

Form 621—General Information
(Certificate of Merger—Domestic Entity Divisional Merger)

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 certificate of merger is to be used to effect a merger as defined by section 1.002(55)(A) of the Texas Business Organizations Code (BOC). A merger, as defined by that section, means the division of a domestic entity into two or more new domestic entities or other organizations or into a surviving domestic entity and one or more new domestic or foreign entities or non-code organizations. A domestic entity may effect a merger by complying with the applicable provisions of title 1, chapter 10 of the BOC, as well as the title and chapter applicable to the domestic entity. To effect the merger the domestic entity must set forth a plan of merger that is approved in the manner prescribed by the BOC. A domestic entity may not merge if an owner or member of that entity that is a party to the merger will, as a result of the merger, become subject to owner liability, without that owner's or member's consent, for liability or other obligation of any other person.

If one or more non-code organizations is to be created by the merger, each non-code organization must effect the merger by taking all action required by the BOC and its governing documents, and the merger must be permitted by the law of the state or country under whose law each non-code organization is incorporated or organized, or the governing documents of each non-code organization if the documents are not inconsistent with such law.

Form 622 should be used to effect a merger that combines one or more domestic entities with one or more domestic entities or non-code organizations.

Form 623 should be used to effect a short form merger of a parent organization with a subsidiary organization under section 10.006 of the BOC.

Formation Documents of New Domestic Filing Entities: If a domestic filing entity is being created pursuant to the plan of merger, the certificate of formation of the entity must be filed with the certificate of merger. *Pursuant to section 3.005 of the BOC, the certificate of formation of a domestic filing entity that is to be created by the plan of merger must contain the statement that the domestic filing entity is being formed under a plan of merger.* The formation and existence of a domestic filing entity created pursuant to a plan of merger takes effect and commences on the effectiveness of the merger (BOC § 3.006).

Registration as a Limited Liability Partnership: A general partnership or limited partnership that is created by a plan of merger may file for registration to become a limited liability partnership by complying with section 152.803 of the BOC and by filing an application for registration with the secretary of state in accordance with section 152.802.

Instructions for Form

- Merging Entity Information:** The certificate of merger is filed by the domestic filing entity that is dividing itself. Provide the legal name of the filing entity, its organizational form (e.g., for-profit corporation, limited partnership, etc.) and the address of the entity's principal place of business. If the name of the merging entity is to be changed pursuant to the plan of merger, state the current

name and not the amended name. It is recommended that the file number assigned by the secretary of state be provided to facilitate processing of the document. ***It is required that you indicate whether the entity will or will not survive the merger.***

- **Plan of Merger:** Unless the domestic filing entity opts to complete the Alternative Statements section of this form, a plan of merger conforming to the requirements of sections 10.002 and 10.003 of the BOC must be attached to the certificate of merger.
- **Alternative Statements Option:** As an alternative to attaching the complete plan of merger, the entity may opt to certify and complete the statements contained in the Alternative Statements section of the form (items 1-4).

Items 3A-3D—Amendments: A plan of merger may include amendments to, restatements of, or amended and restatements of the certificate of formation of any surviving organization. If the filing entity is to survive the merger, the alternative statements **must** include a statement that: (A) no amendments or changes to the certificate of formation of the filing entity are to be effected by the merger; (B) no amendments or changes to the certificate of formation are being effected by the merger or by the restated certificate of formation attached to the certificate of merger; (C) the plan of merger amended and restated the certificate of formation of the filing entity as set forth in the attached restated certificate of formation containing amendments; or (D) identifies the amendments to be effected to the certificate of formation of the surviving entity.

Option 3A is the default selection unless the plan of merger amends, restates, or amends and restates the certificate of formation of the surviving entity. If option B is selected, attach the restated certificate of formation without further amendments as an exhibit to the certificate of merger. If C is selected, attach the restated certificate of formation containing further amendments to the certificate of merger. If D is selected, state the amendments or changes in the text area provided on the form. If the space provided is insufficient, the amendments may be provided as an exhibit to the certificate of merger.

Item 4—Organizations Created by Merger: Section 10.151(b) of the BOC requires the identification of each domestic entity or non-code organization that is to be created by the plan of merger. The identification must include: the legal name of the entity, which must include an appropriate organizational designation; the name of the jurisdiction in which each new organization is to be incorporated or organized; a description of the organizational form of each new organization (e.g., for-profit corporation, limited partnership, etc.); and the principal place of business of the new organization. In addition, the certificate of merger must state that the certificate of formation of each new filing entity is being filed with the certificate of merger.

