporation, foreign limited partnership, foreign limited liability company, foreign business trust, foreign real estate investment trust, foreign cooperative, foreign public or private limited company, or another foreign entity, the formation of which, if formed in Texas, would require the filing of a certificate of formation with the secretary of state.

2. A foreign entity that affords limited liability for any owner or member under the laws of its jurisdiction of formation is also required to register under the BOC.

3. A foreign entity that is authorized under other state law to transact business in Texas is not required to register under chapter 9 of the BOC. For example, a foreign financial institution registered to do business under the Finance Code is not required to submit an application for registration under the BOC.

### B. Failure to Register

A foreign entity that fails to register when required to do so is subject to the following penalties:

a. the entity may be enjoined from transacting business in Texas on application by the attorney general;

b. the entity may not maintain an action, suit, or proceeding in a court of this state until registered; and

c. the entity is subject to a civil penalty in an amount equal to all fees and taxes that would have been imposed if the entity had registered when first required.[22]

### C. Late Filing Penalty

Section 9.054 of the BOC permits the secretary of state to condition the filing of a foreign entity's registration on the payment of a late filing fee. In fiscal year 2013, the secretary of state imposed a late filing fee on 1,122 foreign filing entities and collected $2,212,325 in penalties.

1. A foreign entity that has transacted business in the state for more than 90 days is subject to a late filing penalty for each year, or part of a year, the entity transacted business in this state without having registered. For late fee purposes, a partial calendar year is counted as a full year. The late filing fee is a penalty for noncompliance with state law registration requirements. The late filing fee applies as soon as the 90-day grace period expires and it relates back to the beginning date of business stated in the application.

2. Under certain circumstances, calculation of the late fee may relate to a date other than the date the entity first began to do business in the state.

a. A late filing penalty will relate back no earlier than January 1, 2006, the effective date of the BOC, if the foreign filing entity was not required

under prior law to register with the secretary of state in order to transact business in Texas (e.g., a foreign business trust).

b. The beginning date of business in Texas is the date that the entity established sufficient nexus for purposes of registration with the secretary of state rather than the date the entity began "doing business" for purposes of state franchise tax liability.

c. If the entity had a prior registration that was revoked by the secretary of state and the entity cannot reinstate its prior registration due to expiration of the statutory time frame,[23] the "beginning date of business" for purposes of calculation of the late fee is the date of revocation by the secretary of state.

d. If the entity held a prior registration and filed an application for withdrawal, the "beginning date of business" for any subsequent registration should be the date that the entity began to transact business in Texas without an effective registration.

3. An application for registration submitted during the statutory 90-day grace period that is rejected for noncompliance will not be assessed a late fee if the corrected document is received within 30 days of the date of mailing noted on the rejection notice even when the resubmission occurs after expiration of the 90-day grace period.

4. Before execution and submission of the application for registration, please review and confirm the stated beginning date of business. There are consequences for misstating this date.

a. Misstating the beginning date of business in an application for registration may result in a judicial finding that the foreign entity lacks the capacity to bring suit regarding a matter that pre-dates its stated beginning date of business. See e.g., *Coastal Liquids Transportation, L.P. v. Harris County Appraisal District*, 46 S.W. 3rd 880 (Tex. 2001) wherein the Court held that a foreign LP could not maintain its suit challenging a tax appraisal because the entity failed to comply with the Revised Limited Partnership Act when it did not correctly state its beginning date of business and did not pay the late filing fee that would have been imposed.

b. A certificate of correction may be filed to correct a misstatement to the beginning date of business. However, if the beginning date of business as corrected would have resulted in the imposition of a late filing fee, the certificate of correction must be accompanied by the payment of the late fee that would have been imposed on the foreign filing entity at the time of its registration.

5. The secretary of state is authorized to condition the filing of an application for registration on the payment of a late filing fee. The late filing penalty does not apply when filing an application for reinstatement of a foreign filing entity's registration following a tax forfeiture or revocation.

### D. Late Filing Penalty Caps

1. While the secretary of state does not waive a late filing penalty, a foreign entity that has transacted business without registration for six or more years may be eligible to receive a cap on the amount of the late filing penalty (five calendar years) if the foreign entity:

a. is current on all taxes and fees owed to any Texas state agency;

b. can provide evidence from the Texas Comptroller of Public Accounts that its right to transact business is active or an agency letter stating that the entity is tax-exempt or a passive entity; and

c. has not been contacted by this agency regarding its noncompliance with state registration requirements[24] or been referred to the attorney general for further action.

2. A foreign entity seeking a 5-year cap on a late filing fee penalty must have a stated beginning date of business that predates its submission by more than 5 years; should highlight its request for the 5-year cap in a separate cover letter, and provide the additional declarations and documentation noted above.

3. A request to reduce or cap the late filing penalty under other circumstances should be submitted in writing. The request may be e-mailed to corphelp@sos.texas.gov; faxed to (512) 475-2781, or mailed to P.O. Box 13697, Austin, Texas 78711-3697, Attn. Corporations Attorneys. The request will be reviewed by a member of the legal staff who will notify the entity or its attorney in writing of the determination. Matters that may be considered by the legal staff in connection with a request to cap or reduce late fees include:

a. Whether additional time beyond the grace-period granted was needed in order to correct or address the reasons for rejection or to obtain the execution of an application for registration;

b. Whether additional time was needed due to the occurrence of a natural disaster affecting the entity's ability to timely file or re-submit the application for registration;

c. Whether a filing error was made (e.g., the entity formed a domestic entity rather than registering the foreign filing entity) at the time the entity began to transact business in Texas; or

d. Whether other extenuating circumstances exist that warrant a reduction to the late fees imposed. *Ignorance of the law is not an extenuating circumstance.*

4. A foreign entity requesting consideration of a reduction to or cap on late fees imposed should be prepared to pay at least one year of late fees, even if the entity's request is granted.

### E. Transfer/Succession of a Foreign Registration

1. Section 9.009 of the BOC permits the transfer or succession of a foreign entity's registration with the secretary of state after a merger or conversion.

a. A foreign entity registered under the BOC may amend its registration to disclose a change that results from 1) a conversion from one type of foreign filing entity to another type of foreign filing entity with the converted entity succeeding to the registration of the converting foreign filing entity; or 2) a merger into another foreign filing entity with the foreign filing entity making the amendment succeeding to the registration of the original foreign filing entity.[25]

b. For example, a Nevada LLC registered in Texas that converts to a Delaware LP need only file an application for amended registration to reflect the change in organizational structure and jurisdiction of organization and need not obtain a new registration file number for the converted entity.

c. SOS form 422 is specifically designed for this amendment. When submitting SOS form 422, include a completed application for registration applicable to the entity type that is succeeding to the converting/merged entity's registration.

2. A foreign entity that converts to change its jurisdiction of formation to a jurisdiction other than Texas, but that does not change its entity type should file an amendment to its registration to reflect its new jurisdiction of organization. (SOS form 406)

3. A termination of a registration (SOS form 612) is required under section 9.011(d) of the BOC if:

a. The registered foreign filing entity merges with another registered foreign filing entity.

b. The registered foreign filing entity merges with and into a domestic filing entity.

c. The registered foreign filing entity terminates its existence by dissolution or termination in its jurisdiction of formation.

4. Section 9.012 provides for the automatic withdrawal of the registration of a foreign filing entity or a foreign limited liability partnership that converts to a domestic filing entity.

### F. Required Amendments

1. A foreign filing entity is required to amend its registration when the foreign filing entity changes its name in its jurisdiction of formation.[26]

2. A foreign filing entity is required to amend its registration when it changes the business or activity stated in its application for registration.

3. A foreign filing entity that is a foreign limited partnership is required to amend its registration to reflect:

a. the admission of a new general partner;

b. the withdrawal of a named general partner; or

c. a change in the name of a general partner stated in its application for registration.

4. A foreign entity that is required to amend its registration must file the amendment on or before the 91st day following the date of the change. The failure of a foreign entity to amend its registration when required by law may result in the revocation of the entity's registration by the secretary of state. (Sec. 9.101(b)(1)(c) BOC)

## V. FOREIGN PARTNERSHIPS AND LLCS

### A. Foreign LLPs

Although not defined as a "*foreign filing entity*," the BOC applies many of the provisions of chapter 9 to foreign LLPs.

1. The registration of a foreign limited liability partnership is valid for a period of one year. Renew the registration annually before the expiration of the current term to maintain an effective registration.

2. The fee for filing an application for registration for a foreign limited liability partnership is $200 per partner in Texas, but not less than $200 and not more than $750. For purposes of determining the number of partners in Texas and calculating the filing fee, the secretary of state has adopted an administrative rule[27] that provides that a partner is considered to be in Texas if:

a. the partner is a resident of the state;

b. the partner is domiciled or located in the state;

c. the partner is licensed or otherwise legally authorized to perform the services of the partnership in this state; or

d. the partner, or a representative of the partnership working under the direct supervision or control of the partner, will be providing services or otherwise transacting the business of the partnership within the state for a period of more than 30 days.

3. Unlike a Texas limited liability partnership, a foreign LLP that files an application for registration is required to have and maintain a registered office and agent in Texas for the purpose of service of process.

4. Section 152.914 of the BOC authorizes the secretary of state to revoke the registration of a foreign LLP for the partnership's failure to:

a. file a report within the period required by law or pay a fee or penalty prescribed by law when due and payable;

b. maintain a registered agent or registered office address in the state; or

c. pay a fee in connection with a filing, or payment of the fee was dishonored when presented by the state for payment.

5. A foreign LLP that has had its registration revoked by the secretary of state must make an application for reinstatement in accordance with section 152.914 no later than the date the registration would have expired had the registration not been revoked. The application for reinstatement must be accompanied by a tax clearance letter from the Comptroller of Public Accounts stating that the foreign LLP has satisfied all franchise tax liabilities for purposes of reinstatement. A foreign LLP that fails to make an application for reinstatement within the time frame specified cannot reinstate and must re-register if it is to continue to transact business in the state.

6. A foreign LLP that is transacting business in Texas and that fails to file an application for registration with the secretary of state is subject to subchapter B of chapter 9 of the BOC to the same extent as a foreign filing entity. This means that the foreign LLP may not maintain an action, suit, or proceeding in Texas until it has registered with the secretary of state. Failure of the foreign LLP to register does not impair the validity of a contract or act of the partnership and does not impose personal liability on any partner for the partnership's debts and obligations solely because the foreign LLP failed to register.

7. Pursuant to section 152.910 of the BOC, a foreign LLP doing business in Texas is subject to the same late filing penalty assessed on foreign filing entities. A late filing fee will not be charged if: 1) the foreign LLP held a prior registration for the time stated as its beginning date of doing business; and 2) the new application for registration is submitted to this office within 90 days of the date of expiration of its lapsed registration.

8. Foreign limited partnerships that are also LLPs (i.e., *limited liability limited partnerships or LLLPs*) are required to file a registration as a foreign limited partnership under the provisions of chapter 9 of the BOC, as well as the annual application for registration under section 152.905 of the BOC as a foreign LLP. Although the BOC grants the secretary of state the authority to assess and impose a late filing penalty for each registration document, the failure to register both the foreign limited partnership and the foreign LLLP within 90 days of doing business will result in the imposition of a late filing fee *for the registration of the foreign limited partnership*.[28]

9. While the LLP is predominantly a business entity that exists under the laws of the states of the United States, several foreign countries have adopted LLP provisions.[29]

### B. Registration of Foreign Series LLCs and LPs

1. Delaware, Iowa, Nevada, Oklahoma, Illinois, Tennessee, Utah, Kansas, Wisconsin, the District of Columbia, and Puerto Rico provide for the creation of a series LLC.

2. Section 9.005, which specifically addresses the registration of a foreign series LLC, requires the application for registration of a foreign LLC governed by a company agreement that establishes or provides for the establishment of a designated series to include additional statements that provide notice of the series structure.

3. In addition to the information required under section 9.004, an application for registration of a foreign series LLC must state whether:

a. the series has separate rights, powers, or duties with respect to specified property or obligations of the LLC or separate profits and losses associated with specified property or obligations of the LLC;

b. any debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to a particular series shall be enforceable against the assets of that series only, and

not against the assets of the company generally or the assets of any other series; and

c. any debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to the company generally or any other series shall be enforceable against the assets of that series.

