THE INVOLUNTARY TERMINATION OF A BUSINESS ENTITY



CARMEN FLORES

Office of the Secretary of State Business & Public Filings Division P. O. Box 13697 Austin, Texas 78711-3697 Cflores@sos.texas.gov

State Bar of Texas
12TH ANNUAL
ADVANCED BUSINESS LAW COURSE

November 6 - 7, 2014 Dallas

CHAPTER 5

CARMEN I. FLORES

Business and Public Filings Division Office of the Secretary of State 1019 Brazos, P.O. Box 13697 Austin, TX 78711-3697 phone: (512) 463-5588 cflores@sos.texas.gov

BIOGRAPHICAL INFORMATION

EDUCATION

B.A. in English and History with Honors, Maryville College, St. Louis, Missouri J.D. The University of Texas at Austin

PROFESSIONAL ACTIVITIES

Director, Business and Public Filings Division, Office of the Secretary of State

Member, State Bar Committee on the Business Organizations Code

Member, State Bar Committee for Corporation Law

Member, State Bar Partnership/LLC Committee

LAW RELATED PUBLICATIONS, ACADEMIC APPOINTMENTS AND HONORS

Author/Speaker for the University of Texas Continuing Legal Education Program on Current Issues on Partnerships, Limited Partnerships and Limited Liability Companies, 2006-2014

Author/Speaker for the University of Texas Continuing Legal Education Program on Understanding and Working with the New Business Organizations Code, 2006

Author/Speaker for the State Bar Annual Meeting Business Law and Corporate Counsel CLE, 2006

Co-Author of *The Texas Business Organizations Code: Doing Business with the Secretary of State On and After January 1, 2010-A Guide for Texas Nonprofit Corporations, 2009*

Co-Author for the State Bar CLE program on Essentials of Business Law, 2011-2013

Author/Speaker for the State Bar CLE program on Essentials of Business Law, 2014

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATUTORY AUTHORITY	1
	A. Chapter 11 Business Organizations Code	1
	1. Dishonored Payments	
	B. Chapter 22 Business Organizations Code	
	C. Chapter 22-Forfeiture of Rights and Involuntary Termination	
	D. Chapter 153 Business Organizations Code	
	E. Chapter 153-Forfeiture of Rights and Involuntary Termination	
	F. Chapter 171 Tax Code	
III.	CHAPTER 11FAILURE TO MAINTAIN REGISTERED AGENT/OFFICE	4
111.	A. Reminder—Consent of Agent Required	
	B. Filing Consent Not Required But Permitted	
	C. Rejection of Agent Appointment	
	D. Maintenance of Registered Office	
	D. Waintenance of Registered Office	
IV.	CHAPTER 11—FAILURE TO FILE REQUIRED REPORTS	5
V.	REINSTATING AN INACTIVE DOMESTIC ENTITY	5
• •	A. Reinstatement—Chapter 11 BOC Involuntary Termination	
	B. Reinstatement After Involuntary Termination-Chapter 22	
	C. Reinstatement After Involuntary Termination-Chapter 153	6
	D. Reinstatement—Chapter 171 Tax Forfeiture	7
	E. Reinstatement After Voluntary Termination-Chapter 11 BOC	
	F. Intervening Events May Give Rise to Rejection	
	1. Entity Name Issues	
	2. No Registered Agent	
	3. Entity Expired	
	5. Littly Expirod	
VI.	FRANCHISE TAX CLEARANCE	8
VII.	POTENTIAL PROBLEMS AND CONCERNS	8
	A. Effects of Forfeiture—Tax Code	8
	B. Limited Survival and Other Special Chapter 11 Provisions	8
I ICT	OF APPENDICES	
LIST	Appendix A: SOS Form 801 – General Information (Application for Reinstatement and Request to Se	A side
	Tax Forfeiture)	
	Appendix B: SOS Form 811 – General Information (Certificate of Reinstatement)	
	**	
	Appendix C: SOS Form 814 – General Information (Certificate of Reinstatement of a Profe Association After Failure to File Annual Statement)	
	Association After Failure to File Annual Statement)	
	Appendia D. Compuonei Porm 03-371 – Laa Cicarance Lenei Request foi Remstatement	<i>4</i> 3

THE INVOLUNTARY TERMINATION OF A BUSINESS ENTITY

I. INTRODUCTION

Do any of the following scenarios sound familiar?

My client has a limited liability company he wants to terminate. In attempting to obtain a Certificate of Account Status from the Comptroller, I discovered that the entity was forfeited by the Secretary of State last year. I have been told by your staff that I need to reinstate to terminate. If there are no outstanding debts or any assets in the company, is there any reason why I should advise my client to go to the expense of reinstating the company now that the state has administratively terminated it?

My client had a corporation and the charter lapsed. When the lapse was discovered, it was immediately reinstated. There were debts/liabilities incurred during the lapse period. Does the reinstatement of the corporate charter limit liability to the assets of the corporation or are the officers and directors of the corporation now personally liable for the debt/liability? If you can answer this question or point me in the right direction for further research, I would greatly appreciate it.

I have a serious problem....XYZ is a holding company that has never owed any taxes, but is required to file informational reports with the Comptroller. The holding company's bookkeeper failed to file the reports on a timely basis. The registered agent of XYZ moved and never received the notices of forfeiture that were sent by the Comptroller. XYZ's corporate charter was then forfeited in February of 2008. It was reinstated 3 years and 48 days later in March of 2011.

XYZ had and has a valid existing claim against another company in the amount of approximately \$x,xxx,xxx and filed suit in February of 2013. The other company has filed a motion claiming that XYZ's claim has been extinguished citing \$11.356 of the Business Organizations Code. The party claims that XYZ had only 3 years from the date of forfeiture to file suit on an existing claim. XYZ filed suit in February 2013, 5 years after forfeiture....If XYZ had only 3

years from the date of forfeiture to reinstate and file suit, why did the Secretary of State reinstate the corporation after the 3 year period had already expired?

