

Update from the Office of the Secretary of State

2018 LLCs, LPs and Partnerships
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Austin, Texas

Presented by:

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New Texas Entity Filings

	<u>2017</u>	<u>2016</u>
For-Profit Corporations	21,939	22,404
Nonprofit Corporations	12,338	11,890
Professional Corporations	719	674
Professional Associations	432	537
Limited Liability Companies	166,589	150,266
Limited Partnerships	4,516	5,054
Limited Liability Partnerships (initial registrations)	525	624

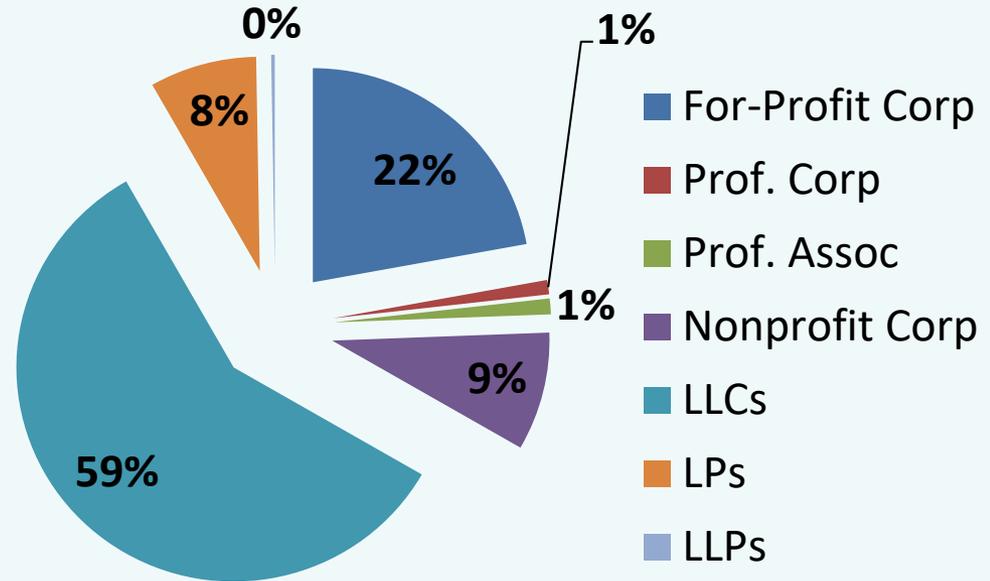


SOS Census

June 1, 2018

For-Profit Corp	361,774
Prof. Corp	17,635
Prof. Assoc	19,444
Nonprofit Corp	145,909
LLCs	955,018
LPs	130,298
LLPs	4,375

Active Domestic Entities



Business Entity Names

Names 101



Entity Name Availability Standard

BOC §§ 5.053, 5.102 & 5.153

Distinguishable In the Records

- Comparison shows enough differences to make the name available.

SAME

- Comparison shows no differences or the only differences do not alter the names sufficiently to make them distinguishable. Unavailable even with consent.

Available with Consent

- Comparison reveals certain similarities and therefore is only available with consent.



Entity Name Standard Definitions

1 TAC §79.30(2)

“Key word” means a word or words that alters the proposed name sufficiently to make it distinguishable in the record. Key word does not include:

- an article of speech or a conjunction;
- a preposition, unless the addition, substitution or omission of the preposition alters the name sufficiently to make it distinguishable;



Entity Name Standard Definitions

1 TAC §79.30(2)

Key word does not include:

- the word “company” or abbreviation “Co.” unless the addition or omission of the word or abbreviation alters the name sufficiently to make it distinguishable; or
- an organizational identifier which operates as an organizational identifier for the entity or appears after all key words in the name.



Distinguishable Names

1 TAC §79.38

- Certain conditions define when a name is considered distinguishable and therefore available:
 - Difference of one key word
 - Key words are the same but in a different order
 - Key words or contractions of key words are derived from the same root word



Distinguishable Names

1 TAC §79.38

- Distinguishable and therefore available if:
 - Key words are the same but in a different language
 - Key word or words sound the same, but have a different meaning or connotation
 - Key word or words are the same except for the addition, substitution, or omission of prepositions that alter the name sufficiently to make it distinguishable



Distinguishable Names

1 TAC §79.38(1)

Difference of one key word

TexCrete vs TexCrete Construction

United vs United One

Apex Flooring vs Apex Flooring Dallas

Not Distinguishable

The Swan Dive vs Swan Dive vs Le Swan Dive



Distinguishable Names

1 TAC §79.38(2)

Same key words but in different order

Austin Auto Parts is distinguishable from

Auto Parts of Austin

Global One is distinguishable from

One Global

Texas Ventures is distinguishable from

Ventures Texas



Distinguishable Names

1 TAC §79.38(3)

Key words or contractions of key words are derived from the same root word

Summit Electric is distinguishable from

Summit Electrical

Southwest Engineers is distinguishable from

Southwest Engineering



Distinguishable Names

1 TAC §79.38(3)

Key words are the same but in a different language.