4. The application for registration form for a foreign series LLC is SOS form 313.

5. Delaware law also provides for series limited partnerships and statutory trusts.[30] However, Texas business organization law does not specifically address or recognize a series LP or statutory trust. Regardless, it is clear that the secretary of state may not refuse to file an application for registration of a foreign entity due to the differences between the laws governing its internal affairs and liability.[31]

6. Registration by the secretary of state of a series LP or statutory trust is solely authorization that the legal entity may transact business in Texas. Registration should not give rise to the inference that the secretary of state or the laws of Texas recognize the legitimacy of the structure of a series LP or statutory trust or provide assurance that the limitations of liability provided under the governing documents will be given full faith and credit in Texas.

7. A series LLC, LP or statutory trust that is treated as a single legal entity under the laws of the jurisdiction of its organization will be treated as a single legal entity for qualification purposes. The LLC, LP or statutory trust rather than the individual series should register as the legal entity that is transacting business in Texas.

8. If each or any series of a foreign LLC, LP, or statutory trust transacting business in Texas transacts its business under a name other than the name of the LLC, LP, or statutory trust, the qualifying entity should file an assumed name certificate in compliance with chapter 71 of the Texas Business & Commerce Code.

9. Registration with the secretary of state does not control how the Texas courts will treat a foreign series LLC, LP, or statutory trust, what law will apply to liability (Texas or state of organization) in an action by a third-party creditor or claimant, or whether the courts will "pierce the corporate veil" to hold the entity and its series and the members of the other series liable for the actions of another series or its members. In addition, registration by the secretary of state does not determine how the series LLC, LP, or statutory trust may be treated for purposes of sales tax, franchise tax or other state taxes.

### C. Registration of Foreign Professional Entities

A foreign professional entity would register with the secretary of state as the entity type to which it most closely corresponds. If the jurisdiction of formation of the professional entity categorizes the professional entity as a professional association, the foreign entity would register in Texas as a professional association even if a domestic entity formed for the same purpose would be formed as a different entity type.

## VI. POST FORMATION MAINTENANCE

### A. Maintenance of Registered Agent/Office

In FY 2013, the secretary of state processed 99 allegations that a filing entity had failed to maintain a registered agent and registered office address as required by Chapter 5 of the BOC, notified 3,243 entities of the resignation of their registered agent, and filed 19 rejections of a registered agent appointment.

1. Pursuant to section 5.201(c) of the BOC, the registered office address of a filing entity must be located at a street address where process may be *personally* served on the entity's registered agent. This means that the address provided as a registered office address must be the physical address where the registered agent may be found. It may not be solely the address of a business that provides the entity (or designated agent) will mail box or telephone answering services.

2. The registered office address does not need to be the business office address of the represented entity, but is required to be the business office address of the designated registered agent.[32]

3. If the secretary of state determines that the registered agent is not located at the street address provided as the registered office address or that the registered office address is merely the street address of a business providing mail box services, the secretary will notify the entity of its failure to maintain a registered agent/office as required by law.

4. A registered agent that is an organization must have an employee available at the registered office address during normal business hours to receive service of process. Any employee of that organization may receive service at the registered office.[33]

5. The address of the registered office may be updated by a filing submitted by the entity itself or by the registered agent. An address correction or update

made by the designated registered agent pursuant to section 5.203 of the BOC should be made using SOS Form 408 rather than SOS Form 401. A registered agent may file a statement under section 5.203 of the BOC that applies to more than one filing entity. There are individual fees as well as maximum fees for each different type of entity represented.

6. *Practice Tip:* When making a change to the legal name or registered office address of a filing entity, determine whether the entity itself is designated as the registered agent of another entity (e.g., LLC general partner of a Texas LP is the designated registered agent of the LP). A filing effecting a change to the name or address of the designated agent/general partner does not effect a change or update to the certificate of formation of the represented entity.

**B. Periodic Reports—Limited Partnerships**

In addition to filing annual reports with the Comptroller of Public Accounts under the Texas Tax Code, domestic and foreign limited partnerships are subject to periodic reporting requirements with the secretary of state.

1. Pursuant to section 153.301 of the BOC, the secretary of state may require a domestic or a registered foreign limited partnership to file a report not more than once every four (4) years. The report (SOS form 804) must be signed by a general partner of record. A periodic report signed by a person who is not a named general partner will be rejected. A certificate of amendment to show the change in general partner will be required as a pre-condition to filing the periodic report.

2. The periodic report must include:[34]

a. the name of the limited partnership;

b. the state or territory under the laws of which the partnership is formed;

c. the current address of the registered office in Texas and the name of the registered agent at that address;

d. the address of the principal office in the United States where records are to be kept or made available under sections 153.551 and 153.552; and

e. the name, mailing address, and street address of the business or residence of each general partner.

3. The report is due no later than the 30th day after the date the secretary of state sends notice to the partnership that the report is due. (Sec. 153.304 BOC) The statutory fee for the periodic report is $50.[35]

4. The secretary of state sends all notices relating to the filing of the periodic report, including any notice of forfeiture or involuntary termination, to the designated registered agent at the registered office address on file. Consequently, it is important that the limited partnership continuously maintain current information regarding its registered agent and registered office address to reduce the risk of involuntary termination.

5. *Practice Tip*: There is no "anniversary date" for the filing of a limited partnership periodic report. However, a limited partnership may avoid the consequences of noncompliance by voluntarily submitting a periodic report to the secretary of state on a routine basis on an "anniversary date" of its own choosing. Periodic reports also may be filed online through SOSDirect.

6. The periodic report permits a limited partnership to update its principal office address, the business or office address of a named general partner, and the name and address of the partnership's registered agent. The report cannot however be used to update the name of the general partner, to add a new general partner or to withdraw a named general partner.[36] A certificate of amendment to the certificate of formation of the limited partnership is required for this purpose.

7. *Practice Tip*: A certificate of amendment or other filing instrument that affects the name, status, or registered office address of a named general partner does not affect or update the certificate of formation of the limited partnership. Consequently, remember to submit a corresponding certificate of amendment to amend the certificate of formation of any limited partnership in which the affected business entity is the named general partner.

8. The address shown in the records of the secretary of state as the "entity address" for a domestic limited partnership is the principal office address in the United States where records are to be kept or made available under sections 153.551 and 153.552 of the BOC. This address may be changed by filing a periodic report or by filing a certificate of amendment. While a statement of change of registered agent/registered office (SOS form 401) may be used to change the partnership's registered office address, it does not effect a change to the partnership's principal office address or entity address shown in the secretary of state's records.

### C. Periodic Reports—Nonprofit Corporations

Domestic and foreign nonprofit corporations are subject to periodic reporting requirements with the secretary of state.

1. A nonprofit corporation is required by section 22.357 of the BOC to file a periodic report that lists the names and addresses of its current registered agent/office, and its current officers and directors. The secretary of state is authorized to require a nonprofit corporation to file the report (SOS form 802) not more than once every four (4) years.

2. The report is due no later than the 30th day after the date the secretary of state sends notice to the corporation that the report is due. (Sec. 22.359 BOC) The secretary of state sends all notices relating to the filing of the periodic report, including any notice of forfeiture or delinquency, to the designated registered agent at the registered office address on file. (Sec. 22.358 BOC)

3. The notice sent by the secretary includes a pre-printed periodic report form that includes the current information of record. The statutory fee for the periodic report is $5.[37]

4. *Practice Tip*: There is no "anniversary date" for the filing of a nonprofit periodic report. However, a nonprofit corporation may avoid the consequences of noncompliance by voluntarily submitting a periodic report to the secretary of state on a routine basis on an "anniversary date" of its own choosing. Periodic reports also may be filed online through SOSDirect.

### D. Annual Statements—Professional Associations

In addition to filing annual reports with the Comptroller of Public Accounts under the Texas Tax Code, a professional association must file an annual statement with the secretary of state.

1. Pursuant to section 302.012 of the BOC, a professional association is required to file an annual statement with the secretary of state by June 30th of each year. The due date is statutory and is not dependent on the date of formation of the professional association.

2. The secretary of state generally sends all professional associations a notice of the need to file the annual statement in April of each year. The notice is sent to the registered agent and registered office address of record.

3. Although the notice sent does not include a pre-printed annual statement form (SOS form 803), the notice provides instructions for electronic filing through SOSDirect. The annual statement may be submitted by mail using SOS form 803, which is obtained from the secretary of state website.

4. The annual statement must include: 1) the name of the professional association; 2) its jurisdiction of formation; 3) the name and address of its current registered agent/office; 4) the name and address of each member of the association; 5) the name and address of each member of the board of directors or executive committee; 6) the name and address of each officer; and 7) a statement that all members are licensed to perform the type of service for which the association is formed, or in the case of a professional association that is a multi-practice professional association, that each member is licensed to perform professional services falling within the scope of practice of the practitioner.

5. The annual statement may update the professional association's registered agent, registered office address, and managerial information, but may not be used to change the professional association name or jurisdiction of formation.

## VII. MERGERS AND CONVERSIONS

### A. Certificate of Merger Required

A certificate of merger is required to be filed in accordance with the provisions of chapter 10 of the BOC when any party to the merger is a domestic filing entity or when any entity created pursuant to a plan of merger is a domestic filing entity.

1. A merger transaction controlled by another statute is governed by the other statute. For example, chapter 162 of the Utilities Code will govern the consolidation or merger of telephone cooperatives.

2. A general partnership is not a domestic filing entity. Consequently, the merger of a foreign entity with a domestic general partnership would not require the filing of a certificate of merger with this office.

3. A foreign filing entity that holds a registration with the secretary of state and that merges with and into a Texas general partnership should however submit a termination of registration (SOS form 612) to the secretary of state to evidence its termination of existence by merger.

### B. Alternative Certified Statement in Lieu of a Plan of Merger

1. A plan of merger is a document that conforms to the requirements of sections 10.002 and 10.003 of the

BOC. Pursuant to section 10.002, a plan of merger must be in writing.

2. The requirements for a plan of merger are set forth in sections 10.002 to 10.004 of the BOC. The plan of merger must be set forth as part of the certificate of merger unless the certificate of merger includes a statement certifying:[38]

a. the name, organizational form and jurisdiction of formation of each domestic or foreign entity that is a party to the plan of merger or that will be created as a result of the merger;

b. that the plan of merger has been approved by each organization;

c. any amendments to the certificate of formation or a statement that no amendments are to be effected by the merger;

d. that the certificate of formation of each new Texas corporation, limited partnership, or limited liability company to be created as a result of the merger are being filed with the secretary of state as part of the certificate of merger;

e. that an executed plan of merger is on file at the principal place of business of each surviving or newly created domestic or foreign corporation, limited partnership or limited liability company, and the address of each principal place of business; and

f. that a copy of the plan will be on written request furnished without cost by each surviving, acquiring, or new domestic entity or non-code organization to any owner or member of any domestic entity that is a party to the merger and, for a merger with multiple surviving domestic entities or non-code organizations, to any creditor or obligee of the parties to the merger if a liability or obligation is then outstanding.

3. *Practice Tip:* If the complete plan of merger adopted by the constituent entities is lengthy or contains numerous exhibits, schedules, or attachments, the total cost of a certified copy of the merger may be more than expected.[39] Providing the alternative certified statements in lieu of the plan of merger may be more cost-efficient and convenient.

4. The certificate of merger also must contain a statement that the plan of merger was approved as required by the laws of the jurisdiction of formation of each organization that is a party to the merger and by the governing documents of those organizations.[40] Procedures for the approval of fundamental business transactions are found in the spoke applicable to the domestic entity type.[41]

### C. Special Merger Provisions under the BOC

1. Sections 10.006 and 10.152 of the BOC apply to mergers between parent and subsidiary entities and permit a short form merger of:

a. one or more subsidiary entities into a parent;

b. the merger of a parent into a subsidiary; or

c. the merger of one or more subsidiaries and the parent into another subsidiary.[42]

2. The parent organization must own at least 90 percent of the outstanding ownership or membership interests of each class and series of each of one or more subsidiary organizations. At least one of the parties to the merger must be a domestic entity. No action by any domestic subsidiary organization is required to approve a short form merger. If the parent organization survives the merger, the merger is required to be approved only by a resolution adopted by the governing authority of the parent.