The above scenarios reflect some of the thorny issues encountered by managerial officials of entities that have been involuntarily terminated/forfeited by the secretary of state.

II. STATUTORY AUTHORITY

A. Chapter 11 Business Organizations Code

The secretary of state frequently receives an urgent phone call or email from a lawyer or managerial official who has recently discovered, typically one or two days before financing or a closing, that their business entity has been involuntarily terminated/forfeited by the state. Before attempting to provide the correspondent/caller with the steps needed to reactivate the entity, the legal staff of the Business & Commercial Filings Section must first obtain certain information relating to the entity and verify the statutory provision used to involuntarily terminate the entity's certificate/registration.

Section 11.251 of the Business Organizations Code (BOC) authorizes the secretary of state to involuntarily terminate the existence of a domestic entity if the secretary finds that:

- 1) the entity has failed to, and before the 91st day after the date notice was mailed has not corrected the entity'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; or
 - b) maintain a registered agent or registered office in this state as required by law¹; or
- 2) 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.

The grounds giving rise to the revocation of a foreign filing entity's registration may be found in section 9.101 of the BOC. In addition to the circumstances described above, the secretary of state may revoke the registration of a foreign filing entity if the entity fails to amend its registration when required to do so by law.²

1. Dishonored Payments

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,³ 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.

B. Chapter 22 Business Organizations Code

All domestic and registered foreign nonprofit corporations are required to file periodic reports with the secretary of state when requested to do so.

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.

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)

The notice sent by the secretary includes a preprinted periodic report form that includes the current information of record. The statutory fee for the periodic report is \$5.4

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.

C. Chapter 22-Forfeiture of Rights and Involuntary Termination

Although section 11.251(b)(1)(A) of the BOC references involuntary termination for failure to file reports when due, sections 22.360-22.364 govern the forfeiture of the right to transact business and the subsequent involuntary termination of a nonprofit corporation and revocation of a foreign nonprofit corporation's registration for failure to file a periodic report as required by Chapter 22.

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.

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.

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.

D. Chapter 153 Business Organizations Code

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.

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.

The periodic report must include:⁵

- 1) the name of the limited partnership;
- 2) the state or territory under the laws of which the partnership is formed;
- 3) the current address of the registered office in Texas and the name of the registered agent at that address;
- 4) 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
- 5) the name, mailing address, and street address of the business or residence of each general partner.

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 \$50.6

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.

Practice Tip I: 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.

Practice Tip II: 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. A certificate of amendment to the certificate of formation of the limited partnership is required for this purpose.

Practice Tip III: 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.

Practice Tip IV: 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.

E. Chapter 153-Forfeiture of Rights and Involuntary Termination

Although section 11.251(b)(1)(A) of the BOC references involuntary termination for failure to file reports when due, sections 153.307-153-153-311 govern the forfeiture of the right to transact business and the subsequent involuntary termination of a domestic limited partnership and revocation of a

foreign limited partnership's registration for failure to file a periodic report as required by Chapter 153.

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.

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.

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

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.

F. Chapter 171 Tax Code

Franchise tax reports are due annually on May 15. If the franchise report is not timely filed or an extension to file is not timely requested, the Comptroller will notify the taxable entity of its delinquency. If the entity does not file the required report or pay the tax or penalty owed within 45 days after the date of the delinquency notice, the Comptroller will forfeit the entity's privileges (right to conduct business). (Sec. 171.251-2515 Tax Code)

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.

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 notifications regarding the forfeiture of its corporate or business privileges from the Comptroller under subchapter F of chapter 171 of the Tax Code.⁸

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.

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.

III. CHAPTER 11--FAILURE TO MAINTAIN REGISTERED AGENT/OFFICE

Certain events will trigger a "90-day" notice under section 11.251(b)(1)(B): the resignation of a registered agent, the rejection of appointment as agent, and the receipt of an allegation that an entity has failed to maintain a registered agent/office.

A. Reminder—Consent of Agent Required

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.

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.

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.

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 Consent Not Required But Permitted

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, 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").

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.

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 Agent Appointment

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.

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.

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.

D. Maintenance of Registered Office

In FY 2014, the secretary of state processed 98 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 2,879 entities of the resignation of their registered agent, and filed 40 rejections of a registered agent appointment.

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.

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.¹⁰

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. Notice of the need to designate a new registered agent/office is sent to the entity by certified mail. 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.

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. ¹²

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.

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.

IV. CHAPTER 11—FAILURE TO FILE REQUIRED REPORTS

Generally, the reports referenced in BOC section 11.251 relate to annual statements that a professional association must file with the secretary of state.

- 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.
- 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:
 - a) the name of the professional association;
 - b) its jurisdiction of formation;
 - c) the name and address of its current registered agent/office;
 - d) the name and address of each member of the association;
 - e) the name and address of each member of the board of directors or executive committee;
 - f) the name and address of each officer; and
 - g) 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.
- 6) 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.

V. REINSTATING AN INACTIVE DOMESTIC ENTITY

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

A. Reinstatement—Chapter 11 BOC Involuntary Termination

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.

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.

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.

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.

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.

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.

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.

B. Reinstatement After Involuntary Termination-Chapter 22

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.

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.

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

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.

C. Reinstatement After Involuntary Termination-Chapter 153

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. Section 153.312 does not address the effect of a reinstatement of a limited partnership after its involuntary termination for failure to file a periodic report other than its change in status. ¹³

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 \$225.¹⁴ A separate certificate of reinstatement would not be submitted for filing.

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

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.

D. Reinstatement—Chapter 171 Tax Forfeiture

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. ¹⁵ The revival and reinstatement of a taxable entity follows the same procedures used when reinstating a corporate entity.

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.

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.

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.

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.

