

Form 638—General Information
(Certificate of Conversion of a Limited Liability Company Converting to a
Real Estate Investment Trust)

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

A limited liability company may convert into a real estate investment trust (hereinafter REIT) by adopting a plan of conversion in accordance with section 10.101 of the Texas Business Organizations Code (BOC) and filing a certificate of conversion with the secretary of state in accordance with sections 10.154 and 10.155 of the BOC. As defined in section 1.002 of the BOC, conversion means the continuance of a Texas entity as a foreign entity of any type, the continuance of a foreign entity as a Texas entity of any type, or the continuance of a Texas entity of one type as a Texas entity of another type. As used in the BOC and in this form, “converting entity” means the entity that existed before the conversion; “converted entity” means the entity resulting from a conversion. This form should be used when a domestic limited liability company is the converting entity and the converted entity is a domestic or foreign REIT.

Formation of the REIT: If a Texas REIT is formed under a plan of conversion, the certificate of conversion, along with the certificate of formation of the REIT, must also be filed with the county clerk of the county in Texas in which the principal place of business of the REIT is located (BOC § 10.155(c)).

Instructions for Form

- **Converting Entity Information:** The certificate of conversion is filed by the converting entity and should set forth the legal name of the converting entity as part of the certificate. It is recommended that the date of formation and file number assigned by the secretary of state be provided to facilitate processing of the document.
- **Plan of Conversion/Alternative Statements:** A plan of conversion conforming to the requirements of section 10.103 of the BOC should be attached to the certificate of conversion. As an alternative to attaching the complete plan of conversion, the converting entity may opt to certify and complete the alternative statements in the form.
- **Approval of the Plan of Conversion:** The certificate of conversion must include a statement that the plan of conversion has been approved as required by the laws of the jurisdiction of formation and the governing documents of the converting entity. Section 101.356(c) of the BOC sets forth the requirements for approval of the plan of conversion by a Texas limited liability company.
- **Effectiveness of Filing:** A certificate of conversion 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 converting Texas filing entity will be shown as “conversion” on the records of the secretary of state.

- **Tax Certificate:** When a Texas limited liability company is the converting entity, the certificate of conversion 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 entity is in good standing for the purpose of conversion. Please note that the Comptroller issues many different types of certificates of account status. *Do not attach a certificate or print-out obtained from the Comptroller’s web site as this does not meet statutory requirements.* You need to attach form #05-305, which is obtained directly from a Comptroller of Public Accounts representative.

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.

In lieu of the tax certificate, the certificate of conversion may provide that the converted entity is liable for the payment of the required franchise taxes.

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

A certificate of conversion 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 conversion.

The certificate of conversion 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 conversion of a limited liability company into a REIT is **\$300**.

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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