

**Secretary of State's Office:
A View from the Trenches
2013 Essentials of Business Law
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New Texas Business Filings

	<u>2012</u>	<u>2011</u>
For-Profit Corporations	22,918	24,123
Limited Liability Companies	100,452	86,947
Limited Partnerships	7,728	5,633
Limited Liability Partnerships (new & renewal)	3,701	3,857

Active Entities as of March 1, 2013

For-Profit Corporations	361,083
Limited Liability Companies	498,952
Limited Partnerships	128,766
Limited Liability Partnerships	3,789

Restated Certificates of Formation and Amendment Issues

Restated Certificates of Formation

Common Errors to Avoid

- Omission of governing authority information

*Organizer information may be omitted, but restated certificates **must** include the number, names, and addresses of the entity's governing authority.*

- Failure to identify amendments made.

Section 3.059(d)(2) requires an identification "by reference or description each added, altered, or deleted provision."

Full text of added/altered provisions is set forth in exhibit, but brief description of amendments being made not included.

Restated Certificates of Formation

Statements Required by §3.005(a)(7)

- Was entity formed pursuant to a plan of merger?

Restated certificate must include statement that entity was formed pursuant to plan of merger.

- Was entity formed pursuant to a plan of conversion?

Restated certificate must include:

1. *Statement of its formation pursuant to plan of conversion, and:*
2. *Name, address, date of formation, prior form of organization, and jurisdiction of formation of the converting entity.*

Restated Certificates of Formation

- SOS Form 414—Restated Certificate of Formation with New Amendments
- SOS Form 415—Restated Certificate of Formation without New Amendments

Attached exhibit of Restated Certificate need not be signed.

Amendments

- If a certificate of amendment is filed changing the name of an entity that is a general partner in an LP, remember to file an amendment to the certificate of formation of the LP noting the change.
- If the name of an entity that is a manager or managing member of LLC is changed, the certificate of formation for an LLC for which the newly named entity serves as a manager or member is not automatically updated.

A certificate of amendment only changes the certificate of formation for which it is submitted and does not update other documents that may reference the entity.

Amendments

- Periodic reports for LPs may update the registered office and agent, principal office where records are kept, and the address of the general partner.
- Periodic reports do not update the name of the general partner. §153.306 BOC.
- Change of registered office/agent under §5.202 BOC does not update the office where records are kept or the address of the general partner. If all addresses are the same, voluntarily file a report under §153.302 BOC.

Series LLCs

Establishing a Series LLC

- A company agreement may establish or provide for the establishment of one or more designated series of members, managers, membership interests, or assets.
- Statement that a series LLC is being created not required in certificate of formation.
- Section 101.602(b)(3) BOC requires certificate of formation to include notice of limitations on liabilities of the series. No requirement that the notice reference a specific series.

Notice of Limitations

Section 101.602(a) BOC requires notice to state:

- The debts, liabilities, and obligations shall be enforceable against the assets of that series only and shall not be enforceable against the assets of the LLC or any other series.

- None of the debts, liabilities, and obligations with respect to the LLC shall be enforceable against the assets of any series.

How Popular is the Texas Series LLC?

- There is no filing with the SOS when a series is actually established, so SOS records do not reflect when and how many series have been created.
- SOS reviewed a representative sample of LLCs formed in 2011 to identify certificates of formation that included the notice of limitations. Between 0.75% and 1% of new LLCs might be series.

Conducting Business in the Name of a Series

- A series has the power, in the series' own name, to:
 - sue and be sued;
 - contract;
 - hold title to assets; and
 - grant liens and security interests in those assets.
- If each or any series of the LLC conducts business under a name other than the name of the LLC, the LLC should file an assumed name certificate in compliance with chapter 71 of the Texas Business & Commerce Code.

Registration of a Foreign Series LLC

- Unless the jurisdiction of formation treats each series as a separate legal entity, the LLC rather than the individual series would register as the legal entity that is transacting business in Texas.
- The secretary of state has a separate application for registration form for foreign series LLC. *See Form 313.*

Supplemental Information Required in the Application for Registration

The application must state whether:

- the series has separate rights, powers, or duties with respect to specified property or obligations or separate profits and losses associated with the specified property or obligations;
- any debts, liabilities, obligations, and expenses of a particular series shall be enforceable against the assets of that series only and not against the assets of the LLC or other series;
- any debts, liabilities, obligations, and expenses with respect to the LLC generally, or any other series shall be enforceable against the assets of that series.

