Hot Topics with the Secretary of State in 2010

Presented to:
Capitol Area Paralegal Association
April 28, 2010
Austin, Texas

Presented by:
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Office of the Secretary of State
Regardless of formation date

On January 1, 2010, the following statutes were repealed:

- Texas Business Corporation Act
- Texas Non-Profit Corporation Act
- Texas Professional Association Act
- Texas Professional Corporation Act
- Texas Limited Liability Company Act
- Texas Revised Partnership Act
- Texas Revised Limited Partnership Act
- Texas Real Estate Investment Trust Act
- Texas Miscellaneous Corporation Laws Act
- Texas Cooperative Association Act
- Texas Uniform Unincorporated Nonprofit Association Act
Structure of the BOC

Professional Entities

Title 1: General Provisions

Corporations

Title 2

Title 3

Title 4

Title 5

Title 6

Title 7

Title 8

LLCs

Partnerships

REITs

Associations

Misc. & Transition
New Terminology

Old

Articles of Incorporation
Incorporator
Articles of Amendment
Articles of Dissolution

New

Certificate of Formation
Organizer
Certificate of Amendment
Certificate of Termination
Must We Amend?

- Immediate amendment not required
- Conform certificate of formation to BOC in next amendment
- SOS does not require new terminology or updates to references to prior law
Name Availability
Name Availability

★ Texas standard: same, deceptively similar, or similar requiring letter of consent
★ Statute: BOC § 5.053
★ Administrative Rules: 1 Tex. Admin. Code Chapter 79, Subchapter C
The “First Two Word” Rule

★ A proposed entity name is similar requiring a letter of consent if:
   – The first two or more words of the proposed entity name are the same as, or deceptively similar to, the first two words of an entity name on file, and are not frequently used in combination.
<table>
<thead>
<tr>
<th>Proposed Name</th>
<th>Existing Name</th>
<th>Consent Required?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prime Property Realty, LLC</td>
<td>Prime Property Landscaping, Inc.</td>
<td>Yes</td>
</tr>
<tr>
<td>Hot Dog Publications, Inc.</td>
<td>Hot Dog Enterprises Corp.</td>
<td>No</td>
</tr>
</tbody>
</table>
The “Geographic Ending” Rule

★ A proposed entity name is similar requiring a letter of consent if:
  – The proposed entity name is the same as, or deceptively similar to, an entity name on file except for a geographic designation at the end of the name.
## Examples

<table>
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<tr>
<th>Proposed Name</th>
<th>Existing Name</th>
<th>Consent Required?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bull and Bear Club of San Antonio</td>
<td>Bull and Bear Club</td>
<td>Yes</td>
</tr>
<tr>
<td>San Antonio Bull and Bear Club</td>
<td>Bull and Bear Club</td>
<td>No</td>
</tr>
<tr>
<td>Exhibits International, LLC</td>
<td>Exhibits, Inc.</td>
<td>No</td>
</tr>
</tbody>
</table>
Matters Not Considered

- Prior SOS action
- Preliminary SOS opinion
- Action by applicant under proposed name
- Timing of applicant’s and existing entity’s documents
- Attempts to contact existing entity
Matters Not Considered

- Locations and business purposes
- Whether existing entity is actively engaged in business, bankrupt, or intending to take action to make the name available (e.g., merge out of existence)
- Which entity is more or less widely known
- Trademark rights
Names Reviewed

★ The following types of active names are included in a name availability search:

– legal names of Texas corporations, LPs, LLCs, PAs, cooperatives, and REITs (filing entities);
– legal and fictitious names of foreign filing entities;
– name registrations; and
– name reservations
Names Reviewed

★ The following types of names are not reviewed for availability:
  – assumed names (except fictitious names of foreign filing entities) and
  – names of LLPs
Limited Liability Partnerships
LLP Registration

★ Does not create a partnership!
The LLP “Umbrella”
General Partnership
Limited Partnership
The LLP “Umbrella”
Limited Liability Partnership
Limited Liability Limited Partnership
Obtaining Limited Liability Protection

★ To obtain limited liability protection, a partnership or limited partnership must:
  – register annually with the SOS; AND
  – provide $100,000 in security or insurance designated to cover the specific types of liability protected by the registration.
Formation and Registration Steps

1. Select organizational form of partnership
   a. general partnership (no SOS filing)
   b. limited partnership (SOS Form 207)
2. Register as LLP (SOS Form 701)
3. Obtain required security or insurance
4. Annually renew LLP (SOS Form 703)
2009 Legislative Changes
2009 Legislative Changes

1. Newly taxable entities
2. Certificates of correction
3. Changes in GP by a foreign LP
4. Conversions
5. Series LLCs
6. Registered Agent Consent
Newly Taxable Entities
Newly Taxable Entities

★ LPs, LLPs, and PAs are now taxable entities.
★ Tax certificates required for:
  – Voluntary terminations;
  – Withdrawals of foreign registrations;
  – Withdrawals of LLP registrations; and
  – Mergers or conversions (unless accompanied by alternate statement under BOC §10.156).
★ Tax clearance letters required for
  – Reinstatement following voluntary termination, involuntary termination, or revocation of foreign registration for LPs, LLPs, and PAs.
Certificates of Correction
Certificates of Correction