Paloma Blanca Café is distinguishable from

White Dove Cafe

Mis Amigos Trucking is distinguishable from

My Friends Trucking

Not Distinguishable

El Rodeo is the same as Rodeo or The Rodeo



Distinguishable Names

1 TAC §79.38(5)

Key words or words sound the same, but at least one word, on its face, has a different meaning or connotation.

Capitol Investments is distinguishable from
Capital Investments

Mussel Beach Café is distinguishable from
Muscle Beach Café

Not Distinguishable

Xpress Tires is the same as Express Tires.



Distinguishable Names

1 TAC §79.38(6)

Key words are the same except for the addition, substitution, or omission of prepositions that sufficiently alter the names to make them distinguishable.

Light Entertainment is distinguishable from

Into the Light Entertainment

Friends is distinguishable from

Between Friends



Look to the Future is **the same** as
Look toward the Future



Same Names

1 TAC §79.39

A proposed name that is deemed the same as an existing name is not available—even if consent is provided.

Name is the same when a comparison reveals no differences or when the only difference between the proposed name and an existing name meets certain conditions.



Conditions = Same Names

1 TAC §79.39

- Use of upper case or lower case letters, distinctive lettering or typeface, superscript or subscript letters or numerals

H2O is **the same** as H^2O or H_2O or *h2o*

1st Venture is **the same** as *1st Venture*

sw sales is **the same** as SW SALES



Conditions = Same Names

1 TAC §79.39

- Use of punctuation, accent marks, spaces, or other spacing symbols

A/B/C Group = A.B.C. Group = A-B-C Group = ABC Group
*Fairhaven Inn = Fair Haven Inn = Fair*Haven Inn*

Gotham is distinguishable from Got Ham



Conditions = Same Names

1 TAC §79.39

- Addition, substitution, or omission of different articles or conjunctions

The Truck Store = Truck Store

Books and Candles = Books or Candles = Books Candles

*John Smith Photos is distinguishable from
John A. Smith Photos*



Conditions = Same Names

1 TAC §79.39

The repetition, absence, or difference in letters that does not alter the names sufficiently to make the names distinguishable.

Texas Gold is **the same** as *Texxas Gold*

Going Strong is **the same** as *Goin' Strong*

XX Tires is **distinguishable** from *XXX Tires*



Names Available With Consent

BOC § 5.053(b); 1 TAC §79.40

- Names are the same except for use of a common abbreviation of the same word

Vista Barbeque Rentals is available with consent from *Vista BBQ Rentals*

Smith Bros. Electric is available with consent from *Smith Brothers Electric*

DFW Brokers is available with consent from *Dallas-Fort Worth Brokers*



Names Available With Consent

BOC § 5.053(b); 1 TAC §79.40

Names are the same except for use of the singular, plural, or possessive form of a word if use doesn't make names distinguishable.

1776 Vineyard is **available with consent** from
1776 Vineyards

Child's Corner is **distinguishable** from
Children's Corner



Names Available With Consent

BOC § 5.053(b); 1 TAC §79.40

- Names the same except for the addition or omission of a state to a name that already includes the name of a city.
 - *Auto Parts of Austin* is **available with consent** from *Auto Parts of Austin, Texas*

Athens TX Ventures is **distinguishable** from *Athens GA Ventures*



Names Available With Consent

BOC § 5.053(b); 1 TAC §79.40

Names the same except for the existence, addition, substitution or absence of a word, phrase, or abbreviation that identifies or indicates different types of entities.

Apex Properties, LLC is **available with consent** from *Apex Properties, LP*

ABC Limited Partnership is **the same** as *ABC LP*



Names Available With Consent

Different Organizational Identifiers

SOS will include the following as corporate entities for purposes of applying rule:

For-profit corporations, public benefit corporations, professional corporations, as well as nonprofit corporations.

Hart & Associates Inc is **the same** as
Hart & Associates PC



Entity Name Standard Definitions

1 TAC §79.30(1) & (3)

- “Consent” means written notarized consent signed by an officer or authorized agent of the consenting entity.
- “Simultaneous submission” means the submission of two or more documents at the same time under the same cover by mail, fax or delivery. The submitter must be the same for all documents being submitted simultaneously.



Distinguishable Name Standard

Things to Note

SOS search program has not changed, so search results will need to be closely reviewed.

When calling for availability, spell out the name exactly how it will appear.

Identify entity type and/or include organizational identifier for name reservations



Distinguishable Name Standard

Things to Note

Inform your clients of SOS search parameters and new entity name standard.

