

# The View from the Secretary of State's Office



*Presented by:*  
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Office of the Secretary of State

*Presented to:*  
2010 LLCs AND PARTNERSHIPS  
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Continuing Legal Education  
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## New Texas Business Filings

	<u>2009</u>	<u>2008</u>
For-Profit Corporations	25,142	28,136
LLCs	68,802	68,036
LPs	5,551	7,912
LLPs (new & renewal)	4,091	4,499



## Active Entities as of June 1, 2010

For-Profit Corporations	374,460
Limited Liability Companies	364,251
Limited Partnerships	128,690
Limited Liability Partnerships	4,029



Mandatory Application Date for the  
Business Organizations Code  
*January 1, 2010*



## **BOC Mandatory Application Date**

As of January 1, 2010, the Texas Business Organizations Code applies to all entities irrespective of formation date or whether the entity filed an election to adopt.



## **All Source Laws Repealed**

*as of January 1, 2010*

- 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



## Should a pre-BOC entity amend?

- Section 402.005 of the BOC indicates that a domestic or foreign filing entity should **conform** its certificate of formation or application for registration when it next files an amendment to its certificate or application.
- “Conform” means “to be similar or identical; *also* : to be in agreement or harmony.” [Merriam-Webster Online]



## References to Prior Law

Must an entity amend to update references to prior law to BOC terminology?

*SOS thinks not.*





## References to Prior Law

SOS believes references to prior law conform to BOC.

- Reference is historically accurate.
- BOC applies despite contrary references.
- Repeal does not affect prior operation of the statute or any action under that statute. Gov't Code § 311.031.
- BOC lists synonymous terms in § 1.006:
  - *articles of incorporation = certificate of formation*
  - *regulations = company agreement*
  - *certificate of authority = registration to transact business*



## Designation of Entity Type

Does absence of statement of entity type mean that a pre-BOC certificate of formation does not conform to the BOC?

*SOS thinks not.*

→ Entity type is apparent in SOS records.



## Appointment of SOS as Agent for Foreign Entity

Does absence of statement appointing SOS as agent for service of process mean that a pre-BOC application for registration does not conform to the BOC?

*SOS thinks not.*

- Section 5.251 makes SOS agent under certain circumstances regardless of whether the statement is included in the application for registration.



## To Amend or Not to Amend

- Consider amending if documents do not conform in some substantive manner, i.e., name or registered agent, rather than to change references or terminology.
- If amending, consider a restated certificate of formation changing substance, references, and terminology.
  - Easier to make wholesale changes.
  - Supersedes original certificate of formation and prior amendments and is *effective certificate of formation*.



# Series LLCs



## **Establishing a Series LLC**

- ❖ A company agreement may establish or provide for the establishment of one or more designed series of members, managers, membership interests or assets.
- ❖ Statement that a series LLC is being created not required in certificate of formation.
- ❖ Sec. 101.602(b)(3) BOC requires certificate of formation to include notice of limitations on liabilities of the series.



## Notice of Limitations

Sec. 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.
- Notice not required to reference a specific 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 newly formed LLCs to identify certificates of formation that included the notice of limitations.





## **SOS Sampling**

**Sample Size 1,023 Confidence Interval  $\pm 4$  Confidence Rate 99%**

- ❖ Only one certificate of formation (0.097% of the sample) included the series notice language.
  - In the first eight months after the effective date of the legislation, fewer than 5% of newly formed LLCs included the notice of limitations.
  - Fewer than 2,574 out of the 62,826 LLCs formed between September 1, 2009 and May 15, 2010.



## Registration of a Series

Generally, a series LLC formed under the laws of another jurisdiction is treated as a single legal entity for qualification purposes. The LLC itself rather than the individual series should register as the legal entity that is transacting business in Texas.



## **Supplemental Information Required in the Application for Registration**

Sec. 9.005 of the BOC requires a foreign LLC governed by a company agreement that establishes or provides for the establishment of series to include a notice of limitation of liabilities in its application for registration.

SOS created Form 313 foreign series LLC registrations.



## **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 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 with respect to the LLC generally or any other series shall be enforceable against the assets of that series.



## **Conducting Business in the Name of the 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.
  
- ❖ A series conducting business under its own name rather than the legal name of the LLC should file an assumed name certificate. Tex. Bus. & Comm. Code ch. 71.



# LLP Issues



## LLP Renewals

*Be vigilant about timely renewals of LLP registrations!*

- *Evanston Ins. Co. v. Dillard Dep't Stores, Inc.*, 602 F.3d 610 (5th Cir. 2010).
  - debt “incurred” by judgment against partnership.
  - despite active LLP registration when cause of action arose, because no active LLP registration when judgment rendered, individual partners personally liable.
- LLPs are taxable entities. If LLP is general partnership comprised solely of natural persons, registration lapse triggers final franchise tax report. If the partnership later re-registers, an initial franchise tax report will be due.



# New Registered Agent Provisions





## **Consent of Registered Agent**

### **New Provisions Effective January 1, 2010**

- 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.
- SOS developed Form 401-A for the consent.
  - Use of form is optional.
  - See 1 TAC § 79.29 if not using form.



## **Registered Agent Filings to which the consent requirement applies**

- Filings under the BOC:  
certificates of formation, applications for registration, statements of change of registered agent/office, amendments, restated certificates, mergers, conversions, reinstatements.
- Similar documents for filings by entities organized under special statutes and governed in whole or part by the BOC or to which general corporate laws apply.
- Appointment of agents by:  
unincorporated nonprofit associations  
Texas financial institutions  
defense base development authorities



## 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 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.
  - SOS developed 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.



## Transfer of Ownership or Membership Interests

*Sec. 5.2011 BOC requires that before the sale, acquisition, or transfer of a majority of interest of an entity, the governing authority should verify that the person named as a registered agent has consented to continue to serve in that capacity. Continuation of that registered agent is affirmation that the requisite verification has occurred and the person consents to serve as registered agent.*



**Beneficial Ownership Issue  
&  
Pending Federal Proposals**



## Beneficial Ownership Issue

Pending federal legislation to require beneficial ownership information for business entities to combat terrorism and bring the US into compliance with federal treaties.

Several proposals are pending:

- ★ S. 569 by Senator Levin
- ★ *The Uniform Law Enforcement Access to Entity Information Act* (compromise drafted by the ULC Commissioners and the ABA working with NASS and IACA).
- ★ Treasury Proposal





## What Happens Next?

S. 569 pending in US Senate. It was originally scheduled for mark-up in June but mark-up postponed until July or August so that the committee can study the amendments and proposals and determine the administration's position.

Federal legislation likely to pass requiring states to adopt a requirement that someone verify the identity of the beneficial owners of entities and file or provide the names of those owners when requested by law enforcement.



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## Need Help?

### Contact SOS by Email

Name availability & general entity information:

**[corpinfo@sos.state.tx.us](mailto:corpinfo@sos.state.tx.us)**

Request copies or certificates of fact:

**[corpcert@sos.state.tx.us](mailto:corpcert@sos.state.tx.us)**

Legal questions relating to filing issues:

**[corphelp@sos.state.tx.us](mailto:corphelp@sos.state.tx.us)**

SOSDirect assistance & issues:

**[sosdirect@sos.state.tx.us](mailto:sosdirect@sos.state.tx.us)**



## Need Help?

Contact SOS by Email

Contact individual at SOS:

***first initial last name@sos.state.tx.us***

***lwassdorf@sos.state.tx.us***

***cflores@sos.state.tx.us***



**Need Help?**  
Call 463-5586



Leigh Joseph	463-5747
Briana Godbey	463-5590
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