3. The short form merger provisions do not apply if a subsidiary organization is a partnership.

4. Merger of a General Partnership:

a. A Texas partnership may adopt a plan of merger and merge with one or more partnerships or other entities.[43]

b. A certificate of merger on behalf of a general partnership is filed with the secretary of state *only* when a party to the merger is a domestic filing entity or a domestic filing entity is to be created under the plan of merger. Consequently, a partnership merger is filed with the secretary of state when the general partnership merges with or into a domestic corporation, limited partnership, limited liability company, professional association, or cooperative association or provides for the creation of one of these entities.[44]

c. A general partnership merger with or resulting in the creation of a real estate investment trust is not filed with the secretary of state. The merger should be filed with the county clerk in the county in which the domestic real estate investment trust's principal place of business in Texas is located.[45]

### D. Nonprofit Mergers

Certain restrictions and limitations apply to mergers involving Texas nonprofit corporations.

1. Pursuant to section 10.010(a) of the BOC, a nonprofit corporation may not merge into another entity if, the nonprofit corporation would, because of the merger, lose or impair its charitable status. The secretary of state does not determine whether a

proposed merger will affect a nonprofit corporation's charitable status.

2. One or more domestic or foreign for-profit entities or non-code organizations may merge into one or more domestic nonprofit corporations if the nonprofit corporations continue as the surviving entity or entities. A nonprofit corporation may merge with a foreign for-profit entity, but only if the nonprofit corporation continues as the surviving entity. One or more nonprofit corporations and non-code organizations may merge into one or more foreign nonprofit entities that continue as the surviving entity or entities.

3. Although an unincorporated nonprofit association is a BOC entity, it is not authorized to engage in a statutory merger under chapter 10 of the BOC. Section 252.017 of the BOC specifically provides that the only provisions of the BOC that apply to an unincorporated nonprofit association are chapters 1 and 4, and, if a nonprofit association has designated an agent for service of process, the provisions of subchapter E of chapter 5.[46]

4. The fee for filing a merger transaction of a nonprofit corporation with a for-profit entity is $300. The fee for filing a merger transaction where the only parties to the merger are nonprofit corporations is $50.

**E. Common Errors to Avoid**

Generally, the most frequent reason for rejection of a merger document is the failure to set forth all necessary recitations in the certificate of merger or alternative statements.

1. The most frequent omission in a certificate of merger is the authorization statement.[47] Although a merger document drafted to contain the alternative statements certifies that the plan of merger has been approved, the certificate of merger *also* must include the following statement:

> "The plan of merger has been approved as required by the laws of the jurisdiction of formation of each organization that is a party to the merger and by the governing documents of those organizations."

2. Pursuant to section 3.006, the formation and existence of a domestic filing entity created pursuant to a plan of merger takes effect and commences on the effectiveness of the merger. Consequently, the certificate of formation of a domestic filing entity created pursuant to the plan of merger cannot have an effective date (or delayed effective date and time) that differs from the effective date of the certificate of merger.

3. Persons using an SOS certificate of formation form for a domestic filing entity created pursuant to a plan of merger often fail to include the additional statement regarding the entity's formation pursuant to a plan of merger, which is required under section 3.005(a)(7) of the BOC. If using an SOS form the additional required statement may be set forth as additional text in the "Supplemental Provisions/Information" section of the promulgated form.

4. While section 10.004 permits a plan of merger to include amendments to the governing documents of a domestic filing entity, a domestic entity *may not* effect a restatement of its certificate of formation pursuant to a plan of merger. The restatement of a certificate of formation has a different legal effect than an amendment to the certificate of formation. If the surviving entity desires to amend and restate its certificate of formation, it may do so by submitting a separate filing instrument to be filed immediately after the filing of the certificate of merger.

**F. Conversions**

1. Under the BOC the *converting* entity is the entity before conversion and the *converted* entity is the resulting entity after conversion. The organizational documents for the converted entity will appear in the plan of conversion.

a. Like a plan of merger, the plan of conversion can be, but is not required to be filed with the certificate of conversion. In lieu of filing the plan, the converted entity may include a statement in the certificate of conversion certifying:

(1) the name, organizational form and jurisdiction of formation of the converting entity;

(2) the name, organizational form and jurisdiction of formation of the converted entity;[48]

(3) that the plan has been approved;

(4) that the plan is on file at the principal place of business of the converting entity and the address thereof, and that the plan will be on file from and after conversion at the principal place of business of the converted entity and the address thereof; and

(5) that a copy of the plan will be furnished by the converted entity on written request and without cost to any shareholder or comparable interest holder of the converting or converted entity.

b. The certificate of conversion also must contain a statement that the approval of the plan of conversion was duly authorized by all action required

by the laws under which the converting entity was incorporated, formed, or organized and by its constituent/governing documents.

c. While the organizational documents of the converted entity are included as part of the plan of conversion and are not required to be filed independently, the statutes anticipate that separate organizational documents for any domestic entity formed by conversion (other than general partnerships) will be submitted with the certificate of conversion.

d. Pursuant to section 10.156 of the BOC, the secretary of state cannot accept a certificate of conversion if the required franchises taxes of the converting entity have not been paid. If a converting entity is a taxable entity under the franchise tax statutes and the converting entity is not in good standing for purposes of the conversion, the secretary of state must refuse to file the conversion.

2. *Practice Tip*: A print-out obtained from the Comptroller's franchise account status online search is *not* sufficient for purposes of evidencing tax clearance pursuant to section 10.156 of the BOC. A practitioner must obtain a Certificate of Account Status from the Comptroller (Comptroller form 05-329) or include a statement in the certificate of conversion that the converted entity will be liable for the payment of all franchise taxes.

3. The conversion provisions apply to domestic as well as foreign entities. The foreign entities must have the ability to convert under the laws of their home jurisdiction.

a. Section 9.012 provides for the automatic withdrawal of the registration of a foreign filing entity or a foreign limited liability partnership that converts to a domestic filing entity.

b. If a domestic entity converts to a foreign filing entity and the foreign entity will be transacting business in Texas, the *converted* entity will be required to file an application for registration under the statutes applicable to the converted entity.

c. Under the BOC, a foreign filing entity that converts to another type of foreign entity may file an amendment to its application for registration in order to succeed to the registration of the original foreign filing entity (SOS form 422).[49]

3. A conversion transaction includes the continuance of a domestic entity of one type as a foreign entity of the same type or the continuance of a foreign entity of one type as a domestic entity of the same type and which may be treated as a domestication, continuance, or transfer transaction in the jurisdiction of the foreign converting or converted entity.

4. The conversion provisions in chapter 10 of the BOC are applicable to all entities (other than unincorporated nonprofit associations). Section 4.151 provides for one filing fee for the certificate of conversion, plus the fee for filing the certificate of formation for the converted domestic entity.

5. The conversion provisions do not apply when a domestic limited liability company is changing its purpose to come under the provisions relating to professional limited liability companies and vice versa. A certificate of amendment is sufficient to effectuate this change as a limited liability company includes a professional limited liability company and there is not a change to the *type* of entity.

6. The provisions of the BOC specifically prohibit the conversion of a nonprofit corporation to a for-profit entity. (Sec. 10.108, BOC)

7. An unincorporated nonprofit association is not authorized to engage in a statutory conversion under chapter 10 of the BOC. Section 252.017 of the BOC specifically provides that the only provisions of the BOC that apply to an unincorporated nonprofit association are chapters 1 and 4, and, if a nonprofit association has designated an agent for service of process, the provisions of subchapter E of chapter 5. Accordingly, a Texas unincorporated nonprofit association cannot convert to a nonprofit corporation.

### G. Common Errors to Avoid

1. Submitting a certificate of formation to form the domestic "converted" entity *before* submission of the certificate of conversion. This error may require the practitioner to re-draft and restructure the transaction as a merger with the newly created entity as the surviving entity.

2. Failure to include additional statements relating to the conversion in the formation document of the converted entity is a frequent error. The formation document of a converted entity must include:

a. a statement that the entity is being formed pursuant to a plan of conversion; and

b. the name, address, date of formation, and prior form of organization and jurisdiction of organization of the converting entity. (Sec. 3.005(a)(7) BOC)

If the converted entity is a domestic filing entity and you are using an SOS form for the converted entity, the additional required statements may be set forth in

the "Supplemental Provisions/Information" section of the promulgated form.

3. Failure to ensure tax clearance for the converting entity by either including the appropriate tax certificate or by including a statement relating to the payment of such taxes by the converted entity.

**H. Nonprofit Conversions**

Section 10.108 of the BOC specifically prohibits a nonprofit corporation from converting into a for-profit entity. However, the secretary of state will accept a certificate of conversion that converts a domestic nonprofit corporation to a nonprofit limited liability company, a nonprofit corporation created under another Texas statute or foreign nonprofit corporation.

**I. How to Avoid Last Minute Problems with Tax Clearance**

1. Failure to obtain tax clearance for the transaction is a common reason for rejection. Texas law requires the secretary of state to determine that a merging or converting entity subject to franchise tax has paid all taxes due before the merger or conversion can be accepted and filed.[50] The requirement for tax clearance is not limited to specific entity types; consequently, this requirement applies to any taxable entity that is a non-surviving party to the merger or the converting entity in a conversion.

2. The secretary of state suggests two alternatives to avoid last minute refusal to file the merger or conversion for tax reasons:

a. Submit the merger or conversion with a certificate of account status from the Comptroller of Public Accounts for each merging or converting filing entity that is a taxable entity. If the merging or converting entity is a passive entity, provide a statement or certification from the Comptroller of Public Accounts that the entity is not a taxable entity. A certificate of account status provided for a merging or converting entity must specifically indicate that it is for the purpose of merger or conversion; or

b. Include in the plan of merger or conversion, or in the alternative statement provided in lieu of a plan of merger or conversion, a statement that one or more of the surviving, new or acquiring entities will be responsible for the payment of all fees and franchise taxes and that all of such surviving, new or acquiring domestic or foreign entities will be obligated to pay any fees and franchise taxes if not timely filed.[51]

**J. Abandonment of Mergers and Conversions**

1. Subchapter E of chapter 10 of the BOC governs the abandonment of a merger, conversion or exchange that has been approved, but has not become effective. Remember, a certificate of merger, conversion or exchange is effective on filing with the secretary of state, unless the effectiveness of the transaction is delayed pursuant to section 4.052 of the BOC.

2. The abandonment of the transaction is subject to any contractual rights, and would be abandoned in the manner set forth in the plan of merger, conversion or exchange. If the plan does not contain a provision regarding the procedures for abandoning the plan, the plan of merger, conversion, or exchange would be abandoned in the manner determined by the governing authority of the domestic entity.

3. An abandonment of a merger, conversion or exchange need not have the approval of the domestic entity's owners or members. If the merger, conversion or exchange has been filed with the secretary of state, the domestic entity must file a statement of abandonment in accordance with section 4.057 of the BOC, the general provision applicable to any filing instrument filed with a delayed effectiveness. The abandonment must be signed on behalf of each entity that signed the certificate of merger, conversion or exchange.

4. *Practice Tip*: On filing, the secretary of state records the filing of an merger or conversion instrument with a delayed effective date or condition and takes necessary action at that time to create new entities, change the status of merged or converting entities, and change names when amended by the filed document. Consequently, when a statement of abandonment is submitted as permitted by law, the secretary must determine whether the former name of any entity is available or whether the organizational documents need to be amended to change the name.[52] If the likelihood exists that the parties might abandon a merger transaction, consider filing a name reservation for the prior or former name of a merged entity that may need to be reactivated.

5. When the effectiveness of a document is conditioned on the occurrence of a future event other than the passage of time (delayed effective condition), the entity is required to file a statement with the secretary of state within ninety (90) days from the date of execution of the instrument in order to effect the transaction evidenced by the filing.[53] Failure to file the statement regarding the satisfaction or waiver of the delayed effective condition *does not effect an abandonment of the filed document.* In order to abandon the document, a certificate of abandonment must be filed with the secretary of state.