Assumed Name for Foreign Series

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

Registered Agent Provisions

Consent of Registered Agent

- A person appointed or named as a registered agent must have consented, in written or electronic form, to serve in that capacity.
- Designation or appointment of a registered agent by an organizer or managerial official in a registered agent filing is affirmation of consent.
- *See Form 401-A* for the consent.
 - Use of form is optional.
 - See 1 TAC § 79.29 if not using form.

Filing Consent of Registered Agent

- Filing with the SOS is ***not*** required.
- SOS recommends that the represented entity retain a copy of the consent in its own records.
- A statement of consent of registered agent will be maintained in the records of the SOS when:
 - submitted simultaneously with or as part of a registered agent filing; or
 - submitted separately with the appropriate filing fee.

Failure to Obtain Consent

Sections 4.007 and 4.008 apply to a false statement in registered agent filing naming a person without consent.

- Section 4.007 provides for damages, court costs, and attorney's fees for a loss caused by a false statement of material fact in a filing instrument.
- Section 4.008 provides criminal penalties if a person signs or directs the filing of an instrument that the person knows is materially false.

Rejection of Appointment

- A person named as registered agent without consent is *not* required to perform the duties of a registered agent and may refuse service of process.
- A person designated without consent may terminate the designation by filing a statement of rejection with SOS. *See Form 428* for rejection.
- SOS will notify entity of the necessity of filing a new registered agent and office.
- Failure to timely designate a new agent may result in involuntary termination of a domestic entity or revocation of registration of a foreign entity.

Conversions

Conversion Pitfalls

- *Don't file the certificate of formation of the "converted" entity before the conversion!*
- A domestic entity created by a plan of conversion is formed by filing the certificate of conversion. Its existence is effective on the effectiveness of the conversion.

Conversion Pitfalls

Don't use SOS certificate of formation forms for the formation document in a conversion unless the language required by §3.005(7) is added:

- A statement that entity is formed under a plan of conversion; and
- The name, address, date of formation, prior form of organization, and jurisdiction of formation of the converting entity.

Nonprofit Conversion Issues

- A domestic nonprofit corporation may not convert into a for-profit entity. §10.108 BOC
- SOS will accept a certificate of conversion that converts a Texas nonprofit corporation to a:
 - foreign nonprofit corporation;
 - nonprofit LLC; or
 - special nonprofit corporation formed under a code other than BOC.

Nonprofit Conversion Issues

- Chapter 10 of the BOC does not apply to an unincorporated nonprofit association. §252.017 BOC
- An unincorporated nonprofit association may not convert to a nonprofit corporation.

Conversion Effective Dates

The certificate of conversion and the certificate of formation filed as part of the conversion cannot have different effective dates.

Ex: Do not show an effective date of 12/31/2013 on the certificate of conversion and an effective date of 1/1/2014 on the formation.

§3.006 provides that the formation and existence of a domestic filing entity that is a converted entity in a conversion takes effect and commences on the effectiveness of the conversion.

Amendments to Foreign Registrations following a conversion or merger

- Section 9.009(a-1) permits a foreign filing entity to amend its application for registration to disclose a change resulting from:
 1. a conversion from one type of foreign filing entity to another type of foreign filing entity; or
 2. a merger into another foreign filing entity.
- Entity making the amendment succeeds to the registration of the original foreign filing entity.
- *See SOS Form 422.*

**Involuntary Terminations and
Forfeitures by the Secretary of State**

Statutory Provisions

- Chapter 171 Tax Code (applies to taxable entities).
- Chapter 153 Business Organizations Code (applies only to LPs that fail to file periodic reports).
- Chapter 22 Business Organizations Code (applies only to nonprofit corporations that fail to file periodic reports).
- Chapter 11 Business Organizations Code (applies to any entity that fails to maintain a registered agent or office or payment of a formation filing fee is dishonored; also applies to professional associations that do not file an annual statement).

* *Documents, other than formation documents, are revoked under chapter 405 of the Government Code if payment is dishonored.*

Reinstatements After Tax Forfeiture (76,377 forfeitures in 2012)

Entity reinstates under chapter 171 of Tax Code rather than BOC.

- To reinstate, entity must obtain a tax clearance letter from the Comptroller of Public Accounts, and
- Submit an application for reinstatement with the SOS (*Form 801*). Filing fee \$75.
- Application for reinstatement must be submitted and signed by an officer, director, or shareholder *at the time of forfeiture*.
- No time limit for reinstatement.