Foreign entity that was required to adopt a fictitious name for registration may wish to determine if the entity's name is now distinguishable in the records.

If fictitious name is no longer needed, may file an Amendment to Registration.



Other Matters of Interest



Certificates of Correction

§§4.101-4.105

An entity may correct a filed instrument that:

- Is an inaccurate record of the action referred to in the instrument,
- Contains an inaccurate or erroneous statement; or
- Was defectively executed.



Certificates of Correction

§§4.101-4.105

Must be executed by a person authorized by the provisions of the BOC to execute the instrument being corrected.



Correction to a Certificate of Formation for a corporation or an LLC must be signed by the organizer.



Certificates of Correction

§§4.101-4.105

Certificate of Correction may be subject to greater scrutiny and may be rejected if:

- It appears that an amendment rather than a correction is being made;
- Multiple corrections have been submitted for same filing instrument; or
- Instrument being corrected was filed over a year ago.



Restated Certificates of Formation

Errors to Avoid

- Changing organizer
- Omission of Governing Authority Information
 - Organizer information may be omitted, but restated certificate must include the number, names, and addresses of the entity's governing authority.



Restated Certificates of Formation

Statements required by §3.005(a)(7) BOC

Was entity formed pursuant to plan of merger?

- Restated certificate of formation must include statement to that effect.



Restated Certificates of Formation

Statements required by §3.005(a)(7) BOC

Was entity formed pursuant to plan of conversion?

- Restated certificate must include:
 1. Statement to that entity was formed pursuant to a plan of conversion.
 2. Provide the name, date of formation, prior form of organization, and jurisdiction of formation of the converting entity.



Conversions

Issues & Pitfalls

§3.006 BOC

- A domestic entity created by a plan of conversion is formed by filing the certificate of conversion.

Do not file the certificate of formation of the “converted” entity before submitting the certificate of conversion.



Conversions

Issues & Pitfalls

Using an SOS form as the formation document of the converted entity?

- *Don't forget to add language required by §3.005(7) BOC.*
 1. A statement that entity is formed under a plan of conversion; and
 2. The name, address, date of formation, prior form of organization, and jurisdiction of formation of the converting entity.



Mergers & Conversions

Common Errors and Other Issues

- Execution of merger
- Delayed Effectiveness Issues
- Identifying merging/converted domestic entity as an LLP without including the organizational form of the underlying partnership



Signature Issues

- If a party to the merger or converting entity is a Texas limited partnership, verify whether your execution block identifies the general partner found in the SOS records.
- If general partner information is not current, file a certificate of amendment to LP's certificate of formation to avoid rejection.



Delayed Effectiveness Issues

Mergers & Conversions

- If you are providing a plan of merger or plan of conversion, verify the effectiveness provision in the plan when completing the effectiveness provision in the certificate of merger or certificate of conversion.
- Unclear or inconsistent language stated in the plan may create issues or give rise to a rejection of the merger/conversion.



Delayed Effectiveness Issues

- Delayed effective date may not be later than 90 days from the date of signing.
- Delayed effective times may not be stated as 12:00 am, 12:00 pm, midnight or noon.
- All delayed effective dates and times are recorded as the date and time in the time zone used by filing office—***Central Time***.



Delayed Effectiveness

- 1 TAC §79.73 SOS updates its computer records and takes action to make the changes effected by the filing instrument as of the day of filing.
- If you need a Certificate of Existence for a closing, please note that a Certificate of Fact—Status will reflect what is evidenced in the SOS's database at the time of generation of the certificate.



Post-Transaction Filings May Be Required

- ✓ Amendment to Foreign Registration
(Forms 406 [LLC or Corp], 407 [LLP] or 412 [LP])
- ✓ Termination of Foreign Registration
(Form 612)
- ✓ **Transfer of Foreign Registration**
(Form 422 [LLC, Corp or LP])
- ✓ New Assumed Name Certificate
(Form 503)