### K. Merger and Conversion Forms

1. The secretary of state has promulgated certain merger and conversion forms designed to comply with BOC filing requirements. If you do not find the form for your specific transaction, it is because the secretary of state did not develop a form for the transaction (e.g., holding company merger or merger of parent into one or more subsidiaries). Please do not alter a numbered SOS form or "re-number" a promulgated SOS form for the purpose of tailoring the form to meet your specific merger or conversion transaction.

2. SOS merger forms do not include a plan of merger form. The plan of merger may be attached to the certificate of merger form or the alternative statements contained within the form may be checked and completed.

3. SOS merger forms also do not include a form for the creation of any domestic filing entity to be created pursuant to a plan of merger. If the plan of merger results in the creation of a domestic filing entity, please remember that the certificate of formation of a domestic filing entity created pursuant to the plan of merger must contain a statement that the entity is being formed under a plan of merger.[54]

4. SOS conversion forms comply with the provisions of the BOC and are not designed for cross-statutory transactions. The forms are entity specific: SOS forms 631 to 634 are used when the converting entity is a for-profit or professional corporation; SOS forms 635 to 638 are used when the converting entity is a limited liability company, and SOS forms 641 to 644 are used when the converting entity is a limited partnership. SOS form 645 may be used to convert a professional association to a professional limited liability company. A domestic general partnership, including a general partnership that is registered as a limited liability partnership, seeking to convert to a domestic filing entity may use SOS form 646.

5. The secretary of state does not have a form for the specific purpose of "domesticating" or converting a foreign entity to a Texas entity of the same entity type. However, the secretary of state has a summary (SOS form 647) that includes general information and a checklist for a conversion of this nature.

6. SOS conversion forms do not include a plan of conversion or a certificate of formation for a converted entity that is to be a domestic filing entity. When drafting the certificate of formation of a converted entity that is a domestic filing entity, remember to include the additional statements required under section 3.005(a)(7) of the BOC.

## VIII. FRANCHISE TAX ACCOUNT STATUS

Effective May 5, 2013, the Comptroller of Public Accounts changed the manner in which the account status of a taxable entity is determined and described and ceased to issue online certifications of account status indicating that an entity was in "good standing" through a date certain.

### A. Account Status Is Determined by Entity's Right to Transact Business

1. Before May 5, 2013, the public was able to obtain from the Comptroller of Public Accounts' public website a certification that a taxable entity had met all franchise tax filing requirements with a certification that no tax was due through a date certain. However, since the revision of the franchise tax in 2008 and the resulting changes to filing requirements, the issuance of a "good standing" certification became more complicated. Because of this, the Comptroller changed the terminology used to describe a taxable entity's status in order to clarify that references made to status referred to an entity's franchise tax account status.

2. As of May 5, 2013, the phrases "good standing," "temporary good standing," and "not in good standing" are no longer used by the Comptroller to describe a business entity's account status. Instead, the account status of an entity is based on whether the Comptroller has forfeited the entity's right to transact business in Texas pursuant to sections 171.251-171.2515, and section 171.256 of the Tax Code.

3. The Comptroller is authorized to forfeit a taxable entity's right to transact business when the entity does not file a franchise tax report or pay a tax or penalty required under Chapter 171 of the Tax Code. Before the forfeiture actually occurs, the Comptroller mails a notice to the entity and provides the entity with at least 45 days within which to cure the franchise tax deficiencies.

### B. New Comptroller Account Terminology

1. A person using the Comptroller's public website to verify a taxable entity's "status" must look to the entity's "Right to Transact Business." A status of "Active" means that the entity's right to transact business in Texas has not been forfeited by the Comptroller of Public Accounts.

2. A status of "Active, Eligible for Termination/Withdrawal" means that the entity has

met those franchise tax requirements that would make the entity eligible to obtain a certification for purposes of filing a certificate of termination or withdrawal with the secretary of state.[55] However, please note that a print-out from the Comptroller's website showing this status does not satisfy the requirements of section 11.101(b) or section 9.011(c) of the BOC for purposes of filing the certificate of termination or withdrawal.

3. A status of "Forfeited" means that the Comptroller has forfeited the entity's right to transact business in accordance with subchapter F of the Tax Code. Please note that the records of the secretary of state may still reflect the status of a domestic taxable entity with this status as "in existence."

4. A status of "Franchise Tax Ended" with respect to a domestic taxable filing entity means that the entity terminated its existence with its right to transact business intact. With respect to a domestic filing entity, this status would apply if an entity terminated its existence by virtue of filing a voluntary termination or merger.

5. A status of "Franchise Tax Involuntarily Ended" with respect to a domestic taxable entity means that the existence of the entity ended due to action taken by the secretary of state. The action taken may have been an administrative tax forfeiture or an involuntary termination. To verify the statutory basis for the entity's inactive status, contact the secretary of state.

6. A foreign taxable entity's "right to transact business" for franchise tax liability purposes is not tied to the "transaction of business" for purposes of registration with the secretary of state under chapter 9 of the BOC.[56] Consequently, in the case of a foreign entity, an active status does not necessarily indicate that the foreign entity has an active registration to transact business on file with the secretary of state. Similarly, an account status of "Franchise Tax Ended" is not tied to the status of a foreign entity's registration with the secretary of state.

### C. New: Online Self-Service for Comptroller Certificates/Tax Clearance

1. In December of 2013, the Comptroller of Public Accounts introduced online self-service requests for Certificates of Account Status for purposes of Termination or Withdrawal and Tax Clearance Letters for reinstatement purposes.

2. The electronic self-service requests may be submitted by taxpayers and tax preparers who have the franchise tax WebFile (XT) number or who have previously used WebFile for franchise tax. Please note that certain taxable entities are not eligible to make a self-service request. For further information on restrictions and system requirements, please visit the Comptroller of Public Accounts' website at www.window.state.tx.us/taxinfo/franchise/cert_ltr_requests.html.

3. If an eligible taxpayer has satisfied all tax requirements, the online system will return the requested certificate or tax clearance letter in a PDF file format for filing with the secretary of state. If the taxable entity has not satisfied all tax requirements, the system will return a list of requirements that must be satisfied in order to receive the requested certificate or letter, or will return a message to contact the Comptroller's office for further assistance.

## IX. PROFESSIONAL ENTITIES

A professional entity is governed by title 7 of the BOC and is formed for the purpose of providing a professional service. A professional entity is a professional corporation, professional association, and a professional limited liability company. The term does not include a partnership, including a limited liability partnership.

### A. What is a Professional Service?

1. Section 301.003(8) of the BOC defines a professional service as "any type of service that requires, *as a condition precedent to the rendering of the service*, the obtaining of a license in this state, including the personal service rendered by an architect, attorney, certified public accountant, dentist, physician, public accountant, or veterinarian." The term "includes" is a term of expansion and not a term of limitation or exclusive enumeration.

2. When determining whether a professional entity must be formed to render a particular service a practitioner must first determine whether the activity in which the entity is to be engaged is a "professional service" within the meaning of section 301.003 of the BOC. This determination requires a review of the laws governing or regulating the activity or service being provided. If the law governing the activity *requires* a person to obtain a license from the state before engaging in the activity and prohibits rendition of the activity by a non-licensed person, the activity or service is a professional service within the meaning of section 301.003 of the BOC. If the law governing the activity *does not require* a person to obtain a license from the state before engaging in the activity, the activity or service is not a professional service. Some examples of personal services that are not "professional services" include the provision of

mediation services,[57] enrolled agent and patent agent services.[58]

## B. What Type of Entity Should Be Formed?

1. Although an activity may be deemed to be a "professional service" within the meaning of section 301.003 of the BOC, a professional entity may not be the only entity type through which the activity or service may be rendered. To determine whether one *must* form a professional entity for this purpose, review the statute regulating the activity or profession.

2. If the enabling legislation regulating the profession only licenses individuals to perform the professional service, such as the practice of law, a licensed professional seeking to form a limited liability company or a for-profit corporation through which to render the professional service would form a professional limited liability company or a professional corporation that is subject to title 7 of the BOC.

3. If the enabling legislation regulating the professional service authorizes the issuance of a license to provide the service to an individual, corporation, limited liability company, partnership, or association, in accordance with the reasoning and analysis of Texas Attorney General Opinion JC-0536 (2002),[59] a professional seeking to form a limited liability company through which to render the service may form a limited liability company or a professional limited liability company.

4. Only certain licensed professions can be rendered through a professional association. A professional association may be formed for the purpose of providing the professional service rendered by a doctor of medicine, doctor of osteopathy, doctor of podiatry, dentist, chiropractor, optometrist, therapeutic optometrist, veterinarian, or licensed mental health professional. A "licensed mental health professional" means a person, other than a physician, who is licensed by the state to engage in the practice of psychology or psychiatric nursing or to provide professional therapy or counseling services.

5. Pursuant to section 301.003(3) of the BOC, the definition of a professional corporation excludes the practice of medicine as a professional service that may be rendered through a professional corporation.

6. *Practice Tip*: The secretary of state provides a permissible entity type chart for certain licensed activities and other professions. The chart, which is used as a guide by our document examiners, may be found in our FAQs. A version of the chart is provided as an appendix to this paper.

## C. Joint Ownership and Practice

1. As a general rule, a domestic or foreign professional entity may render only one type of professional service (and any ancillary services). (Sec. 2.004 BOC)

2. Section 301.012 of the BOC however specifically provides for the joint practice of the following professionals.

a. Persons licensed as doctors of medicine, and persons licensed as doctors of osteopathy by the Texas State Board of Medical Examiners and persons licensed as podiatrists by the Texas State Board of Podiatric Medical Examiners may jointly form and own a professional association or a PLLC to perform professional services that fall within the scope of the practice of those practitioners.[60]

b. Professionals, other than physicians, engaged in related mental health fields such as psychology, clinical social work, licensed professional counseling, and licensed marriage and family therapy may form a professional association, PLLC or PC that is jointly owned by those practitioners to perform professional services that fall within the scope of the practice of those practitioners.[61]

c. Persons licensed as doctors of medicine and persons licensed as doctors of osteopathy by the Texas State Board of Medical Examiners and persons licensed as optometrists or therapeutic optometrists by the Texas Optometry Board may, subject to the provisions regulating those professionals, jointly form and own a partnership, including a limited liability partnership, a professional association or a professional limited liability company to perform professional services that fall within the scope of the practice of those practitioners.[62]

3. Changes in the laws governing the professions may permit the joint practice of certain professionals not reflected in section 301.012, the joint professional practice provision of the BOC. In recognition of this fact, section 2.004 of the BOC provides that a professional entity may engage in only one type of professional service *unless the entity is expressly authorized to provide more than one type of professional service under the state law regulating the professional services*.

4. While section 2.004 provides for an exception to the general rule, please note that if a formation document contains a joint practice provision not specifically provided for in the BOC, the legal

practitioner should be prepared to provide reference to the specific law permitting the stated joint practice.

**D. Physicians and Physician Assistants**

Chapters 22, 152, and 301 of the BOC provide for the joint ownership of certain entities by physicians and physician assistants.

1. While physicians and physician assistants may jointly own a professional association or professional limited liability company, certain management and ownership restrictions apply to a professional association that is formed and owned jointly by such professionals. For example, one or more of the original members must be a physician and each physician that is an original member must sign the certificate of formation as an organizer and must ensure that a physician or physicians control and manage the professional association. A licensed physician assistant who is an original member of the association cannot act as an organizer, director, or officer of the association.

2. Chapters 162 and 204 of the Occupations Code impose reporting requirements on physicians and physician assistants who form and own such jointly owned entities. The licensed professionals must file an annual report with the applicable regulatory board; namely, the Texas Medical Board or the Texas Physician Assistant Board. For more information on reporting requirements, contact the applicable regulatory board.

**E. Certificate of Formation Issues**

1. The provisions of title 2, chapters 20 and 21, and title 7, chapters 301 and 303, govern a domestic professional corporation. Accordingly, when drafting the certificate of formation of a professional corporation, you must provide the supplemental information required for a for-profit corporation under section 3.007 (e.g., capital structure and management information), in addition to the supplemental information required of professional entities under section 3.014.

a. The BOC effected a change to the ownership provisions for professional corporations.[63] Under the BOC, a "professional organization," as well as a "professional individual" may hold an ownership interest in the professional corporation.[64]

b. A professional corporation's officers and directors however must still be licensed individuals.

c. A professional corporation also may be formed as a close corporation.