Reinstatement of LP After Termination for Failure to File a Report

LP reinstates under §153.312 BOC.

- To reinstate, the LP files the delinquent report.
- No application for reinstatement submitted.
- Pay the fees under §4.155 (11) BOC: \$225 (\$50 plus a late fee of \$100 and a reinstatement fee of \$75).
- Tax clearance required.
- No time limit.

Reinstatement of a Nonprofit After Termination for Failure to File a Report

Nonprofit corporation reinstates under §22.365 BOC.

- To reinstate, the NP files the delinquent report.
- No application for reinstatement submitted.
- Filing fee \$25. See §4.153(13) BOC.
- Tax clearance required.
- No time limit.

Reinstatements After Involuntary Termination under Chapter 11

Entity reinstates under §11.253 BOC.

- To reinstate, the entity must correct the circumstances that led to the termination.
- Obtain a tax clearance letter from the Comptroller.
- Submit a certificate of reinstatement (*Form 811*) to the SOS. Filing fee \$75.
- **No time limit.** (If the reinstatement is filed before the 3rd anniversary of the termination, the entity is considered to have continued in existence without interruption. §11.253(d))

Reasons to Avoid Terminations/Forfeitures

Name Conflicts

Beware the Intervening Events!

- Secretary of State only considers names of active entities when determining name availability.
- On reinstatement, the terminated/forfeited entity will be required to submit a certificate of amendment to change its name if there is a name conflict that arose while the entity was terminated/forfeited.

BOC §§11.253(c); §153.312(c); §22.365(c) and Tax Code §171.315

Liability

- Under §§171.252, 171.255-171.2515 Tax Code, managerial officials liable for debts of entity.

This liability exposure is triggered by the forfeiture of corporate privileges prior to the Comptroller's certification that the entity should be forfeited and extends back to debts created or incurred after the franchise tax report was due.

- Reinstatement under chapter 11 has no effect on any issue of personal liability during the period between termination and reinstatement. §11.253(d) BOC
- Forfeiture of right to transact business does not affect the liability of a limited partner. §153.309(c) BOC

Right to Sue or Defend

- Taxable entity denied the right to sue or defend in a court in this state. §171.252 Tax Code

See Mello v. A.M.F., Inc. 7 SW3rd 339, 331 (Tex. App.—Beaumont 1999, pet. denied) Corporation could not bring cross action but could defend.

- After the forfeiture of privileges of the LP or NP for failure to file report (prior to termination), the entity may not maintain an action, suit, or proceeding in a court of this state. §153.309 BOC

Other Things to Ponder

Claims Resolutions Against Terminated Entities and Limited Survival After Termination

- Viability of and extinguishment of claims against a terminated entity.
- Three-year limited survival after termination.
- Bankruptcy issues.

Subchapter H, Chapter 11 BOC §§11.351-11.359

Coming Attractions?

Pending Legislation (Amendments to the BOC)

- SB 847/HB 1929—Relating to business entities and associations.
- SB 849/HB 1928—Relating to social purposes of a for-profit corporation and the consideration of social purposes and other interests by officers and directors of a for-profit corporation.
- HB 2565—Relating to the formation of benefit corporations and to the consideration of public benefits and other interests by officers and directors of benefit corporations; providing for the imposition of a fee.

Pending Legislation (Amendments to LLC provisions of BOC)

- HB 1624—Relating to the name of a series limited liability company.
- HB 2622—Relating to the creation of a low-profit limited liability company.

Pending Legislation (Amendments to Assumed Name Act)

- SB 699—Relating to the contents of an assumed name certificate filed by certain businesses or professionals.
- HB 1581—Relating to an entity's designation of an agent for service of process, notice, or demand in an assumed business or professional name certificate.

Pending Legislation (UCC)

- SB 474/HB 1978—Relating to financing statements and other records under the secured transaction law.
- HB 1859/SB 1094—Relating to security interests in oil and gas production and its proceeds.

Pending Legislation (Trademarks and Notaries Public)

- SB 1033—Relating to the registration and the use of marks, including trademarks and service marks.
- SB 1037/HB 1954—Relating to the education requirements for a notary public; authorizing a fee.
- HB 2501—Relating to an identifying number assigned to a notary public by the secretary of state.

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