On filing the application for reinstatement, the secretary of state changes the status of the entity from "forfeited existence" to "in existence." Pursuant to section 171.314, if forfeiture is set aside, the Comptroller shall revive the taxable entity's corporate privileges and right to do business.

E. Reinstatement After Voluntary Termination-Chapter 11 BOC

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:

- 1) the termination was by mistake of inadvertent;
- 2) the termination occurred without the approval of the entity's governing persons when approval is required by the title governing the entity;
- 3) the process of winding up before termination had not been completed by the entity; or
- 4) 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.

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.

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.

F. 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.

VI. FRANCHISE TAX CLEARANCE

Before reinstating an involuntarily terminated entity or voluntarily terminated entity, the secretary of state must determine whether all taxes have been paid. The means by which the secretary of state makes this determination is a Tax Clearance letter issued by the Comptroller of Public Accounts.

- In December of 2013, the Comptroller of Public Accounts introduced online selfservice 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.

VII. POTENTIAL PROBLEMS AND CONCERNS

Oftentimes, an entity will continue to conduct business as usual unaware of the fact that the entity has forfeited its privileges or been involuntarily terminated.

A. Effects of Forfeiture—Tax Code

Sections 171.252, 171.255-171.2515 of the Tax Code set forth the effects of the forfeiture of privileges of a taxable entity. Pursuant to section 171.252(1), a taxable entity that has forfeited its privileges is denied the right to sue or defend in a court in this state. Notwithstanding this direct language, there is case law that interprets this provision as prohibiting an entity from bringing cross actions, but not from defending itself. *See*, Mello v. A.M.F., Inc., 7 S.W. 3rd 339, 331 (Tex. App.—Beaumont 1999, pet. denied)

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. This liability is not affected by the restoration of the taxable entity's corporate privileges.

The liability of an officer or director is not limited to tax liabilities and penalties under Chapter 171. The language of section 171.255 does not limit the scope of debts for which liability is imposed.¹⁷

An officer or director is not liable if it can be shown that the debt was created or incurred over the director's objection; or without the director's knowledge and that the exercise of reasonable diligence to become acquainted with the affairs of the entity would not have revealed the intention to create the debt. (Sec. 171.255(c) Tax Code)

B. Limited Survival and Other Special Chapter 11 Provisions

Section 11.001(4) defines a "terminated entity" as a domestic entity the existence of which has been:

- terminated in a manner authorized or required by the BOC, unless the entity has been reinstated in the manner provided by the BOC; or
- 2) forfeited pursuant to the Tax Code, unless the forfeiture has been set aside. 18

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.

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.

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

- i) a claim against an entity that existed before the entity's termination and that is not barred by limitations¹⁹; or
- ii) a contractual obligation incurred after termination.

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* 3^{rd} *anniversary of the date of termination of the entity*²⁰.

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,²¹ the secretary's reinstatement of the entity may not cure the thorny issues that may be faced by the forfeited or involuntarily terminated entity.

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.

ENDNOTES

¹ The provisions of the Texas Revised Limited Partnership Act (now repealed) did not authorize the involuntary termination/cancellation of a limited partnership for its failure to maintain a registered agent or registered office address. This authority was granted once the Business Organizations Code (BOC) became effective.

² Sec. 9.101(b)(3) BOC

³ 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.

⁴ Sec. 4.153(11) BOC

⁵ Sec. 153.302 BOC

⁶ Sec. 4.155(9) BOC

⁷ Sec. 153.306(b) BOC

⁸ The weekend of October 25, 2014, the Comptroller mailed out approximately 140,000 notices of forfeited privileges to delinquent taxable entities.

⁹ 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.

¹⁰ Sec. 5.201(b)(3) BOC

¹¹ In FY 2014, the secretary of state received 1,025 notices of *non-delivery* of a certified mailing.

¹² Sec. 5.201(d) BOC

¹³ Manning v. Enbridge Pipelines (East Texas) L.P., 345 S.W. 3rd 718 (Tex. App. – Beaumont 2011, pet. denied) relates to revival of right to transact business after forfeiture but before involuntary termination.

¹⁴ 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).

¹⁵ Sections 9.106 and 11.254 BOC

¹⁶ Although the Tax Code provisions speak of "officers" and "directors," the provisions also apply to non-corporate entities. See <u>Bruce v. Freeman Decorating Servs., Inc.</u>, No. 14-10-00611-CV, 2011 WL 3585619 (Tex. App.—Houston [14th Dis.] Aug. 15, 2011, no pet. h.) (mem. op.)

See <u>Bosch v. Cirro Group, Inc.</u>, No. 03-11-01625-CV,
 2012 WL 5949481 (Tex. App. – Dallas Nov. 28, 2012, pet. denied)

¹⁸ Before 1993, a corporation that had its existence forfeited under Chapter 171 of the Tax Code was not considered to be a dissolved/terminated entity. However, the definition of "dissolved corporation" found in Article 7.12 of the Texas Business Corporation Act was amended in 1993 to include a corporation that had forfeited its charter under the Tax Code.

¹⁹ See <u>Anderson Petro-Equip, Inc. v. State</u>, 317 S.W. 3rd 812, 817 (Tex. App. –Austin 2010, pet. denied) which held that broad definition of claim included "contingent, unliquidated or unmatured claims."

²⁰ Sec. 11.359 BOC

²¹ Sec. 11.253 BOC

APPENDIX A

Form 801—General Information

(Application for Reinstatement and Request to Set Aside Tax Forfeiture)

The attached form is designed to meet minimal statutory filing requirements pursuant to the relevant code provisions. This form and the information provided are not substitutes for the advice and services of an attorney and tax specialist.

Commentary

This form may be used to complete the final step for reinstating a domestic or foreign filing entity that has been forfeited or revoked by the secretary of state under chapter 171, Tax Code. Before submitting this form, an entity seeking reinstatement must: (1) file with the comptroller of public accounts each delinquent report that is required by chapter 171; and (2) pay the tax, penalty, and interest imposed by the Tax Code and due at the time the request to set aside forfeiture is made.