2. The provisions of title 2, chapters 20 and 21, and title 7, chapters 301 and 302, govern a domestic professional association.[65] Therefore, if a professional association is to issue shares in the association, it must provide for its capital structure in the certificate of formation and provide the same information that would be required of a for-profit corporation and a professional corporation under section 3.007 of the BOC.

a. The listing of professionals who may form professional associations is exclusive and reflects the professionals who were specifically authorized to form professional associations as of September 2003. An advance nurse practitioner, nurse anesthetist, or surgical assistant *cannot* form a professional association.[66]

b. Ownership and management in a professional association are still limited to individuals who are licensed to perform the professional service for which the professional association was formed.

3. Section 3.015 of the BOC requires the certificate of formation of a professional association to include certain supplemental information. The certificate of formation of a professional association must state whether the association is to be governed by a board of directors or by an executive committee and must provide the name and address of each person serving on the initial board or committee.

**F. Name Issues for Professional Entities**

1. The names of professional entities must meet the same availability standards as the names of general-purpose corporations or limited liability companies.

2. The name of a professional limited liability company must contain the words *professional limited liability company* or the abbreviation P.L.L.C. or PLLC. (Sec.5.059 BOC) The name of a professional corporation must include a word or an abbreviation required for a for-profit corporation, or it may contain the phrase *professional corporation* or an abbreviation of the phrase. (Sec. 5.054(c) BOC) The name of a professional association must contain the word *associated*, *associates*, or *association*, the phrase *professional association*, or an abbreviation of one of those words or that phrase. (Sec. 5.058 BOC)

3. The name of a professional entity may not be contrary to law or to the ethics of the profession involved. (Sec. 5.060 BOC) Check with the regulatory or licensing authority to determine whether the name chosen violates any law or regulation governing the profession.

## X. REINSTATING AN INACTIVE DOMESTIC ENTITY

To determine the appropriate filing requirements, first determine the reason for the domestic entity's inactive status.

### A. Forfeited Existence—Chapter 171 Tax Code

1. The secretary of state has statutory authority to forfeit the charter, certificate or registration of a domestic or foreign corporation, limited liability company, professional association, or limited partnership, or foreign business trust that the Comptroller of Public Accounts certifies has not revived its forfeited privileges.

2. The secretary of state is not required to notify a taxable entity of the forfeiture of its existence or registration. The taxable entity has already received statutory notification regarding the forfeiture of its corporate or business privileges from the Comptroller under subchapter F of chapter 171 of the Tax Code.

3. On forfeiture, the secretary of state changes the status of the taxable entity from "in existence" to "forfeited existence." While the secretary of state can provide the effective date of the forfeiture of an entity's certificate or registration, it is the Comptroller of Public Accounts who determines the effective date that a taxable entity forfeits its corporate or business privileges under sections 171.251 and 17.2515 of the Tax Code.

4. Registration of a limited partnership as an LLP does not create a separate entity. While an underlying domestic limited partnership that is subject to the franchise tax may forfeit its privileges and be subject to forfeiture of its certificate of formation or registration, the LLP registration itself is not subject to forfeiture by the secretary of state.

### B. Reinstatement—Chapter 171 Tax Forfeiture

1. The secretary of state has authority to revive the certificate or registration of a taxable entity after forfeiture by the secretary of state. An application for reinstatement and request to set aside a tax forfeiture is governed by sections 171.312 to 171.315 of the Tax Code rather than the BOC or its source statutes.[67] The revival and reinstatement of a taxable entity follows the same procedures used when reinstating a corporate entity.

2. Chapter 171 of the Tax Code does not establish a time frame within which an entity must file an application for reinstatement with the secretary of state.

3. Section 171.313 of the Tax Code requires the secretary of state to determine whether a taxable entity has filed each delinquent report and paid any delinquent tax before filing an application for reinstatement and setting aside the forfeiture. A tax clearance letter issued by the comptroller of public accounts stating that the entity is in good standing for purposes of reinstatement fulfills this requirement and must accompany the application for reinstatement and must be valid through the date of filing of the application for reinstatement.

4. An application for reinstatement and request to set aside forfeiture under chapter 171 of the Tax Code must be submitted on behalf of and executed by a person who was a managerial official or owner of the taxable entity at the time of forfeiture. In the case of a limited partnership, the application for reinstatement would be submitted and executed by a person who was a partner in the partnership at the time of forfeiture.

5. The specific SOS form for making an application for reinstatement and request to set aside forfeiture is SOS form 801. The filing fee for a taxable entity, other than a nonprofit corporation, is $75. There is no filing fee assessed for an application for reinstatement and request to set aside a tax forfeiture filed on behalf of a nonprofit corporation.

### C. Involuntary Terminations—Chapter 11 BOC

1. Section 11.251 of the BOC authorizes the secretary of state to involuntarily terminate the existence of a domestic entity if the secretary finds that:

a. the entity has failed to, and before the 91st day after the date notice was mailed has not corrected the entity's failure to:

(1) file a report within the period required by law or pay a fee or penalty prescribed by law when due and payable; or

(2) maintain a registered agent or registered office in this state as required by law; or

b. the entity has failed to, and before the 16th day after the date notice was mailed has not corrected the entity's failure to, pay a fee required in connection with the filing of its certificate of formation, or payment of the fee was dishonored when presented for payment by the state for payment.

2. *Registered Agent/Office*: The most frequent basis for involuntary termination of a domestic entity's

existence is an entity's failure to maintain a registered agent or registered office address in Texas as required by law. Typically, notice of delinquency follows the receipt and filing of a resignation of registered agent or rejection of appointment. Notice of the need to designate a new registered agent/office is sent to the entity by certified mail.[68] If an additional contact address is shown in the records of the secretary of state, additional notice may be sent by regular mail to the secondary address.

3. *Delinquent Annual Statement*: Section 302.012 of the BOC requires each professional association to file an annual statement with the secretary of state by June 30th. A professional association that fails to file its annual statement by June 30th is subject to involuntary termination after notice pursuant to section 11.251 of the BOC.

4. *Dishonored Payment*: Failure to satisfy the statutory fee for a certificate of formation will result in the involuntary termination of a domestic filing entity. An initial notice regarding nonpayment or dishonor of payment of the formation fee is sent to the submitting party/payor name and address. If substitute payment is not received within the time frame specified in the initial contact letter,[69] notice of the entity's failure to satisfy the formation fee and intent to involuntarily terminate the entity is sent to the registered agent at the registered office address of record by regular mail.

**D. Reinstatement—Chapter 11 BOC Involuntary Termination**

1. An involuntarily terminated entity may reinstate its existence by filing a certificate of reinstatement under section 11.253 of the BOC and by correcting the circumstances that gave rise to the involuntary termination and any other circumstances that may exist of the types described by section 11.251(b). Additional fees and filings may be required depending on the circumstances that led to the involuntary termination and any intervening events that may require an amendment to the domestic entity's certificate of formation.

2. Pursuant to section 11.253(d) of the BOC, a certificate of reinstatement after involuntary termination may be filed at any time. However, the entity is considered to have continued in existence without interruption from the date of its involuntary termination only if the entity is reinstated before the third anniversary of the date of its involuntary termination.

3. A professional association that was involuntarily terminated for its failure to file its annual statement is required to simultaneously submit the certificate of reinstatement and each delinquent annual statement due at the time of submission, together with the appropriate filing fees for each filing. A certificate of reinstatement that is not accompanied by each delinquent statement cannot be filed and must be rejected.

4. A domestic entity that was involuntarily terminated for its failure to pay a fee required in connection with the filing of its certificate of formation is required to submit the certificate of reinstatement together with a fee sufficient to cover the filing fee for the reinstatement and the amount owed to the secretary of state.

5. A domestic entity that was involuntarily terminated for its failure to maintain a registered agent or registered office as required by law need not provide a separate statement of change of registered agent/office with its certificate of reinstatement. Each entity requesting reinstatement must provide a current registered agent and registered office in the certificate of reinstatement. A certificate of reinstatement that does not include current registered agent and registered office information cannot be filed and will be rejected.

6. There are two forms that have been promulgated for filing a certificate of reinstatement: SOS forms 811 and 814. SOS form 811 is the generic BOC certificate of reinstatement form. SOS form 814 is designed specifically for use by professional associations that have been involuntarily terminated for failing to file an annual statement. If these forms are not used, the certificate of reinstatement must satisfy the requirements of section 11.253(b) and (c). The reinstatement filing fee is $75, unless the entity is a nonprofit corporation. The fee for a nonprofit corporation is $5.

7. A certificate of reinstatement submitted on behalf of a domestic filing entity, other than a nonprofit corporation, requires a tax clearance letter issued by the Comptroller stating that the entity is in good standing for purposes of reinstatement.

**E. Failure to File Periodic Report—Chapter 22 BOC Involuntary Terminations**

1. Failure to file the nonprofit periodic report when due results in the forfeiture of the corporation's right to conduct its affairs in Texas. (Sec. 22.360 BOC) Notice of forfeiture is mailed to the corporation's registered agent at the registered office address.

2. Forfeiture of the corporation's right to conduct its affairs does not impair the validity of a contract or act of the corporation, or prevent the corporation from defending an action, suit or proceeding in a court of this state, but the corporation may not maintain an action, suit or proceeding in a court of this state.

3. A Texas nonprofit corporation that fails to file the delinquent periodic report and revive its right to conduct business within 120 days of the mailing of the notice of forfeiture is involuntarily terminated by the secretary of state pursuant to section 22.364 of the BOC.

**F. Reinstatement After Involuntary Termination-Chapter 22**

1. A nonprofit corporation that has involuntarily terminated its existence for its failure to file a periodic report is reinstated by following the specific reinstatement procedures set forth in section 22.365 and not the procedures established under section 11.253 of the BOC.

2. A nonprofit corporation involuntarily terminated under section 22.364 of the BOC would file the delinquent report together with the maximum filing fee of $25. The corporation would not submit a certificate of reinstatement.

3. Section 22.365 does not set forth a time frame within which the delinquent report must be filed and the corporation reinstated.

4. Section 22.365(a) requires the secretary of state to determine whether the corporation has paid all fees, taxes, penalties, and interest due and accruing before the termination; and an amount equal to the total taxes from the date of termination to the date of reinstatement that would have been payable if the corporation had not been terminated. If the nonprofit corporation is not tax-exempt, a tax clearance letter issued by the comptroller of public accounts stating that the entity is in good standing for purposes of reinstatement fulfills this requirement. The tax clearance letter must accompany the delinquent report and must be valid through the date of filing of the report.

**G. Failure to File Periodic Report—Chapter 153 BOC Involuntary Terminations**

1. The failure of a limited partnership to file a periodic report when due results in the forfeiture of the partnership's right to transact business in Texas. (Sec. 153.307 BOC) Notice of forfeiture is mailed to the partnership's registered agent at the registered office address.

2. Forfeiture of the partnership's right to transact business does not impair the validity of a contract or act of the corporation, prevent the partnership from defending an action, suit or proceeding in a court of this state, but the partnership may not maintain an action, suit or proceeding in a court of this state.

3. Forfeiture of a partnership's right to transact business does not affect the liability of a limited partner. (Sec. 153.309 BOC)

4. The certificate of formation of a limited partnership that fails to file the delinquent periodic report and revive its right to transact business within 120 days of the mailing of the notice of forfeiture is involuntarily terminated by the secretary of state pursuant to section 153.311 of the BOC.

**H. Reinstatement After Involuntary Termination-Chapter 153**

1. A limited partnership that has its certificate of formation involuntarily terminated for its failure to file a periodic report may reinstate its certificate by following the specific reinstatement procedures set forth in section 153.312 and not the procedures established under section 11.253 of the BOC.

2. A limited partnership that has its certificate of formation involuntarily terminated under section 153.311 of the BOC would file the delinquent report together with the maximum fee of $225.[70] A separate certificate of reinstatement would not be submitted for filing.

3. Section 153.312 does not set forth a time frame within which the delinquent report must be filed and the partnership reinstated.

