FILINGS WITH THE SECRETARY OF STATE BEFORE AND AFTER JANUARY 1, 2006

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I. The Changing Landscape

In 2003 the 78th Legislature passed the Texas Business Organizations Code (BOC), which codified the provisions of existing statutes governing domestic business corporations, nonprofit corporations, professional corporations, professional associations, limited partnerships, limited liability companies, partnerships, real estate investment trusts, cooperative associations, and unincorporated nonprofit associations.[1] The BOC was designed to rearrange the statutes in a more logical order; to facilitate citation to law while accommodating future expansion of the law; and to eliminate duplicative, obsolete, or ineffective provisions.[2]

As the BOC represented a major restructuring of existing statutes and included substantive changes to existing law, the effectiveness of the BOC was delayed until January 1, 2006. In addition, as the structure, organization, and language of the BOC were very different from the existing statutes, a four-year period of transition was provided before the repeal of existing statutes and the mandatory application of the BOC to existing entities. Filing entities formed before January 1, 2006 were permitted to adopt the provisions of the BOC before the mandatory application date by filing an election to adopt the provisions of the BOC with the secretary of state.

Delaying the effectiveness of the BOC following its enactment allowed practitioners and legislative drafters a period within which to review the provisions of the BOC as well as an opportunity to legislatively update, clarify or correct any provisions of the BOC prior to its effective date. As a result, during the 79th Regular Legislative Session several bills were enacted that affect filing procedures and filing requirements for transactions with the secretary of state. These legislative acts amended the Texas Business Corporation Act (TBCA), the Texas Limited Liability Company Act (TLLCA), the Texas Revised Limited Partnership Act (TRLPA), the Texas Revised Partnership Act (TRPA), and the BOC.

A. *Business Organizations Legislation-Effective September 1, 2005* The bill analysis and text of each bill cited may be viewed electronically at Texas Legislature Online.[3]

HB 1154 relating to limited liability companies and partnerships

The provisions of the Texas Limited Liability Company Act (TLLCA), the Texas Revised Limited Partnership Act (TRLPA), and the Texas Revised Partnership Act (TRPA) will be continue to apply to limited liability companies, limited partnerships, and partnerships formed before January 1, 2006. In an effort to facilitate transactions during the transition period, several amendments and technical corrections were made to the existing statutes to more closely align certain secretary of state filing provisions to BOC standards.

HB 1507 relating to the regulation of corporations

House Bill 1507 is a product of the State Bar Committee on Corporations. The bill amends the Texas Business Corporation Act to more closely align certain filing provisions and transactions to the provisions of the BOC. The bill also clarifies that the existence of a corporation continues until a certificate of dissolution is filed with the secretary of state.

B. *Business Organizations Legislation-Effective January 1, 2006*

HB 1156 relating to the adoption of the Business Organizations Code

Enacted by the 78th Legislature in 2003, HB 1156 is a product of the State Bar Ad Hoc Committee on the Business Organizations Code and the Office of the Secretary of State. The Act is a substantive codification of existing law governing the formation and governance of business organizations and nonprofit associations. The text of the bill provides notations relating to the source law of BOC provisions. An excellent resource for interpreting the provisions of the BOC, as enacted, is the Revisor's Report, which provides the text of the source law and includes the revisor's notes, which explain the difference, if any, between the revised law and the source law or the reasons behind the need for the new law. The

Revisor's Report is made available online at www.tlc.state.tx.us/legal/bocode/bo_revisors_report.html.

HB 1319 relating to business entities and associations

A product of the State Bar Ad Hoc Committee on the Business Organizations Code, this bill makes technical corrections, clarifications, and conforming changes to provisions of the BOC, as enacted. The bill amends the BOC to conform provisions to reflect legislative changes enacted to the existing source laws by the 78th Legislature. In addition, the bill corrects errors, provides further clarifying provisions, and resolves certain omissions that were identified in the BOC.

II. Entity Name Issues

A. *Name Availability* --Although the changes to the legislative framework have made some changes to the current world of entity names, in many respects statutory and administrative requirements relating to entity names are substantially the same. It is anticipated that the leading cause of rejection on any formation filing, regardless of the type of entity, will continue to be the failure of the entity name to meet the entity name standards established by law and by the administrative rules adopted by the secretary of state.