Do Not Use This Form If:

- The entity was voluntarily terminated. See Form 811.
- The existence or registration was terminated or revoked by the secretary of state for a reason other than tax forfeiture. See Forms 811, 814.
- The entity was terminated or revoked by court order.

① Time Frame for Reinstatement ②

The request to set aside forfeiture may be submitted at any time after forfeiture so long as the entity would otherwise have continued to exist.

Persons Authorized to Submit Application for Reinstatement

- For-profit or professional corporation: shareholder, director, or officer at the time of forfeiture.
- Professional association: shareholder, member, director, or officer at the time of forfeiture.
- Nonprofit corporation: director, officer, or member at the time of forfeiture.
- Limited liability company: member or manager at the time of forfeiture.
- Limited partnership: partner at the time of forfeiture.
- Statutory or business trust: trustee or beneficial owner at the time of forfeiture.

Registered Agent & Office Updates

Filing entities must maintain accurate registered agent and office information on file with the secretary of state. Neither tax filings nor this application for reinstatement can be used to update the registered agent and office information; rather updates to the registered agent and office require an additional filing. See Form 401.

Instructions for Form

- **Item 1—Entity Name:** Set forth the legal name of the entity as stated in its certificate of formation or registration. If the entity is a foreign filing entity that was granted authority to transact business under a different name, then also set forth the assumed name under which the foreign filing entity was registered to transact business.
- Entity Name Availability: The reinstatement cannot be filed if the name of the entity is the same as, deceptively similar to, or similar to the name of any existing domestic or foreign filing entity, or

any name reservation or registration filed with the secretary of state. The administrative rules adopted for determining entity name availability (Texas Administrative Code, title 1, part 4, chapter 79, subchapter C) may be viewed at http://www.sos.state.tx.us/tac/index.shtml.

If the entity name is no longer available, the application for reinstatement must be accompanied by a letter of consent or an amendment to the entity's formation document or registration, as applicable.

- Item 2—Secretary of State File Number: It is recommended that the file number assigned by the secretary of state be provided to facilitate processing and ensure that the correct entity is reinstated.
- **Item 3—Date of Forfeiture/Revocation:** Provide the date of the forfeiture or revocation. If unsure, verification of the date may be obtained by calling the secretary of state at (512) 463-5555, by dialing 7-1-1 for relay services, or by sending an e-mail to <u>corpinfo@sos.state.tx.us</u>.
- Item 4—Certified Statements: Although an application for reinstatement need not be notarized, by signing the application for reinstatement, a person certifies to the statements contained in item 4 of the application. Prior to signing, please read the statements on this form carefully. In addition to the penalties imposed by law for the submission of a false or fraudulent document, a person commits an offense under section 171.363 of the Tax Code if the person is an employee, officer, or agent of a taxable entity and the person knowingly enters or provides false information on any report, return, or other document filed by the taxable entity under the provisions of chapter 171, including an application for reinstatement. An offense under section 171.363 is a felony of the third degree.
- Tax Clearance: A certificate of reinstatement must be accompanied by a tax clearance letter from the Texas Comptroller of Public Accounts stating that the entity has satisfied all franchise tax liabilities and may be reinstated.
 - Contact the Comptroller for assistance in complying with franchise tax filing requirements and obtaining the necessary tax clearance letter. The Comptroller may be contacted by e-mail at tax.help@cpa.state.tx.us or by calling (800) 252-1381 or (512) 463-4600.
- **Execution:** The application must be signed by a person who is authorized to apply for and request a reinstatement of the forfeited entity. (See "Persons Authorized to Apply" on page 1 of these instructions.)
- Payment and Delivery Instructions: The filing fee for an application for reinstatement is \$75, unless the entity is a nonprofit corporation. There is no fee for filing the reinstatement of a nonprofit corporation following a tax forfeiture. Fees may be paid by personal checks, money orders, LegalEase debit cards, or American Express, Discover, MasterCard, and Visa credit cards. Checks or money orders must be payable through a U.S. bank or financial institution and made payable to the secretary of state. Fees paid by credit card are subject to a statutorily authorized convenience fee of 2.7 percent of the total fees.

Applicable fees for any additional filing that may be required as a condition for reinstatement (such as an amendment to change the entity's name) must be submitted together with the appropriate filing.

Submit the completed form in duplicate along with the filing fee. The form may be mailed to P.O. Box 13697, Austin, Texas 78711-3697; faxed to (512) 463-5709; or delivered to the James Earl Rudder Office Building, 1019 Brazos, Austin, Texas 78701. If a document is transmitted by fax, credit card information must accompany the transmission (Form 807). On filing the document, the secretary of state will return the appropriate evidence of filing to the submitter together with a file-stamped copy of the document, if a duplicate copy was provided as instructed.

Form 801 (Revised 05/11)

Submit in duplicate to: Secretary of State P.O. Box 13697 Austin, TX 78711-3697 512 463-5555 FAX: 512 463-5709 Filing Fee: See instructions

Application for Reinstatement And Request to Set Aside

Tax Forfeiture

This space reserved for office use.

1. The entity name is:	

The entity is a foreign entity that was required to obtain its registration under a name that differs from the legal name stated above. The name under which the entity is registered is:

- 2. The file number issued to the entity by the secretary of state is:
- 3. The entity was forfeited or revoked under the provisions of the Tax Code on:

mm/dd/yyyy

- 4. The undersigned requests that the forfeiture or revocation of the entity be set aside, and certifies that:
- a. The entity has filed each delinquent report that is required by chapter 171 of the Tax Code and has made payment for the tax, penalty, and interest imposed and that is due at the time of this application as evidenced by the attached tax clearance letter; and
- b. On the date of forfeiture or revocation, the undersigned person was:
- an officer, director or shareholder of the above-named for-profit or professional corporation; or
- an officer, director, shareholder or member of the above-named professional association; or
- an officer, director, or member of the above-named nonprofit corporation; or
- a member or manager of the above-named limited liability company; or
- a partner of the above-named limited partnership; or
- a trustee or beneficial owner of the above-named statutory or business trust.