4. Section 153.312(b) requires the secretary of state to determine whether the limited partnership has paid all fees, taxes, penalties, and interest due and accruing before the termination. A tax clearance letter issued by the comptroller of public accounts stating that the entity is in good standing for purposes of reinstatement fulfills this requirement. The tax clearance letter must accompany the delinquent report and must be valid through the date of filing of the report.

**I. Reinstatement After Voluntary Termination-Chapter 11 BOC**

1. Sections 11.201 and 11.202 of the BOC permit the reinstatement of a domestic entity that has been voluntarily terminated if the owners, members, governing persons, or other persons specified by the BOC approve the reinstatement in the manner provided by the title governing the entity and:

a. the termination was by mistake or inadvertent;

b. the termination occurred without the approval of the entity's governing persons when approval is required by the title governing the entity;

c. the process of winding up before termination had not been completed by the entity; or

d. the legal existence of the entity is necessary to convey or assign property, to settle or release a claim or liability, to take an action, or to sign an instrument or agreement.

2. The certificate of reinstatement of an entity that has been voluntarily terminated must be filed no later than the third anniversary of the effective date of the termination.

3. An application for reinstatement following a voluntary termination submitted on behalf of a domestic filing entity, other than a nonprofit corporation, made pursuant to section 11.202 of the BOC requires a tax clearance letter issued by the Comptroller stating that the entity is in good standing for purposes of reinstatement.

**J. Intervening Events May Give Rise to Rejection**

1. *Entity Name Issues*: Before filing a reinstatement, the secretary of state must determine whether the name of the entity seeking reinstatement is still available for purposes of its reinstatement. If the entity's name is no longer available for its use at the time of submission of the reinstatement filing, the instrument cannot be filed. In the case of a domestic entity, the reinstatement must be accompanied by a certificate of amendment to change the name of the domestic entity. In the case of a foreign entity, the reinstatement must be accompanied by an amendment to the registration for purposes of adopting an assumed name under which the entity may register to transact business.

2. *No Registered Agent:* Before submitting an application for reinstatement and request to set aside forfeiture, you should determine whether there is a need to update the entity's registered agent or registered office address. If the entity's registered agent submitted a resignation to the secretary of state during the period the entity was in a tax forfeited status, the application for reinstatement and request to set aside forfeiture will be rejected. Acceptance of the application will be conditioned on the simultaneous submission of a statement of change of registered agent and registered office.

3. *Entity Expired:* While the vast majority of entities are formed with a perpetual duration, a domestic entity seeking reinstatement of its existence may be unable to do so if its certificate of formation provides for a limited period of duration. If the duration of an entity expires during the time period between termination/forfeiture and reinstatement, the entity ceases to exist due to the expiration of its duration and no longer has an existence that may be reactivated. Consequently, a reinstatement may be filed after a tax forfeiture or involuntary termination so long as the entity would otherwise have continued to exist.

**K. Haunting Issues Faced By An Involuntarily Terminated/Forfeited Entity**

Pursuant to section 11.356(b) of the BOC, a terminated entity may not continue its existence for the purpose of continuing the business for which it was formed unless the entity is reinstated.

1. Section 11.001 defines a "terminated entity" as a domestic entity the existence of which has been:

a. terminated in a manner authorized or required by the BOC, unless the entity has been reinstated in the manner provided by the BOC; or

b. forfeited pursuant to the Tax Code, unless the forfeiture has been set aside.

2. A terminated domestic filing entity continues in existence until the 3rd anniversary of the effective date of its termination *only* for the purposes set forth in section 11.356, which include:

a. prosecuting or defending in the entity's name an action or proceeding brought by or against the terminated filing entity; and

b. permitting the survival of an existing claim by or against the terminated filing entity.

3. Pursuant to section 11.001 of the BOC, an existing claim means:

a. a claim against an entity that existed before the entity's termination and that is not barred by limitations; or

b. a contractual obligation incurred after termination.

4. An existing claim by or against a terminated filing entity is extinguished unless an action or

proceeding is brought on the claim *no later than the 3rd anniversary of the date of termination of the entity*[71].

5. It is important to note that while the secretary of state may accept and file an application for reinstatement submitted on behalf of an entity that has been involuntarily terminated or forfeited,[72] the secretary's reinstatement of the entity may not cure the thorny issues that may be faced by the forfeited or involuntarily terminated entity.

6. Pursuant to sections 171.252, and 171.255-171.2515 of the Tax Code, the managerial officials of a taxable entity that has forfeited its right to do business are liable for the debts of an entity created or incurred in Texas after the date on which the report, tax, or penalty is due and before the corporate privileges are revived. These officials are liable as if the entity were a partnership and the managerial officials were partners in such partnership.[73] This liability is not affected by the restoration of the taxable entity's corporate privileges.

7. While a taxable entity whose existence has been forfeited under the Tax Code or involuntarily terminated under the BOC may submit an application for reinstatement at any time, secretary of state's filing of the application and reactivation of the existence of an entity does not revive any claims that may have been extinguished under subchapter H of chapter 11 of the BOC. *See* Emmett Props., Inc. v. Halliburton Energy Servs., Inc., 167 S.W.3rd 365 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) wherein the appeals court held that a corporation that brought suit and that reinstated its existence more than three years after its forfeiture by the secretary of state could not sue on pre-forfeiture claims.

## XI. SPECIAL LLP ISSUES

### A. LLP Registration—Strict Compliance

The LLP provisions of the BOC do not have a substantial compliance standard; strict compliance with the registration and renewal requirements is required to ensure liability protection.[74]

1. The secretary of state often provides notice to an LLP regarding its need to renew its registration. However, providing notice of renewal is not a duty imposed on the secretary of state. The failure of the secretary of state to send a notice of renewal, or the failure of the LLP to receive a notice of renewal, does not extend the duration of an LLP registration.

2. Once the term of registration expires, a new registration must be submitted. There is no grace period for renewal of registration, and no means of reinstating an expired registration. The failure to be vigilant regarding renewals of registrations may result in the imposition of personal liability.

### B. LPs Registered as LLPs

1. A domestic limited partnership that has also elected to register as an LLP has two separate records and file numbers with the secretary of state—one as an LP and the other as an LLP. However, a limited partnership that also elects to register as an LLP is a single taxable entity.

2. In an attempt to create a tie between the underlying limited partnership record and the LLP registration record, the secretary of state will search the name of the LLP when processing an application for registration or renewal of registration to determine whether an underlying limited partnership is of record. If an active limited partnership by the same name is found, the name and file number of the underlying limited partnership will be shown as an associated entity in the LLP registration records, and the name and file number of the LLP registration will be reflected in the database as an associated entity of the limited partnership. The secretary of state is then able to pass the file number of the LLP's associated limited partnership to the Comptroller of Public Accounts.

### C. Facilitating Linkage Between LP and LLP Records

1. The name of the limited partnership and the name of the partnership on its registration as an LLP should *match*. The secretary of state uses an entity name as the primary means of searching the records to verify the existence of the underlying LP record.

2. If the name of the limited partnership does not match the entity name shown on the LLP registration, you may need to file another instrument with the secretary of state to clarify the records.

a. If the name of the limited partnership on its certificate of formation does not include the LLP identifier used in its application for registration, the limited partnership should file an amendment to the certificate of formation to add the LLP identifier used in its registration.

b. The name of a limited partnership must meet the name availability standards imposed under chapter 5 of the BOC while the name of a partnership that registers as an LLP is not subject to the same standards. (Sec. 5.063(b) BOC) If a name availability conflict results in the formation of a limited partnership under a name that differs from the name

shown on its registration as an LLP, it is suggested that the limited partnership file an assumed name certificate to show that the LP is also conducting business under the name shown in the LLP registration and vice versa.

c. When the certificate of formation of the limited partnership is amended before expiration of the current term of the entity's LLP registration, file a corresponding amendment to the LLP registration to reflect the new name.

3. Section 152.802 of the BOC requires a partnership to provide its federal taxpayer identification number at the time of its registration, renewal of registration or withdrawal of registration, and when filing any amendment to its registration. Although provision of such information is statutorily required, the secretary of state accepts an LLP initial registration or renewal of registration that does not include a taxpayer identification number if the partnership states that it has not obtained its identification number at the time of the submission of the filing.

4. *Practice Tip*: It is strongly recommended that a limited partnership that will also be registered as an LLP file an amendment to its LLP registration to provide the federal taxpayer identification number once that number is obtained. This additional information will facilitate linkage between the limited partnership and its registration as an LLP. The filing fee for an amendment to registration that does not add additional partners is $10.

5. When a domestic limited partnership files an instrument that affects the existence of the entity as a limited partnership, the partnership's registration as a limited liability partnership is not updated to reflect the filing of the instrument. Consequently, while the record of the limited partnership will show the entity as "inactive," its LLP registration record will remain active until it is either withdrawn or expires. A practitioner may wish to consider filing a withdrawal of the partnership's registration as an LLP when the existence of the underlying partnership ceases due to a termination, cancellation, merger or conversion.

6. When a domestic general partnership converts to domestic limited partnership (or vice versa), the secretary of state will accept an amendment to the partnership's LLP registration to show the reorganization of the underlying partnership and change of name, if applicable.

### D. Common Reasons for Rejection

1. A registration or renewal form that states that there is only one partner in the partnership will be rejected for clarification if a search of the database does not reflect a limited partnership by the same name. A partnership is defined as an association comprised of two or more persons.

2. The duration of the LLP registration is one year from the effective date of filing. The secretary of state must reject an application for renewal when the application is received after the term has expired.

### E. Failure to Renew—Franchise Tax Consequences

Failure to renew an LLP registration before the expiration of the current term will require the partnership to file a new registration with the secretary of state. This also may have franchise tax consequences. The lapse in registration may trigger the need to file a final franchise tax report for the lapsed registration. To avoid the possibility of establishing a new/duplicate tax account, or filing additional franchise tax reports, a partnership should renew its registration on a timely basis.

## XII. CERTIFICATES OF CORRECTION

### A. Corrections 101

1. A domestic or foreign filing entity may correct a filing instrument that was filed with the secretary of state when the instrument is an inaccurate record of the action referred to in the instrument, contains an inaccurate or erroneous statement, or was defectively executed. (Sec. 4.101-Sec. 4.105 BOC)

2. A certificate of correction must be executed by a person authorized by the provisions of the BOC to execute the instrument being corrected. This means that an entity's organizer must sign a certificate of correction to a certificate of formation. If the organizer is identified as John Doe, and Mary Smith, an initial member of the limited liability company, signs the certificate of correction, it will be rejected. However, if the organizer is identified as a corporation, limited liability company, or partnership (e.g., ABC Servco, Inc.), the certificate of correction need not be signed by the same person who signed the certificate of formation on behalf of the legal entity, but may be signed by an authorized managerial official of the organizer.

3. A certificate of correction is not to be used as a "less expensive" alternative to a certificate of amendment. The secretary of state may subject a certificate of correction to greater scrutiny and may reject the submission of a certificate of correction if:

a. it appears that an amendment rather than a correction is being made to a formation instrument;

b. multiple corrections have been filed to correct the same filing instrument;

c. the filing instrument to be corrected has been on file for more than one year; or

d. the certificate of correction attempts to change a domestic nonprofit corporation to a special purpose nonprofit corporation governed by a law other than the BOC.

4. Documents may be corrected to contain only those statements that lawfully could have been included in the original instrument. The certificate of correction may not be used to alter, include, or delete a statement that by its alteration, inclusion, or deletion would have caused the secretary of state to determine that the document did not conform to law. This means that a certificate of correction cannot be used to change the type of document filed. For example, a certificate of correction cannot be used to change a certificate of formation of a domestic entity to an application for registration of a foreign entity (or vice versa) or an application for registration as a limited liability partnership to a certificate of formation for a limited partnership (or vice versa).

5. The filing of the certificate of correction relates back to the original date of the filing except as to those persons who are adversely affected by the correction. In the case of a person adversely affected by the correction, the filing instrument is considered to have been corrected on the date the certificate of correction is filed.

6. Corrections do not *void* or revoke the original filing; section 4.105(c) provides that any acknowledgment of filing issued by the secretary of state with respect to the effect of the filing is considered to apply to the instrument as corrected.