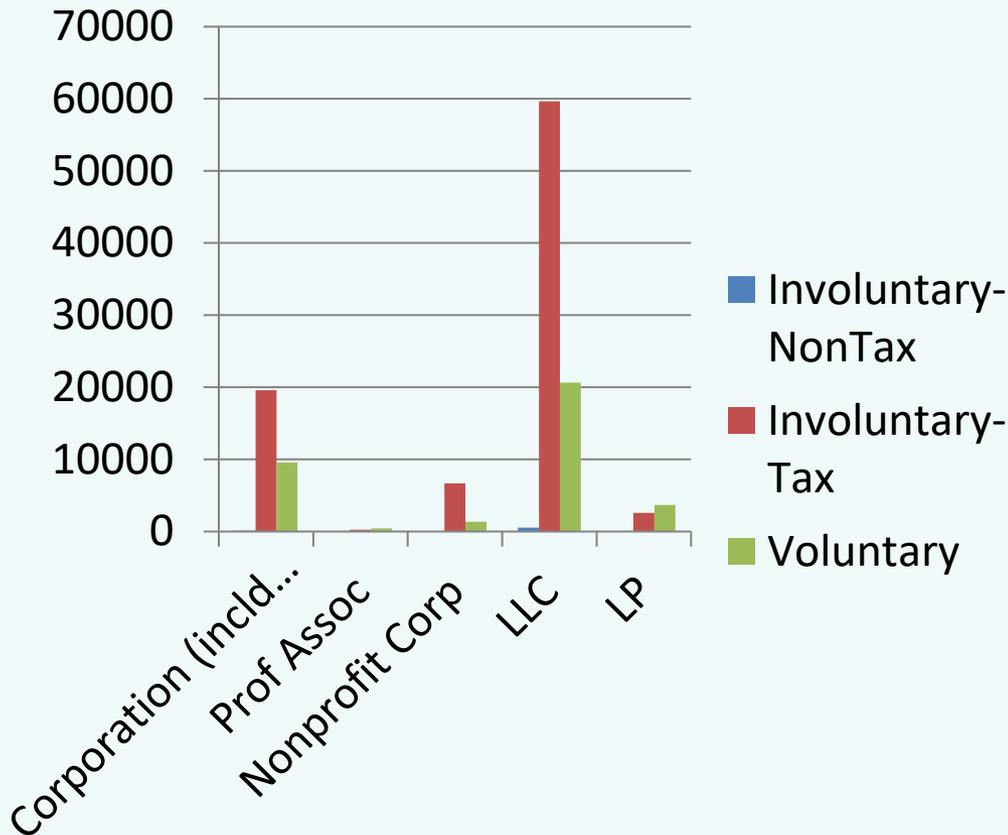


LPs Registered as LLPs

- When a domestic LP files an instrument that affects the LP's existence (termination, merger, or conversion), the LP's LLP registration is not updated to reflect the filing of the instrument.
- Consider filing a withdrawal of the registration when the existence of the underlying partnership ceases due to a termination, merger or conversion.



Terminated Entities 2017



- In 2017, the SOS forfeited the existence of 88,690 Texas filing entities under the Tax Code.
- In January 2018, the SOS forfeited the existence of 59,358 Texas filing entities under the Tax Code.



Hurdles to Reinstatement

- Entity Name Issues

- Section 171.315, Tax Code, requires SOS to determine if entity name is still available for use before acceptance of reinstatement
- If name not available, must provide certificate of amendment with reinstatement
- If name requires consent, must provide notarized written consent with reinstatement.



Hurdles to Reinstatement

- Registered Agent Issues
 - SOS accepts the resignation of a registered agent of a forfeited represented entity
 - Verify registered agent information before reinstatement
 - Entity should submit Form 401 (Change of Registered Agent/Office) with Form 801, if agent has resigned (or information has changed).



Hurdles to Reinstatement

- Entity Has Expired
 - Vast majority of LLCs have perpetual existence
 - However, TLLCA initially limited duration to a period not to exceed 30 years
 - Check duration of any Texas LLC entity formed between August 26, 1991 and August 31, 1993
 - If duration of an entity has expired, entity no longer has an existence that may be reinstated



LLP Annual Reports

- In January of 2018, SOS mailed 3,619 annual notices to Texas LLPs with an active registration status as of December 31, 2017.
- In March of 2018, 564 LLPs in “Delinquent” status received a **Notice of Impending Termination**.



LLP Annual Reports

- In June 2018, approximately 72% of the LLPs who were sent a Notice of Impending Termination were automatically terminated for failing to file the 2017 annual report.
- Termination of LLP registration status does not affect the existence of the underlying partnership and is not an event requiring the winding up of the partnership under BOC.



Reinstatement of LLP Status

- Complete SOS Form 816—Filing Fee \$75
- Tax Clearance Letter from Comptroller of Public Accounts
- Each Annual Report not filed, including the annual report and filing fee due that year.
- Delinquent report fee--\$200 per partner as of May 31 of delinquent report year
- Application for reinstatement, all annual reports, together with all filing fees, must be submitted concurrently.



Reinstatement of LLP Status

- Terminated LLP registration may be reinstated no later than the 3rd anniversary of the effective date of termination.
- Reinstatement of LLP status relates back to the effective date of the termination and takes effect as of that date.
- Partnership's status as an LLP continues in effect as if termination never occurred.



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<https://webservices.sos.state.tx.us/filing-status/status.aspx>



SOS Contact Emails

Name availability & general entity information:

corpinfo@sos.texas.gov

Request copies or certificates of fact:

corpcert@sos.texas.gov

Legal questions relating to filing issues:

corphelp@sos.texas.gov

SOSDirect assistance & issues:

sosdirect@sos.texas.gov