Additional Required Documentation or Filings

	Comptroller of Public Accounts Tax Clearance Letter
	Letter of Consent or Amendment to Certificate of Formation or Registration (Required when entity name
is no	o longer available.)

Execution

The undersigned declares under penalty of perjury, and the penalties imposed by law for the submission of a materially false or fraudulent instrument, that the undersigned is authorized to make this request; that the statements contained herein are true and correct, and that tax clearance was not obtained by providing false or fraudulent information.

te:		
	BY:	
	Signature of authorized person (see instructions)	

Printed or typed name of authorized person

APPENDIX B Form 811—General Information (Certificate of Reinstatement)

The attached form is designed to meet minimal statutory filing requirements pursuant to the relevant code provisions. This form and the information provided are not substitutes for the advice and services of an attorney and tax specialist.

Commentary

This form may be used to reinstate: (1) the existence of a domestic filing entity that has been voluntarily terminated; (2) the existence of a domestic filing entity that has been involuntarily terminated by action of the secretary of state; or (3) the registration of a foreign filing entity whose registration has been revoked by action of the secretary of state.

Do Not Use This Form If:

- The entity's existence or registration was forfeited under the Tax Code. See Form 801.
- The entity is a professional association that was terminated or revoked for failure to timely file an annual statement. See Form 814.
- The entity was terminated or revoked by court order.

① Time Frames for Reinstatement ②

- ➤ <u>Voluntarily Terminated Domestic Entity</u>: Certificate of reinstatement must be filed no later than the third (3rd) anniversary of the effective date of the termination. (See part 4A of the form.)
- ➤ <u>Involuntarily Terminated Domestic Entity</u>: Certificate of reinstatement may be filed at any time so long as the entity would otherwise have continued to exist. However, the entity is considered to have continued in existence without interruption from the date of termination only if the entity is reinstated before the third (3rd) anniversary of the date of involuntary termination. (See 4B.)
- Revoked Foreign Entity Registration: Certificate of reinstatement must be filed no later than the third (3rd) anniversary of the effective date of the revocation. (See 4C.)

Instructions for Form

- Item 1—Entity Name and File Number: Set forth the legal name of the entity and the secretary of state file number. For a foreign filing entity that was registered to transact business in Texas under a different name, also set forth the assumed name under which the entity was registered.
- **Item 2—Jurisdictional Information:** To ensure that the correct entity is reinstated, the jurisdiction of organization and the entity's date of organization or registration in Texas should be provided.
- Item 3—Date of Termination or Revocation: Provide the effective date of the termination or revocation. In the case of a terminated domestic entity that has delayed the effectiveness of the filing of its certificate of termination, provide the effective date as stated on the certificate.
- Item 4—Conditions for Reinstatement: Select the grounds or conditions for reinstatement. <u>Do not check more than one box</u>. If unsure, verify the reason for inactive status by contacting the secretary of state at (512) 463-5555, 7-1-1 for relay services, <u>corpinfo@sos.state.tx.us</u> or on-line through SOSDirect. (Visit http://www.sos.state.tx.us/corp/sosda/index.shtml for SOSDirect information.)
 - 4A. Reinstatement of a Texas Entity Following Voluntary Termination: Sections 11.201 and 11.202 of the BOC permit reinstatement no later than the third anniversary of the effective date of termination if the owners, members, governing persons, or other persons specified by the BOC approve the reinstatement in the manner provided by the title of the BOC governing the entity and:

- (1) the termination was by mistake or was inadvertent;
- (2) the termination occurred without the approval of the entity's governing persons when approval is required by the title of the BOC governing the entity;
- (3) the process of winding up before termination had not been completed by the entity; or
- (4) 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.
- 4B. Reinstatement of a Texas Entity Following Involuntary Termination: Section 11.251 of the BOC authorizes the secretary of state to involuntarily terminate a domestic filing entity, other than a domestic real estate investment trust, if the secretary finds that the entity has failed to:
- (1) file a report within the period required by law or to pay a fee or penalty prescribed by law when due and payable;
- (2) maintain a registered agent or registered office in Texas as required by law; or
- (3) pay a fee required in connection with a filing, or payment of the fee was dishonored when presented by the state for payment.

As a condition to reinstatement, the entity must correct the circumstances that led to termination and any other circumstances of the type described above, including paying any fees, interest or penalties.

- 4C. Reinstatement of a Foreign Entity Following Revocation: Section 9.101 of the BOC authorizes the secretary of state to revoke the registration of a foreign filing entity if the secretary finds that the entity has failed to:
- (1) file a report within the period required by law or to pay a fee or penalty prescribed by law when due and payable;
- (2) maintain a registered agent or registered office in Texas as required by law;
- (3) amend its registration when required by law; or
- (4) pay a fee required in connection with a filing, or payment of the fee was dishonored when presented by the state for payment.

As a condition to reinstatement, the entity must correct the circumstances that led to revocation and any other circumstances of the type described above, including paying any fees, interest or penalties.

• Item 5—Registered Agent and Registered Office: An entity requesting reinstatement must provide the secretary of state with current registered agent and registered office information. The registered agent can be either (option A) a domestic entity or a foreign entity that is registered to do business in Texas or (option B) an individual resident of the state. The entity cannot act as its own registered agent; do not enter the entity name as the name of the registered agent.

An entity that was involuntarily terminated or that had its registration revoked for failure to maintain a registered agent or registered office in Texas need not submit an additional filing to change the registered agent or registered office.