7. An assumed name certificate is not a filing instrument governed by the BOC. Consequently, an assumed name certificate is not an instrument that can be corrected by filing a certificate of correction under chapter 4 of the BOC. If the information is materially misleading or inaccurate, consider filing a new assumed name certificate. (Sec. 71.152, Business & Commerce Code)

**B. Corrections to Mergers or Conversions**

Generally, the filing instrument to be corrected relates to a single entity. In the case of a filing instrument that involves multiple entities as parties to the transaction evidenced by the instrument certain procedures should be taken to facilitate processing.

1. Only one correction filing is required to correct errors in the merger, conversion or exchange filing instrument. If the practitioner is using SOS Form 403 to submit the certificate of correction, the best practice is to show the name and file number of any surviving entity to a merger, the converted entity in a conversion, and the acquiring entity in an interest exchange in the field that asks for the name of the entity submitting the correction instrument.

2. The certificate of correction also should include the name and file number of any merging filing entities, the name and file number of the converting entity, or the name of each acquired domestic filing entity, as applicable. The additional names and file numbers may be included on the form itself or provided as an attachment to the form. Failure to include the names and file numbers of the other filing entities will not be grounds for refusal of the correction instrument; however, providing the additional information saves the SOS time and ensures that the correction instrument is properly indexed.

3. Even though the correction instrument may apply to multiple entities, the certificate of correction need not be signed by all parties that were required to sign the instrument being corrected. It is sufficient if the correction instrument is signed on behalf of a surviving party to the merger, the converted entity in a conversion, or an acquiring entity in the interest exchange.

4. The fee for filing the certificate of correction is $15 regardless of the number of entities that may be affected by the correction instrument.

## XIII. DELAYED EFFECTIVENESS

In general, a filing instrument takes effect on filing by the secretary of state. However, section 4.052 of the BOC allows an instrument to take effect after the time the filing instrument would otherwise take effect.

**A. Effectiveness Delayed to Specific Date and Time**

1. *Practice Tip*: The review and processing of a filing instrument that will have its effectiveness delayed is facilitated if the filing instrument clearly and expressly provides a separate section or paragraph relating to the delayed effectiveness of the filing.

2. If the effectiveness of a filing instrument is to be delayed to a specific date and time, the future date may not be later than ninety (90) days from the date of *signing* and the time cannot be stated as 12:00 am, midnight, 12:00 pm, or noon. In addition, the time

must be stated as a specific time. For example, it is not sufficient to state that the instrument will be effective on a certain date "immediately after" or "immediately before" a stated time.

3. *Practice Tip*: When drafting filing instruments for multi-jurisdictional transactions, please note that all delayed effective dates and times will be recorded as the date and time in the time zone of the filing office—Central Time. For example, a delayed effective date and time stated in the filing instrument as June 1, 2014 at 12:01 am Eastern Time will be evidenced in the certificate of filing and in the records of the secretary of state as May 31, 2014 at 11:01 pm.

4. Delayed effectiveness is not permitted for name reservations, name registrations, statements of event or fact, or abandonment of filings prior to effectiveness. (Sec. 4.058 BOC) Due to the effect and nature of a certificate of correction, the effectiveness of a correction may not be delayed.

### B. Effectiveness Conditioned on Event or Fact

1. A filing instrument the effectiveness of which is conditioned on the occurrence of a future event or fact ("delayed condition") must clearly and expressly state:

a. the manner in which the event or fact will cause the instrument to take effect; and
b. the date of the 90th day after the date the instrument is signed.

2. Section 4.055 of the BOC requires the entity to file a statement confirming: 1) that each event or fact on which the effect of the instrument is conditioned has been satisfied or waived; and 2) the date and time on which the condition was satisfied or waived. (SOS form 805). The statement must be filed not later than the 90th day after the instrument is filed.

3. If the statement of event or fact is not filed, the filing instrument is not effective. In this case, the parties must either:

a. file a subsequent filing instrument to take the action or transaction evidenced by the original filing effective; or
b. file a statement of abandonment of filing under section 4.057 of the BOC.

### C. Actions Taken at Time of Filing

1. When delaying the effectiveness of a filing instrument, it is important to note that the secretary of state updates its computer records and takes action to reflect the changes effected by the filing instrument as of the date of filing. (1 TAC §79.73) This means that the filing history of the entity will be changed to show the filing of the filing instrument, the date of its filing, the future date of its effectiveness, or provide a notation ("condition") to denote that the effectiveness is conditioned on the occurrence of a future event or fact.

2. The secretary of state also takes action to effect the actions referenced in the filing instrument at the time of filing. For example, a certificate of formation that has its effectiveness delayed to a future date and time will be reflected in the records of the secretary of state and will have an active status of "in existence." In the case of a merger with a delayed effectiveness provision the secretary of state will change the status of any non-surviving domestic party to the merger from an active status ("in existence") to an inactive status ("merged") on the date of filing.

3. Certificates of fact reflect what is evidenced in the computer records of the secretary of state. Consequently, a practitioner will not be able to obtain a certificate of status for the non-surviving party to the merger that indicates that the status of the entity is "in existence" once the secretary of state accepts and files a certificate of merger even if the effectiveness of the merger was delayed to a later date and time.

## XIV. PRIVACY ISSUES

Unless otherwise exempted by constitutional provision, statutory provision, or judicial decision, all documents, including correspondence, on file with the Corporations Section, and information contained therein, are subject to public access and disclosure under chapter 552 of the Government Code.

### A. Social Security Numbers

1. The provisions of the BOC do not require an individual to include a social security number in any filing instrument required or permitted to be filed with the secretary of state. However, while individual SSN information is not a statutory filing requirement, sometimes persons voluntarily provided such information in a document that is accepted, indexed and recorded by the Corporations Section.

2. The secretary of state will redact the entire SSN number on documents displayed on SOSDirect and used for the production of copies in response to public information requests. An un-redacted copy of the document will be retained for access by secretary of state staff in response to requests from law enforcement or other authorized requestors.

**B. Public Information Reports**

While the title of the report is self-explanatory, many people remain unaware of the extent of access to such information.

1. Much of the information provided to the Comptroller of Public Accounts under the Tax Code is confidential under state law; however, the Tax Code specifically provides that the information contained in a Public Information Report (PIR) *is not* confidential.[75]

2. The purpose of the PIR is to provide a "snapshot" of the entity as of the date the report is filed. It is only required to be filed annually in May. An entity is not required to file (nor is the Comptroller required to accept) an "updated PIR" whenever an event occurs that changes the information provided in the report. Consequently, the information contained in the PIR may no longer be current when the information is accessed by a third party.

3. Once a corporation or limited liability company files its PIR with the Comptroller of Public Accounts, the Comptroller forwards the report to the secretary of state. The secretary of state indexes the PIR against the entity's record. The Corporations Section maintains the PIR management information in its database. When changes to management information are reflected in a PIR, the information is updated by the secretary of state. Management information is accessible electronically through SOSDirect.

4. An individual whose name was included on a PIR, but who was not an officer or director on the date the report was filed, may file a sworn statement to that effect with the Comptroller of Public Accounts. The Comptroller will then forward the sworn statement to the secretary of state for purposes of updating the management information accordingly.

**C. Home Addresses and Other Expectations of Privacy**

1. The secretary of state provides any information deemed to be public information to both the public and private sectors and cannot limit or restrict the purposes for which the information may be used by a requesting party.

2. If your client has an expectation of privacy regarding home address information, do not use this address as the registered office address. Of course, if the registered agent has no other address other than a home address, there can be no expectation of privacy.

3. When providing management information, provide a business office address rather than a home address when you are required to provide management address information in a filing instrument or PIR.

## XV. SUNDRY ISSUES FROM THE SOS

**A. Nonprofit LLCs**

Titles 2 and 3 of the BOC do not restrict the purpose of a limited liability company to the rendition of a for-profit business, trade, or profession.[76] As the BOC does not restrict the purpose,[77] an LLC may be formed to engage in a nonprofit purpose.

1. An LLC may be organized solely for one or more nonprofit purposes specified by section 2.002 of the BOC. Nonprofit purposes include:

   a. providing professional, commercial, or trade associations; and

   b. serving charitable, benevolent, religious, fraternal, social, educational, athletic, patriotic, and civic purposes.

2. An LLC with a nonprofit purpose is distinct from a nonprofit corporation or other nonprofit association. A BOC provision that applies specifically to a nonprofit corporation does not apply to an LLC formed for a nonprofit purpose. For example, the default tax-exempt provisions found in section 2.107 apply to a nonprofit corporation and do not apply to a nonprofit LLC.

3. There is no statutory basis for distinguishing between an LLC formed for a for-profit purpose and an LLC formed for a nonprofit purpose. Filing fees established under sections 4.151 and 4.154 apply to all LLCs regardless of purpose.

4. Section 171.088 of the Tax Code permits an entity that is not a corporation to qualify for a tax-exempt status if its activities would qualify it for a specific tax exemption were the entity formed as a corporation.

**B. Unincorporated Nonprofit Associations as Taxable Entities**

Pursuant to section 252.006(a) of the BOC, an unincorporated nonprofit association is a "legal entity separate from its members for the purposes of determining and enforcing rights, duties, and liabilities in contract and tort." Section 171.0002 of the Tax Code defines a "taxable entity" to include a "legal entity." Accordingly, an unincorporated nonprofit association is a taxable entity and subject to franchise tax unless otherwise exempt.

### C. Restated Certificates of Formation—Issues

1. *Names and Addresses of Governing Authority:* Section 3.059 of the BOC requires a restated certificate of formation to restate the text of the certificate of formation, as amended, corrected, or restated, in its entirety. While organizer information may be omitted, the secretary of state requires a restated certificate to include the number, names and addresses of the entity's governing authority. Sections 3.060(a), 3.061(a), and 3.0611 permit the entity to update the certificate of formation provision relating to the governing authority by providing the names and addresses of the current governing authority.[78] Also note that an update to the governing authority is not deemed to be a "further amendment" made to the certificate of formation.

2. *Entities Created by Merger/Conversion:* As noted above, a restated certificate of formation restates the text of its certificate of formation, as amended, corrected, or restated, in its entirety. If the domestic filing entity was formed pursuant to a plan of merger or conversion, do not forget to include the additional statements that were required under section 3.005(a)(7) of the BOC.

3. *Legislative Change*: Section 3.059 was amended by the 83rd Legislature, Regular Session[79] to eliminate the requirement that a restated certificate of formation that makes further amendments must "identify by reference or description each added, altered, or deleted provision." This means that a restated certificate of formation that makes further amendments may simply state that "the Certificate of Formation is amended and restated in its entirety as shown in the attachment."

## XVI. DOING BUSINESS WITH THE SECRETARY OF STATE

### A. Ministerial Duties

1. The secretary of state does not determine whether the person signing a document has the capacity claimed or that the signature affixed to the document is, in fact, the signature of the named person.[80] The filing duties of the secretary of state are ministerial and mandatory, which means that the secretary cannot be enjoined from filing a document that on its face conforms to statutory filing requirements.[81]

2. Unless otherwise authorized by law, the secretary of state has no statutory or administrative authority to revoke a filing because the document contained false statements.[82]

### B. Accessing Information

1. The secretary of state's website is found at http://www.sos.state.tx.us. Answers to frequently asked questions and forms promulgated by the office may be found on our website and accessed from the side navigation bar on the Corporations Section home page. A copy of current business entity filing fees is provided as an addendum to this paper.

2. SOSDirect is an electronic self-service business center that permits online access to filing functions and certification or copy orders. SOSDirect is generally available twenty-four hours a day, Sunday through Saturday. In accordance with section 405.018 of the Government Code, the secretary of state collects a fee for searches made through SOSDirect. The fee is currently $1 per search. Visit http://www.sos.state.tx.us/corp/sosda/index.shtml for information on SOSDirect.

3. The search function, "Registered Agent Activity-Past 60 Days," available from the Business Organizations Menu on SOSDirect retrieves a list of entities that have designated a person by the name searched as the entity's registered agent within 60 days of the date of the search. The statutorily authorized fee of $1 per name searched is applicable.