1. Administrative rules on the availability of names of entities filed with the secretary of state are contained in Sections 79.30-79.54 of Title One, Part Four of the Texas Administrative Code (TAC), which may be viewed from the secretary of state web site at www.sos.state.tx.us/tac/index.html.

2. Chapter 79 rules apply to all name availability determinations made for foreign and domestic corporations (business, professional, and non-profit), limited liability companies, limited partnerships, as well as professional associations formed before, as well as after, January 1, 2006. *See* 1 TAC §§79.30, 79.50, 79.51, and 79.52.[4] These sections do not apply to limited liability partnerships. Section 3.08 of the TRPA and section 5.063 of the BOC, as amended[5], do not require the secretary of state to determine the availability of a limited liability partnership's name.

3. There are three categories of name similarity[6]:

a. Names that are the same; that is, a comparison of the names reveals no differences.[7]

b. Names that are deceptively similar; that is, a comparison of the names reveals apparent differences but the difference is such that the names are likely to be confused.[8] If any of the following conditions exist a proposed name is deemed to be deceptively similar to that of an existing entity:[9]

(1) The difference in the names consists in the use of different words or abbreviations of incorporation or organization;

(2) The difference in the names consists in the use of different articles, prepositions, or conjunctions;

(3) The difference in the name consists in the appearance of periods, spaces, and or other spacing symbols that do not alter the names sufficiently to make them readily distinguishable; or

(4) The difference in the name consists in the presence or absence of letters that do not alter the names sufficiently to make them readily distinguishable in oral communications.

c. Names that are similar and require a letter of consent; that is, a comparison of the names reveals similarities that may tend to mislead as to the identity or affiliation of the entity.[10] If any of the following conditions exist, a name is deemed similar and a letter of consent is required:[11]

(1) The proposed name is the same as or deceptively similar to another name except for a geographical designation at the end of the name;

(2) The first two words of the proposed name are the same as or deceptively similar to another name and those words are not frequently used in combination;

(3) The proposed name is the same as or deceptively similar to another name except for a numerical expression that implies that the proposed name is an affiliate or in a series with another entity;

(4) The proposed name uses the same words as another name but the words are in different order in the names;

(5) The proposed name is the same as or deceptively similar to another name except for an Internet locator designation at the end or at the beginning of the name (e.g., www., .com, .org, .net); or

(6) The difference in names consists of words or contractions of words that are derived from the same root word and there is no other distinguishing word in the name.

4. Letters consenting to use of a similar name are only options when the proposed name and the entity name on file are considered *similar*. The secretary of state will not file a proposed name deemed to be the same as or deceptively similar to an existing entity even if the existing entity is willing to provide a letter of consent.[12]

5. Name provisions for a filing entity formed on and after January 1, 2006 or for an existing entity that has elected to adopt the BOC before January 1, 2010 (hereinafter referred to as a "BOC-entity") can be found in Chapter 5 of the BOC. The entity name standards discussed above apply to BOC-entities[13].

B. *Name Clearance--A Trap for the Unwary*

1. Formation under a given name does not give the newly organized entity the *right to use* the name in violation of another person's rights. In fact, the certificate of filing issued by the secretary of state to corporations[14] specifically provides that the issuance does not authorize use of a corporate name in this State in violation of the rights of another under the federal Trademark Act of 1946 (15 U.S.C., Section 1051 *et seq.*), the Texas trademark law (Chapter 16, Texas Business & Commerce Code), the Assumed Business or Professional Name Act (Chapter 36, Texas Business & Commerce Code), or the common law. The same principle holds true for limited partnerships and limited liability companies and is carried forward in the BOC[15].

2. When the secretary of state is requested to give advice about the *availability* of an entity name, the secretary of state is reviewing only the names of active corporations, professional associations, limited partnerships, and limited liability companies, as well as name reservations and registrations for those entities. The secretary of state does not consider state or federal trademark registrations, assumed names filed with the county or the secretary of state under Chapter 36 of the Texas Business & Commerce Code, names of limited liability partnerships registered with the secretary of state, or other sources that might indicate common law usage or reveal possible trade name or trademark infringement.