Consent: A person designated as the registered agent of an entity must have consented, either in a written or electronic form, to serve as the registered agent of the entity. Although consent is required, a copy of the person's written or electronic consent need not be submitted with the reinstatement. The liabilities and penalties imposed by sections 4.007 and 4.008 of the BOC apply with respect to a false statement in a filing instrument that names a person as the registered agent of an entity without that person's consent. (BOC § 5.207)

Office Address Requirements: The registered office address must be located at a street address where service of process may be personally served on the entity's registered agent during normal

business hours. Although the registered office is not required to be the entity's principal place of business, the registered office may not be solely a mailbox service or telephone answering service (BOC § 5.201).

• Entity Name Availability: The reinstatement cannot be filed if the entity name is the same as, deceptively similar to, or similar to the name of any existing domestic or foreign filing entity, or any name reservation or registration filed with the secretary of state. The administrative rules for determining entity name availability (Texas Administrative Code, title 1, part 4, chapter 79, subchapter C) may be viewed at http://www.sos.state.tx.us/tac/index.shtml.

If the entity name is no longer available or written consent for the use of the name is required but cannot be obtained, the entity must amend its certificate of formation or application for registration, as appropriate, to state an available name. The amendment must be submitted at the same time as the certificate of reinstatement.

• **Tax Clearance**: Unless the entity is a nonprofit corporation, a certificate of reinstatement must be accompanied by a tax clearance letter from the Texas Comptroller of Public Accounts stating that the entity has satisfied all franchise tax liabilities and may be reinstated.

Contact the Comptroller for assistance in complying with franchise tax filing requirements and obtaining the necessary tax clearance letter. The Comptroller may be contacted by e-mail at <u>tax.help@cpa.state.tx.us</u> or by calling (800) 252-1381 or (512) 463-4600.

• **Execution:** The reinstatement must be signed by a person authorized to act on behalf of the entity in regard to the filing instrument. Generally, a governing person or managerial official of the entity signs a filing instrument.

The certificate of reinstatement need not be notarized. However, before signing, please read the statements on this form carefully. The designation or appointment of a person as the registered agent by a managerial official is an affirmation by that official that the person named in the instrument has consented to serve as registered agent. (BOC § 5.2011)

A person commits an offense under section 4.008 of the BOC if the person signs or directs the filing of a filing instrument the person knows is materially false with the intent that the instrument be delivered to the secretary of state for filing. The offense 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.

• Payment and Delivery Instructions: Unless the entity is a nonprofit corporation or cooperative association, the filing fee for reinstatement following an involuntary termination or revocation is \$75, and the filing fee for reinstatement following a voluntary termination is \$15. The filing fee for reinstating a nonprofit corporation or a cooperative association is \$5.

Fees may be paid by personal checks, money orders, LegalEase debit cards, or American Express, Discover, MasterCard, and Visa credit cards. Checks or money orders must be payable through a U.S. bank or financial institution and made payable to the secretary of state. Fees paid by credit card are subject to a statutorily authorized convenience fee of 2.7 percent of the total fees. Applicable fees for any additional filings required as a condition for reinstatement must be submitted together with the appropriate filing fee for the certificate of reinstatement.

Submit the completed form in duplicate along with the filing fee. The form may be mailed to P.O. Box 13697, Austin, Texas 78711-3697; faxed to (512) 463-5709; or delivered to the James Earl Rudder Office Building, 1019 Brazos, Austin, Texas 78701. If a document is transmitted by fax, credit card information must accompany the transmission (Form 807). On filing the document, the secretary of state will return the appropriate evidence of filing to the submitter together with a file-stamped copy of the document, if a duplicate copy was provided as instructed.

Form 811 (Revised 05/11)

Submit in duplicate to: Secretary of State P.O. Box 13697 Austin, TX 78711-3697 512 463-5555

FAX: 512 463-5709

Filing Fee: See instructions



This space reserved for office use.

1. The name of the entity is:	
The entity is a foreign entity that was required to obtain its registration the legal name stated above. The name under which the entity is registed	
The file number issued to the filing entity by the secretary of state is: _	
2. The jurisdiction of organization of the entity is:	
	(state or country)
The entity was organized or obtained its certificate of registration on:	mm/dd/yyyy
3. The effective date of the entity's termination or revocation is:	тто шо уууу
4. The condition giving rise to the termination of the entity's existence registration is described below. The entity requests reinstatement under (Select the appropriate box below. Do not check more than or	r the following code provision:
4A. Reinstatement of a Texas Entity Following a Voluntary Termination The domestic filing entity requests reinstatement under section 11 filing of a certificate of termination. The undersigned certifies that the the entity's certificate of formation are met and that the reinstatement approved in the manner provided by the Texas Business Organizations	.202 of the BOC following the conditions for reinstatement of at of the filing entity has been
4B. Reinstatement of a Texas Entity Following an Involuntary Termina The domestic filing entity requests reinstatement of its cert involuntary termination of its existence by the secretary of state pursuar of the Code. The entity has corrected the circumstances giving rise to has taken any other action required for its reinstatement, including the or penalties. The undersigned certifies that the reinstatement of the filit the manner required by the Texas Business Organizations Code.	ificate of formation after the nt to subchapter F of chapter 11 its involuntary termination and e payment of any fees, interest,
4C. Reinstatement Following Revocation of Registration of a Foreign E The foreign filing entity requests the reinstatement of its cert revocation by the secretary of state pursuant to subchapter C of chapter corrected the circumstances giving rise to its revocation and has taken a reinstatement, including the payment of any fees, interest, or penalties.	ificate of registration after its r 9 of the BOC. The entity has