4. The secretary of state has an online certificate validation service that can be used to verify that a certificate of filing or a certificate of fact has, in fact, been issued by the Corporations Section of the Office of the Texas Secretary of State. By entering the document number associated with the certificate, a person can view and verify the certification that was issued. The certificate validation service applies only to certificates of filing, certificates of fact, and information letters issued in connection to business organizations documents filed by the Corporations Section. Certificates generated in connection with state trademark registrations or UCC filings cannot be verified through this service. The service is free and may be accessed from the Help pages on SOSDirect or from other links provided on our web site.

5. Most employees in the office can be reached by e-mail. The e-mail address is name of the employee@sos.texas.gov. The naming convention for any employee is first initial followed by the last name. For example, the e-mail address for Carmen Flores is cflores@sos.texas.gov.

6. Have a question for the legal staff on a filing issue? E-mail corphelp@sos.texas.gov. Alternatively, call the legal staff line at (512) 463-5586 to leave a message and a member of the legal staff will return

your call. You may contact the legal staff directly by telephone at the following numbers.

| | |
|---|---|
| Sara Wagner | 512 475-2081 |
| Meridith Debus | 512 463-5747 |
| Briana Godbey | 512 463-5590 |
| Mike Powell | 512 463-9856 |
| Carmen Flores | 512 463-5588 |

## ENDNOTES

[1] Sections 5.052, 5.053, and 9.004(b)(1) of the BOC.

[2] *See* 1 TAC § 79.35 and Steakley v. Braden, 322 S.W. 2d 363 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.).

[3] When certain organizational abbreviations ("co," "corp" and "inc") are attached to the end of a word to form a new word, such as "Funco," the organizational identifier will be considered as part of the word and will not be disregarded. Such an entity name would require the addition of a separate organizational identifier to be acceptable. For example, "Funco Ltd."

[4] 1 TAC § 79.38. *See also* Steakley v. Braden, *id* at 365 wherein the Texas Court of Civil Appeals held that the provision regarding filing of name with a letter of consent did not apply to deceptively similar names. "If the word 'deceptive' were read into the proviso then the Legislature would have empowered an individual or a single corporation to authorize, by giving consent, the practice of unfair competition, confusion, and fraud."

[5] This restatement of common law also was found in prior law.

[6] Sec. 5.052 BOC

[7] Persons forming a Texas captive insurance company under Chapter 964 of the Insurance Code or domesticating a foreign captive insurance company should contact the Corporations legal staff regarding submission procedures if the company will include the term *insurance* in its entity name.

[8] Sec. 31.005 Texas Finance Code

[9] Persons may obtain further information by calling (512) 475-1300 or by visiting the Department of Banking's web site at http://www.banking.state.tx.us/corp/noobject.htm.

[10] Sec. 5.057 BOC and Sec. 251.452 BOC

[11] Art. 711.021(h) Texas Health & Safety Code

[12] Sec. 1001.301(b) Texas Occupations Code [Tex. Occ. Code]

[13] Sec. 1052.003(b) Tex. Occ. Code

[14] Sec. 1071.251(d) Tex. Occ. Code

[15] Sec. 61.313 Texas Education Code

[16] Sec. 5.062 BOC

[17] Sec. 5.061 BOC

[18] Sec. 16.105 Texas Business & Commerce Code; Amateur Sports Act, 36 U.S.C. §380 (1978)

[19] Sec. 1.03(4) TRLPA

[20] Sec. 101.622 BOC, which became effective September 1, 2013. The new section was added by SB 847, which was enacted by the 83rd Legislature, Regular Session.

[21] The appointment of a statutory agent for an unincorporated nonprofit association pursuant to section 252.011(c) of the BOC requires the signature of the appointed agent to be included with the appointment.

[22] Sec. 9.051 to Sec. 9.052 BOC

[23] A foreign entity that has had its registration revoked by the secretary of state has only three (3) years within which to make an application for reinstatement. See sec. 9.104(a) BOC

[24] A foreign entity may be eligible for consideration of a late fee cap if the entity responds to an initial contact letter within 45 days of its receipt.

[25] Sec. 9.009(a-1) BOC

[26] Sec. 9.010 of the BOC states that the registration of a foreign entity is suspended if the entity changes its name in its jurisdiction of formation to a name that would cause the entity to be denied a registration under the name. While the secretary of state has authority to revoke a registration under section 9.101 of the BOC, the secretary does not take action under section 9.010 to suspend a registration.

[27] 1 TAC §80.2(f)

[28] The policy decision to collect a late fee penalty only on the registration associated with the underlying foreign limited partnership is in recognition of the fact that the foreign entity is not two separate entities.

[29] British Columbia and several other Canadian jurisdictions have LLP provisions. Other foreign countries, such as Japan, also have enacted LLP legislation.

[30] Section 17-218 of the Del Code Ann. Tit. 6; section 3806(b)(2) of the Del Code Ann. Tit. 12.

[31] Section 9.004(c) of the Texas Business Organizations Code provides that "A foreign filing entity may register regardless of any differences between the law of the entity's jurisdiction of formation and of this state applicable to the governing of the internal affairs or to the liability of an owner, member, or managerial official.

[32] Sec. 5.201(b)(3) BOC

[33] Sec. 5.201(d) BOC

[34] Sec. 153.302 BOC

[35] Sec. 4.155(9) BOC

[36] Sec. 153.306(b) BOC

[37] Sec. 4.153(11) BOC

[38] Sec. 10.151(b)(1) BOC

[39] The cost for a certified copy of a filing instrument is $15 for the certification and $1 per page. Keep in mind that if the entity record contains multiple filing instruments, including multiple merger or conversion transactions, the total cost of providing a certified copy of all documents in the entity's record may be considerable.

[40] Sec. 10.151(b)(3) BOC

[41] For example, provisions for for-profit and professional corporations are found in Sections 21.451 to 21.462 of the BOC. LLCs should look to Sec. 101.365.

[42] The short form merger of one or more subsidiaries into another subsidiary is only permitted if at least 90% of the ownership interests are owned by the parent entity.

[43] Sec. 10.001 and Sec. 10.151 BOC

[44] Sec. 10.151(a)(1) BOC. Corporations, limited partnerships, limited liability companies, professional associations, cooperatives, and real estate investment trusts are filing entities. General partnerships and joint ventures are not filing entities under the BOC.

[45] Sec. 10.153(b) and (c) BOC

[46] Pursuant to Sec. 1.106(c), this specific provision of chapter 252 would supersede the provisions of chapter 10.

[47] Sec. 10.151(b)(3) BOC

[48] HB 1737, which became effective September 1, 2007, amended sec. 10.154(b), BOC, to provide for further information regarding the converting and converted entity for purposes of clarifying the public record.

[49] Sec. 9.009(a-1)(2) BOC

[50] Sec. 10.156(2) BOC requires franchise tax clearance as a condition of acceptance. The secretary of state will require tax certification or the alternative statement for merging and converting taxable entities. Tax clearance also is a condition for acceptance under the merger and conversion provisions of prior law.

[51] Sec. 10.156(2) BOC
[52] Sec. 4.057(e) BOC and 1 TAC §79.82
[53] Sections 4.052 to 4.056 BOC
[54] Sec. 3.005(a)(7) BOC
[55] In speaking with a representative of the Comptroller's office, this status is displayed when the taxable entity has filed an annual franchise tax report, as well as a final tax report, for the current tax year.
[56] *See* Sharp v. House of Lloyd, Inc., 815 SW 2nd 245 (Tex. 1991)
[57] While an individual can be certified by an organization as having the training required for qualification as an "impartial third party," chapter 154, Texas Civil Practice & Remedies Code, does not speak to licensing by the state and does not require that a person meet the training requirements in order to be appointed as an "impartial third party" for purposes of facilitating a mediation.
[58] Enrolled agents are licensed by the U.S. Department of the Treasury and represent taxpayers before the IRS; patent agents are non-attorneys that are registered with the U.S. Patent & Trademark Office. The personal services rendered by these individuals are not licensed by the state.
[59] The enabling legislation governing the practice of accountancy permitted the licensing of a firm comprised of non-CPA owners, permitted a corporation (including a PC) to hold a license and to practice accountancy; and permitted the practice of accountancy by an LLC formed under the TLLCA. Therefore, JC-536 opined that the enabling legislation for the profession of accountancy permitted the formation of an LLC under the general provisions or under the special provisions of Part Eleven of the TLLCA.
[60] Sec. 301.012 BOC
[61] Sec. 301.012 BOC
[62] Sections 162.051 and 351.366 of the Occupations Code authorize physicians, optometrists and therapeutic optometrists to jointly own and manage certain types of business entities. However, although an optometrist and therapeutic optometrist can form a professional corporation, pursuant to section 301.003(3)(A) of the BOC, a professional corporation cannot be formed to practice medicine.
[63] Under prior law, ownership in a professional corporation, other than a professional legal corporation, was limited to individuals who were licensed to render the same professional service for which the professional corporation was formed.
[64] Sec. 301.003(7) of the BOC defines a "professional organization" as a person, other than an individual, whether nonprofit, for-profit, domestic, or foreign and including a nonprofit corporation or nonprofit association, that renders the same professional service as the professional corporation only through owners, members, managerial officials, employees, or agents, each of whom is a professional individual or professional organization.
[65] Sec. 302.001 BOC
[66] The BOC specifically describes the types of professional who may form a professional association. The list of professionals authorized to form professional associations is exclusive. *See e.g.*, Forrest N. Welmaker, Jr. v. The Honorable Henry Cuellar, Secretary of State, 37 SW 3d 550, (Tex. Civ. App.—Austin 2001, pet. denied), which upheld the secretary of state's refusal of articles of association with a purpose to practice law.
[67] Sections 9.106 and 11.254 BOC
[68] In FY 2013, the secretary of state received 1,149 notices of *non-delivery* of a certified mailing.
[69] The time frame for curing this deficiency/delinquency is 15 days. The time given is shorter than the 90-days provided to cure other delinquencies because a person submitting payment also receives notice from the person's financial institution or credit card issuer.
[70] The fee set by Sec. 4.155(11) of the BOC includes the filing fee for the report ($50), a late fee ($100), and the reinstatement fee ($75).
[71] Sec. 11.359 BOC
[72] Sec. 11.253 BOC
[73] Although the Tax Code provisions speak of "officers" and "directors," the provisions also apply to non-corporate entities. See Bruce v. Freeman Decorating Servs., Inc., No. 14-10-00611-CV, 2011 WL 3585619 (Tex. App.—Houston [14th Dis.] Aug. 15, 2011, no pet. h.) (mem. Op.)
[74] See APCAR Investment Partners VI, Ltd v. Gaus, 161 S.W. 3d 137 (Tex. App.-Eastland 2005, no pet.), which held that TRPA did not have a substantial compliance requirement for renewal of registration; an LLP was required to comply with statutory renewal requirements for maintaining its status as a registered LLP. Edward B. Elmer, M.D. P.A. v. Santa Fe Properties, Inc., No. 04-05-00821-CV, 2006 WL 3612359 (Tex. App.-San Antonio, Dec. 13, 2006, no pet. h.)
[75] Sec. 171.207 Tax Code
[76] It was the secretary of state's position that the formation of a nonprofit LLC was inconsistent with the provisions of the TLLCA and the laws made applicable to an LLC; namely, the TBCA and the TRLPA.
[77] Other state law regulating a particular activity may contain restrictions that would prohibit an LLC from engaging in the regulated activity.
[78] These sections provide *supplemental* filing requirements for restated certificates of formation that are filed by for-profit and nonprofit corporations and limited liability companies. The use of the term "may" within the cited sections does not mean that the requirement is optional or discretionary. The term "may" permits the entity to provide updated information in lieu of the information initially provided in its certificate of formation. Updating the information would not be seen as a "further amendment."
[79] Amended by Senate Bill 847, which became effective September 1, 2013.
[80] 1 TAC §§79.21, 80.3, and 83.3.
[81] Beall v. Strake, 609 S.W. 2d 885 (Tex. Civ. App—Austin 1981, writ ref'd n.r.e.)
[82] A court may order the revocation of a certificate of termination when the entity was terminated as a result of actual or constructive fraud. The secretary of state is authorized to take any action necessary to reactivate the entity. *See* Sec. 11.153 BOC.