★ **SB 1442 amends the provisions regarding certificate of correction to allow a certificate of formation to be corrected by the organizer who filed the certificate.**

★ **For more information on whether a correction is an appropriate filing, please see §§4.101-4.105 of the BOC.**
Required Amendments for Registered Foreign Limited Partnerships
Change in General Partner of Foreign LP

Foreign LP must amend registration to disclose:

★ a change in name;

★ a change in the business or activity stated in the application for registration;

★ the admission of a new general partner;

★ the withdrawal of a general partner; or

★ a change in the name of the general partner stated in the application for registration.
Conversions
Conversion

- The definition of conversion was expanded to resolve confusion between what is considered a conversion in Texas and considered a domestication, continuance or transfer transaction in another jurisdiction. §1.002(10)
Other Conversion Issues

1. Don’t use SOS certificates of formation for the formation document in a conversion unless the language required by §3.005(7) is added:
   – A statement that the 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.
Other Conversion Issues, cont.

2. A domestic nonprofit corporation *may not* convert into a for-profit entity. §10.108

3. The BOC now allows a foreign filing entity to amend its registration to effect a transfer of the registration to a successor entity after a merger or conversion. (SOS Form 422)
Automatic Withdrawal on Conversion

*The BOC was amended to provide that a foreign filing entity or foreign LLP registered in this state that converts to a domestic filing entity is considered to have withdrawn its registration on the effective date of conversion.*
Series LLC

★ *Chapter 101, subchapter M*

– *What is a series LLC?*
Series LLC cont.

★ **What are the filing requirements?**
  - *Domestic*
  - *Foreign*

★ **Don’t forget the assumed name certificate**
Series LLC cont.

- SOS computer records do not reflect whether the LLC is authorized to establish or has established a series. However, the certificate of formation of a series LLC contains a notice reflecting this option.
Registered Agent Consent
Registered Agent Consent

★ A registered agent appointed on or after January 1, 2010 must consent in writing.

★ A person designated as a registered agent without consent may file a rejection.
Registered Agent Consent cont.

★ Consent does not have to be filed with secretary of state.
★ If filed through SOSDirect, read the screen prompts closely.
Texas Secretary of State - Windows Internet Explorer

Website Business & Public Filings Division

Election Outlook | Maintenance Notice SOSDirect, along with various online filings, will be unavailable Friday, April 23rd from 6:00 p.m. through 10:00 p.m. Sunday, April 25th due to system maintenance. We apologize in advance for any inconvenience this may cause.

Points of Interest
- Election Night Returns
- Am I Registered to Vote?
- Voter Registration Application
- Voter Questions (FAQ)
- Business/Nonprofit Forms
- Certificate Validation

The Press Office
- New Secretary Andrade urges prompt response to census
  AUSTIN - Secretary of State Hope Andrade joined representatives of the 2010 Census at the Capitol on March 12 to promote the importance of a complete count of all Texas residents. Full Story
- New Gov Rick Perry names Secretary of State Hope Andrade the Texas Census Ambassador to promote participation by Texans in the 2010 Census

Quick Links
- Business Opportunity Search
- Notary Public Search
- Debt Collector Bonds Search
- Credit Services Organization Search
- Foreign or Out-of-State Entities
- Nonprofit Organizations
- Registered Agents
Registered Agents

What is a registered agent?

The Texas Business Organizations Code ("BOC") requires every domestic or foreign filing entity to maintain a registered agent and office in Texas. The BOC also permits the filing of an appointment of agent for service of process by an unincorporated nonprofit association. Additionally, the Texas Finance Code permits a Texas financial institution to appoint an agent for service of process.

An entity’s registered agent is an agent of the entity on whom may be served any process, notice, or demand required or permitted by law to be served on the entity. Section 5.201(b) of the BOC requires that registered agents designated on or after January 1, 2010 must have consented to serve in that capacity in a written or electronic form developed by the Office of the Secretary of State. See Form 401-A (Word 86k, PDF 38k) and 1 Tex. Admin. Code § 79.29.

What is a registered office?

An entity’s registered office must be a physical address in Texas where the registered agent can be served with process during business hours. The registered office is also where the Office of the Secretary of State will mail correspondence. A registered office is the business office address of the registered agent and may be the same as the entity’s place of business. It cannot, however, be a post office box that is part of a commercial mail or message service unless that commercial enterprise is the registered agent.
Expanded SOS Resources
Resources

★ Website: www.sos.state.tx.us
  – SOSDirect
  – Forms
  – FAQs
★ SOS Staff
CLIENT REFERENCE (optional): [NONE]

INQUIRIES AND ORDERS

- Name Availability Search
- Find Entity
- Find Supplemental
- Find Global
- Find Assumed Name
- Find People
- Find Registered Agent
- Filing Number Search
- FEIN Search
- TID Search
- Document Number Search
- Order - Certificates and Copies
- Bulk Order - Data
- Registered Agent activity past 60 days

WEB FILLINGS

DO NOT USE 'BACK' BUTTON
Use of the 'BACK' button during the "WEB FILLINGS" process will result in loss of data. Please press the 'Cancel Filing' button and start again.