5. The name of the entity's registered agent a	and the address of the entity's registered office are as		
follows: (Select and complete either A or B and complete C	C)		
A. The registered agent is an organization (cannot be the entity seeking reinstatement) by the name of:			
OR			
	sident of the state whose name is set forth below:		
First Name M.I.	Last Name Suffix		
C. The business address of the registered agent	and the registered office address is:		
	TX		
Street Address City The street address of the registered office as agent's business address.	State Zip Code stated in this instrument is the same as the registered		
	cumentation or Filings ance Letter (Required, unless entity is a nonprofit corporation.)		
Other	Registration (Required if entity name is no longer available.)		
(A certificate of reinstatement may be co	onditioned on the submission of additional filings. See instructions.)		
E	Execution		
appointment. The undersigned signs this docu submission of a materially false or fraudulent in	esignated as registered agent has consented to the ument subject to the penalties imposed by law for the astrument and certifies under penalty of perjury that the ns of law governing the entity to execute the filing		
Date:			
By :			
	Signature of authorized person (see instructions)		
	Printed or typed name of authorized person		

APPENDIX C

Form 814—General Information

(Certificate of Reinstatement of a Professional Association After Failure to File Annual Statement)

The attached form is designed to meet minimal statutory filing requirements pursuant to the relevant code provisions. This form and the information provided are not substitutes for the advice and services of an attorney and tax specialist.

Commentary

A professional association may be terminated or revoked if the association fails to file the annual statement required by section 302.012 of the Texas Business Organizations Code (BOC). This form may be used to reinstate the existence of a Texas professional association or the registration of a foreign professional association that has been terminated or revoked, respectively, for failing to timely file the annual statement.

Do Not Use This Form If:

- The professional association's existence or registration was forfeited under the Tax Code. See Form 801 at: http://www.sos.state.tx.us/corp/forms_reports.shtml
- The professional association was terminated or revoked by the Secretary of State for a reason other than failure to file an annual statement. See Form 811 at: http://www.sos.state.tx.us/corp/forms_reports.shtml

① Time Frames for Reinstatement ①

- Domestic Professional Association: A certificate of reinstatement after involuntary termination for failing to file an annual statement may be filed at any time so long as the association would otherwise have continued to exist. The association is considered to have continued in existence without interruption from the date of termination; however, only if the association is reinstated before the third (3rd) anniversary of the date of involuntary termination.
- Foreign Professional Association: An application for reinstatement after revocation for failing to file an annual statement must be filed no later than the third (3rd) anniversary of the date of revocation.

Instructions for Form

- Item 1—Association Name and File Number: Provide the legal name of the association and the Secretary of State file number. For a foreign professional association that was registered to transact business in Texas under a different name, also provide the assumed name under which the association was registered.
- Item 2—Jurisdictional Information: It is recommended that the jurisdiction of organization and the association's date of formation or registration in Texas be provided to ensure that the correct professional association is reinstated.
- **Item 3—Date of Involuntary Termination or Revocation**: Provide the effective date of the involuntary termination or revocation of the association's existence or registration.
- Item 4—Conditions for Reinstatement: The certificate of reinstatement must include a statement that the circumstances giving rise to the involuntary termination or revocation have been corrected. To correct the circumstances, the association must submit <u>each</u> delinquent annual statement (Form 803) due at the time of submission of the reinstatement. If the reinstatement is not accompanied by each delinquent annual statement, the reinstatement must be rejected. To verify the number of statements due, contact the Reports Unit at (512) 475-2705.

• Item 5—Registered Agent: A professional association that requests reinstatement is required to provide the Secretary of State with current registered agent and registered office information. This information is required even if the information is also included in each annual statement that accompanies the reinstatement. The registered agent can be either (option A) a domestic entity or a foreign entity that is registered to do business in Texas or (option B) an individual resident of the state. The association cannot act as its own registered agent; do not enter the entity name as the name of the registered agent.

Consent: A person designated as the registered agent of an entity must have consented, either in a written or electronic form, to serve as the registered agent of the entity. Although consent is required, a copy of the person's written or electronic consent need not be submitted with the reinstatement. The liabilities and penalties imposed by sections 4.007 and 4.008 of the BOC apply with respect to a false statement in a filing instrument that names a person as the registered agent of an entity without that person's consent. (BOC § 5.207)

• Item 6—Registered Office Address: The registered office address must be located at a street address where service of process may be personally served on the entity's registered agent during normal business hours. Although the registered office is not required to be the entity's principal place of business, the registered office may not be solely a mailbox service or telephone answering service. (BOC § 5.201) A post office box is not sufficient as a registered office address unless the registered office is located in a town with a population of less than 5,000.

Additional Documentation and Filings:

Tax Clearance from Comptroller of Public Accounts: A Certificate of Reinstatement must be accompanied by a tax clearance letter from the Texas Comptroller of Public Accounts stating that the filing entity has satisfied all franchise tax liabilities and may be reinstated. Contact the Comptroller for assistance in complying with franchise tax filing requirements and obtaining the necessary tax clearance letter by email at: tax.help@cpa.state.tx.us by calling (800) 252-1381 or (512) 463-4600.

Annual Statement: An annual statement (Form 803) and applicable filing fee are due at the time of reinstatement for each delinquent year. Form 803 is at: http://www.sos.state.tx.us/corp/forms_reports.shtml

Amendment to Certificate of Formation or Registration: A Certificate of Reinstatement must be accompanied by an amendment to the certificate of formation or registration if the professional association name is the same as or deceptively similar to the name of any existing domestic or foreign filing entity, or any name reservation or registration filed with the Secretary of State. Amendment would also be required for a similar name if consent could not be obtained. The administrative rules adopted for determining entity name availability (Texas Administrative Code, Title 1, Part 4, Chapter 79, subchapter C) may be viewed at: http://www.sos.state.tx.us/tac/index.shtml A preliminary determination on "name availability" may be obtained by calling (512) 463-5555 or e-mail to: corpinfo@sos.state.tx.us

At the time of filing the reinstatement, if the professional association name is no longer available, or if written consent is required but cannot be obtained for the use of the name, simultaneously submit (A) a certificate of amendment to the certificate of formation to change the name of the domestic entity as a condition of reinstatement; or (B) an amended registration to state the assumed name under which the foreign entity shall transact business. The amendment (Form 424 or 406, as appropriate) and applicable filing fee (\$150) must be submitted at the same time as the certificate of reinstatement and annual statement(s). Forms 424 and 406 are available at: http://www.sos.state.tx.us/corp/forms_boc.shtml

Upon completing the reinstatement process of submitting all required forms, paying all applicable filing fees, and meeting all filing requirements, the status of the professional association will be changed to in existence.