3. Advice about the *availability* of an entity name provided by the secretary of state over the telephone or by e-mail response is *preliminary* advice. The decision on the acceptability of a particular name is never made until a document using the name is submitted for filing. Never advise a client to make financial expenditures or execute documents utilizing the name based upon a preliminary name clearance.

C. *Some Words Cause Trouble*

1. Words that might imply a purpose for which the entity could not be organized should not be included in a business entity name.[16] These troublesome words include:

a. *Insurance* must be accompanied by other words, such as *agency*, that remove the implication that the purpose of the entity is to be an insurer.

b. *Bail bonds* and *surety* imply that the entity has insurance powers and should be formed under the Texas Insurance Code.

c. *Bank* and derivatives may not be used in a context that implies the purpose to exercise the powers of a bank.[17] The department of banking can advise you on the use of the words *bank, banc* and the like and will issue you a letter of no objection for use when filing documents with the secretary of state.[18]

d. *Trust* generally implies that the entity has trust powers and accordingly, prior approval of the department of banking is required. A foreign business trust or foreign real estate investment trust qualifying as a foreign limited liability company before January 1, 2006 (or registering under the provisions of the BOC after January 1, 2006) utilizing the term *trust* in its name should obtain a letter of no objection for purposes of filing the application for certificate of authority.

e. *Cooperative* and *Co-op* should be used only by an entity operating on a cooperative basis.[19]

f. *Perpetual care* or *endowment care,* or any other term that suggests "perpetual care" or "endowment care" standards, should only be used in the name of a cemetery that operates as a perpetual care cemetery in accordance with Chapter 712 of the Health & Safety Code.[20]

2. Use of some words in an entity name may require that a licensed professional be associated with the entity.

a. Entities using *engineer, engineering, or engineered* in the entity name should be engaged in the practice of engineering and its engineering services performed by an individual licensed by the Texas Board of Professional Engineers.

b. Entities using *architect, architecture, landscape architect, landscape architecture* or *interior design* should determine from the Texas Board of Architectural Examiners whether such use is in violation of the statutes applicable to architects and interior designers.

c. Entities using *public surveying* in their name should determine from the Texas Board of Professional Land Surveying whether such use complies with the statutes applicable to surveyors.

3. Some words require prior approval.

a. Entities desiring to use the terms *college, university, seminary, school of medicine, medical school, health science center, school of law, law school, law center, or words of similar meaning* must

obtain prior approval of the Texas Higher Education Coordinating Board.[21]

b. Entities desiring to use the terms *veteran, legion, foreign, Spanish, disabled, war or world war* in a manner that might imply that the entity is a Veteran's organization should obtain written approval from a Congressionally recognized Veteran's organization.[22]

4. The use of some words is prohibited.

a. A corporate name may not include the word *lottery*.[23] If forming a limited partnership or limited liability company, you may wish to review the entity name with the Lottery Commission if the name contains the word *lottery* or *lotto*. However, a domestic or foreign filing entity formed on or after the effective date of the BOC, January 1, 2006, may not use of the term *lotto* or *lottery* in its entity name.[24]

b. State and federal law generally precludes the use of the words *olympic, olympiad, olympian,* and *olympus* unless authorized by the United States Olympic Committee.[25]

D. *Words of Organization* — With the exception of non-profit corporations, business entities filed with the secretary of state are required to include specified words or abbreviations in the entity name that provide a clue to the type of entity using the name.

1. The names of Texas business corporations must include one of the following words or abbreviations: company, corporation, incorporated, Co., Corp., or Inc.[26] Effective September 1, 2005, a domestic business corporation also may use the term *limited* or the abbreviation *ltd* as an organizational designation.[27]

2. The names of foreign business corporations must include one of the following words or abbreviations: company, corporation, incorporated, limited, Co., Corp., Inc. or Ltd.[28] If the name of the corporation does not contain one of those words or abbreviations, then the corporation is required to add one of those words or abbreviations to its name for use in Texas.[29]

3. Current law requires that the name of limited partnership must contain the words limited partnership or limited, or the abbreviations L.P., LP, or Ltd. *as the last words of the name.*[30] However, the secretary of state will accept the name of the partnership if a number or date follows the terms indicating organization as a limited partnership (e.g., ABC Family Limited Partnership 2005). Section 5.055 of the BOC does not mandate that the terms of organization appear as the last words of the entity name and does not specify the abbreviations to be used.