This form provides space for identifying up to three new organizations. Should the space provided be insufficient, provide the additional information in the format specified as an attachment or exhibit.

- **Approval of the Plan of Merger:** The certificate of merger must include a statement that the plan of merger has been approved by each organization that is a party to the merger as required by the laws of the jurisdiction of formation and its governing documents.

For-profit or Professional Corporation and Professional Association

Section 21.452 and sections 21.456 to 21.458 of the BOC set forth the procedures and requirements for approval of the plan of merger by a Texas for-profit corporation, professional corporation, or

professional association. Generally, unless required otherwise by the certificate of formation or unless otherwise provided by the BOC, the affirmative vote of the holders of at least two-thirds of the outstanding shares of the corporation entitled to vote on the matter would be required to approve the transaction.

Limited Liability Company

Sections 101.355 and 101.356 of the BOC set forth the voting requirements for a fundamental business transaction. The affirmative vote of the majority of all the company's members would be required to approve the plan of merger.

Limited Partnership

Pursuant to section 10.009 of the BOC, the partnership agreement of each domestic partnership that is a party to the merger must contain provisions that authorize the merger provided for in the plan of merger adopted by the partnership. Each domestic partnership that is a party to the merger must approve the plan of merger in the manner prescribed by its partnership agreement.

- **Effectiveness of Filing:** A certificate of merger becomes effective when accepted and filed by the secretary of state (option A). However, pursuant to sections 4.052 and 4.053 of the BOC the effectiveness of the instrument may be delayed to a date not more than ninety (90) days from the date the instrument is signed (option B). The effectiveness of the instrument also may be delayed on the occurrence of a future event or fact, other than the passage of time (option C). If option C is selected, you must state the manner in which the event or fact will cause the instrument to take effect and the date of the 90th day after the date the instrument is signed. In order for the certificate to take effect under option C, the entity must, within ninety (90) days of the filing of the certificate, file a statement with the secretary of state regarding the event or fact pursuant to section 4.055 of the BOC.

On the filing of a document with a delayed effective date or condition, the computer records of the secretary of state will be changed to show the filing of the document, the date of the filing, and the future date on which the document will be effective or evidence that the effectiveness was conditioned on the occurrence of a future event or fact. In addition, at the time of such filing, the status of a non-surviving domestic filing entity will be shown as "merged" and the status of any new domestic filing entity created by the merger will be shown as "in existence" on the records of the secretary of state.

- **Tax Certificate:** The secretary of state may not accept a certificate of merger for filing if the required franchise taxes have not been paid (BOC § 10.156). The certificate of merger must be accompanied by a certificate of account status from the Texas Comptroller of Public Accounts indicating that all taxes under title 2 of the Tax Code have been paid and that the non-surviving party to the merger may legally end its existence in Texas. Please note that the Comptroller issues many different types of certificates of account status. If the Texas entity will not survive the divisive merger, you need to attach form #05-305, which is issued by the Comptroller of Public Accounts, to the certificate of merger. *Do not attach a print-out of the entity's franchise tax account status obtained from the Comptroller's web site as this does not meet statutory requirements.*

Requests for certificates or questions on tax status should be directed to the Tax Assistance Section, Comptroller of Public Accounts, Austin, Texas 78774-0100; (512) 463-4600; toll-free (800) 252-1381; (TDD) (800) 248-4099. You also may contact tax.help@cpa.state.tx.us.

Alternative: Instead of a tax certificate, the certificate of merger may include a statement that one or more of the surviving, new, or acquiring organizations is liable for the payment of the required franchise taxes.

- **Execution:** Pursuant to section 4.001 of the BOC, the certificate of merger must be signed by a person authorized by the BOC to act on behalf of the *merging* entity in regard to the filing instrument. Generally, a governing person or managerial official of the entity signs a filing instrument.

In the case of a corporation or professional association, an authorized officer should sign the certificate of merger (BOC § 20.001). A certificate of merger filed by a limited liability company should be signed by an authorized manager if the company has managers. If the company does not have managers and is managed by its members, an authorized managing-member must sign the certificate of merger. A certificate of merger filed by a limited partnership should be signed by at least one general partner. The execution of a certificate by a general partner is an oath or affirmation, under a penalty of perjury, that to the best of the executing party's knowledge and belief, the facts contained in the certificate are true and correct (BOC 153.553(c)).

The certificate of merger need not be notarized. However, before signing, please read the statements on this form carefully. *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:** The filing fee for a certificate of merger of a domestic filing entity is **\$300, plus the fee imposed for filing a certificate of formation for each newly created filing entity.**

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.

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.

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