- Reservation * Formation * Registration Documents
  First select the type of entity for which you wish to submit a filing, and then click 'File Document'
  Application for Name Reservation
  File Document

File assumed name certificates, changes to registered office/agent, dissolutions, reinstatements, cancellations, withdrawals and annual statements as change documents.

- Change Documents
  Enter filing number and click 'File Document' or click 'Find Entity'
March 2, 2010 Primary Elections: First Day of Early Voting is Feb. 16th | Find My Polling Place | Voter Information | What's on the Ballot

Points of Interest
- Am I Registered to Vote?
  - Voter Registration Application
- Business/Nonprofit Forms
- Texas Administrative Code
- Legislative Bills
- Certificate Verification

Quick Links
- SOSDirect Search
  - Business Opportunity Search
  - Health Spa Search
  - Notary Public Search
  - Debt Collector Bonds Search
  - Credit Services Organization Search
- VOTEXAS.ORG

The Press Office
- Secretary Andrade Visits three Waco-area businesses
  - WACO - Texas Secretary of State Hope Andrade is scheduled to recognize three long-time local businesses today to thank them for their contributions to the Texas economy. Joined by members of the Greater Waco Chamber of Commerce, Andrade plans to visit RAM Aircraft, LP, Central Texas Ironworks, and Englander Container and Display. Full Release
- Deadline to register to vote is Feb. 1
  - AUSTIN - Texas Secretary of State Esperanza “Hope” Andrade is reminding Texans that February 1 is the deadline to register to vote in the 2010 Primary Elections. Full Release
- Secretary Andrade Visits four North Texas companies
  - NORTH TEXAS - Secretary Andrade visited North Texas earlier this week to highlight several longtime Texas businesses for their contributions to the state’s economy. Full Release

Register to Vote | State of Texas | Trail - Texas Homeland Security | Where the Money Goes | Fraud Reporting
Business and Nonprofit Forms

The secretary of state has promulgated certain forms designed to meet statutory requirements and facilitate filings with the office. Use of the forms is permissive.

Selection or completion of a form found on this website is the responsibility of the user and the user’s attorney. The forms and information provided by the secretary of state are not intended to provide legal advice or to substitute for the advice of an attorney. If you have specific legal questions, consult your attorney.

Online access to the business entity and UCC databases is available through SOSDirect. For information on SOSDirect or to subscribe, call (512) 475-2755.

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These forms are for filing domestic business and nonprofit entity formations, foreign entity registrations, amendments, terminations, and other business filings with the secretary of state.

These forms are for filing Professional Association Annual Statements and Periodic Reports for Limited Partnerships and Nonprofit Corporations.

These forms are for filing trademark applications, renewals, assignments, and transfers.
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Formation of Texas Entities FAQs

The answers to our Frequently Asked Questions are provided for informational purposes and are not intended to provide legal advice or to substitute for the advice of an attorney. If you have specific legal questions, consult your attorney.

Before Formation

1. Can I file a certificate of formation online?
2. How do I form a minority-owned business?
3. Do you have to be a U.S. citizen or a U.S. resident to incorporate and/or own a corporation in Texas?
4. Can a person younger than 18 be a director, officer, or owner of a business entity in Texas?
5. What is a registered agent? What are the agent’s duties? Where may a registered office be located? Can the Secretary of State be the registered agent of a corporation, limited liability company, or limited partnership?
6. Do I need to publish a notice before incorporating a business?
7. What are the differences between a corporation, a limited liability company (LLC), a limited partnership (LP), a limited liability partnership ( LLP), and a limited liability limited partnership (LLLP)? What are the benefits of forming each of these entity types?
8. Am I required to form a professional entity?
9. Who can form a professional association?
10. How do I form a “C” corporation, an “S” corporation, or a “501(c)(3)” corporation?
11. What is a close corporation? What are the benefits of forming a close corporation?
12. Can one person be the sole shareholder, director, and officer of a corporation?
13. Does a corporation have to issue stock? What is par value? How do you determine the par value of the corporation’s stock? Is there a minimum or maximum value for corporate stock?

1. Can I file a certificate of formation online?
What else does the Business & Public Filings Division do?

- Texas Register
  - Texas Administrative Code
- Uniform Commercial Code
- State trademark registrations
- Statutory Documents
  - Notary
  - Authentications
  - Service of Process and other Registrations
Contacting the secretary of state

★ SOS Public Information Response Team
- corpinfo@sos.state.tx.us
- (512) 463-5555

★ SOS Attorneys
- corphelp@sos.state.tx.us
- Leigh Joseph 463-5747
- Briana Godbey 463-5590
- Nahdiah Hoang 475-0218
- Mike Powell 463-9856
- Carmen Flores 463-5588
- Lorna Wassdorf 463-5591