• Execution: The reinstatement must be signed by an officer of the professional association. The reinstatement need not be notarized; however, before signing, please read the statements on this form carefully. The designation or appointment of a person as the registered agent by a managerial official is an affirmation by that official that the person named in the instrument has consented to serve as registered agent. (BOC § 5.2011)

A person commits an offense under section 4.008 of the BOC if the person signs or directs the filing of a filing instrument the person knows is materially false with the intent that the instrument be delivered to the Secretary of State for filing. The offense 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.

- **Filing Fees:** The filing fee for the reinstatement (Form 814) is (\$75) and for <u>each</u> delinquent annual statement (Form 803) that must be submitted with the reinstatement is (\$35). The filing fee for an amendment (Form 424 or 406) <u>if required</u> as a condition of reinstatement is (\$150).
- Payment Instructions: Accepted methods of payment are: (1) a check or money order payable to the Secretary of State; (2) a valid American Express, Discover, MasterCard, or Visa credit card; (3) a funded LegalEase account; or (4) a prefunded Secretary of State client account. Checks and money orders must be payable through a U.S. bank or financial institution; credit card transactions are subject to a statutorily authorized convenience fee of 2.7% of the total fees incurred, if applicable. Use Form 815 at: http://www.sos.state.tx.us/corp/forms_reports.shtml to pay by credit card, LegalEase, or client account.
- **Delivery Instructions:** Submit the completed form(s) in duplicate, along with payment of the applicable filing fees, to the Secretary of State. Mail to: Secretary of State, Reports Unit, P.O. Box 12028, Austin, Texas 78711-2028; deliver to: James Earl Rudder Office Building, Reports Unit, 1019 Brazos, Suite 505, Austin, Texas 78701; or fax to: (512) 463-1423. On filing the document, the Secretary of State will return the appropriate evidence of filing to the submitter together with a file-stamped copy of the document, if a duplicate copy was provided as instructed.

Revised 06/11

Form 814 (Revised 06/11)

Submit in duplicate to: Secretary of State Reports Unit P.O. Box 12028 Austin, TX 78711-2028 Phone: (512) 475-2705

Fax: (512) 463-1423 Dial: 7-1-1 for Relay Services



Certificate of Reinstatement of a Professional Association After Failure to File Annual Statement

This space reserved for office use.

Filing Fee: \$75	Amiuai Statement	
1. The name of the profession	nal association is:	
The association was required	to register in Texas under the following ass	sumed name: (if applicable)
The file number issued to the	association by the secretary of state is:	
2. The jurisdiction of organization	ation of the association is: (state or country)	
The association was organized	d or obtained its registration on:	
3. The effective date of the as	ssociation's involuntary termination or revo	
have been corrected by the subsatisfied its obligations under	at the circumstances giving rise to its involumission of each annual statement due, and the Tax Code and all conditions for reinstances.	I, further, that the association has tement have been met.
5. A. The registered ag	ent is an organization (cannot be the entity seeking	g reinstatement) by the name of:
OR B. The registered ago	ent is an individual resident of the state wh	ose name is:
First Name	M.I. Last Name	Suffix
6. The registered office addre (use street or building address; see	ss, which is identical to the business addre. <i>Instructions</i>)	ss of the registered agent in Texas, is:
		TX
Street Address	City	State Zip Code
	Additional Documentation and Filin	ngs
Annual Statement(s) (Include ea	nts Tax Clearance Letter (Required) ach annual statement (Form 803) and applicable filing fee(s) Formation or Registration (Required only if entity name	
	Execution	
undersigned signs this docume false or fraudulent instrument	the person designated as registered agent has ent subject to the penalties imposed by law and certifies under penalty of perjury that and the entity to execute the filing instrument	for the submission of a materially the undersigned is authorized under
Date:	By :	
	Signature of authorized off	cer
	Printed or typed name of of	ficer and title



APPENDIX D: COMPTROLLER FORM 05-391

Tax Clearance Letter Request for Reinstatement

In order to reinstate an entity, the Texas Secretary of State requires evidence that the entity has met certain franchise tax requirements. To provide this evidence, the Comptroller's office issues a Tax Clearance Letter, Form 05-377. This letter must be included as part of the reinstatement filing with the Secretary of State.

Information about other filing requirements with the Secretary of State is online at www.sos.state.tx.us.

Obtaining a Tax Clearance Letter

All franchise tax reports and signed Information Reports through the reinstatement date must be filed. All franchise tax, penalty and interest must be paid.

• If all required reports and payments are already on file, complete and return this request.

OR

 If all required reports and payments are not on file, send any missing reports and payments along with this re
--

-					
Taxpayer name			11-digit Texas taxpayer number		
Select how the of the format y		ould be sent. Please note tha	at requests are processed in the order received, regardless		
Please selec	et only one:				
Mail	Recipient: _				
	Street:				
	City, state and ZIP code: _				
☐ PDF	Email address:				
☐ FAX	FAX number (Area code an	d number):			
	Mail t	nis request and all missing re	eports and/or payments to:		
		Comptroller of Public P.O. Box 149348	c Accounts		

Requestor name (Type or print.)

Telephone number and extension

Sign here

Austin, TX 78714-9348

FOR ASSISTANCE: Franchise tax information is available online at www.franchisetax.tx.gov. For additional assistance, call 1-800-252-1381.

You have certain rights under Chapters 552 and 559, Government Code, to review, request and correct information we have on file about you. Contact us at the address or phone number listed on this form.