4. The names of limited liability companies must contain the words limited liability company, limited company, or the abbreviations L.L.C., LLC, LC, or L.C. Additionally, the word *limited* may be abbreviated as Ltd. or LTD and the word *Company* as Co.[31]

5. The names of limited liability partnerships should use the words registered limited liability partnership *or* limited liability partnership, or the abbreviation L.L.P. or LLP *as the last words of the name*.[32] Section 5.063 of the BOC does not mandate that the terms of organization appear as the last words of the entity name.

6. If a limited partnership registers as a limited liability partnership, the name of the partnership must comply with both the requirements under Section 1.03 of the Texas Revised Limited Partnership Act and Article 6132b-3.08(c) of the Texas Revised Partnership Act.[33] A limited partnership created before January 1, 2006 and that registers as a limited liability partnership must use, as the last words of the name, *limited partnership* or the abbreviation Ltd. followed by the words *registered limited liability partnership* or *limited liability partnership*, or the abbreviations LLP or L.L.P.[34]

E. *Name Issues for Professional Limited Liability Companies* — There are additional hurdles before selecting a name for a limited liability company that will be rendering professional services.[35]

1. The names of professional limited liability companies must meet the same availability standards as the names for general-purpose limited liability companies.

2. The name must contain the words *professional limited liability company* or the abbreviations P.L.L.C. or PLLC.[36]

3. The name of a professional limited liability company may not be contrary to law or the ethics of the profession involved.[37] The following professions have advised the secretary of state of rules or opinions concerning permissible names:[38]

a. Dentists: For a discussion of trade names, see section 259.003, Texas Occupations Code and the administrative rules adopted by the State Board of Dental Examiners found in Chapter 108 of Title 22, Part 5, Texas Administrative Code.

b. Accountants: The use of terms such as Certified Public Accountant or the abbreviation C.P.A. are permissible provided that the terms or abbreviations are used in such a way as to make clear that the credentials relate to an individual in the PLLC rather than the firm or the other associates of the firm.[39] Additionally, the name of the PLLC must include the name of at least one current or former member of the PLLC.

c. Attorneys: The name of the PLLC must not be misleading as to the identity of the persons practicing in the PLLC. "Legal Clinic of John Smith, PLLC" would be permissible, but not "Legal Clinic, PLLC."[40]

d. Engineers:[41] If the words "Engineer," "Engineering,"or "Engineered" appear in the name of the PLLC, the firm must be involved in the practice of engineering and its engineering services must be performed by or under the supervision of a registered engineer.[42]

e. Architects:[43] A PLLC that uses the words "Architect," "Architecture," "Landscape Architect," or "Interior Design" in its name should determine from the Texas Board of Architectural Examiners whether the use of any of those words violates statutes or administrative rules applicable to the licensing or architects or interior designers.[44]

f. Registered Public Surveyors:[45] A PLLC that uses any name which conveys the impression that any person involved in the firm is a professional land surveyor must ensure that an individual associated with the firm is duly registered or licensed under the Professional Land Surveying Practices Act.

F. *Name Issues for Limited Partnerships*

1. Under current law, a limited partnership name may not contain the name of a limited partner unless that name is also the name of a general partner or the business of the partnership had been carried on under that name before the admission of the limited partner[46]. This prohibition on the use of a limited partner's name *was not* carried forward in the BOC.

2. Current law specifically prohibits the name of a limited partnership from containing a word or phrase indicating or implying that it is a corporation. The secretary of state considers the following words and abbreviations as indicating or implying corporate status: "Incorporated," "Corporation," "Inc.," and "Corp."[47] Although this specific prohibition is not carried forward to the BOC, the Texas Deceptive Trade Practices—Consumer Protection Act prohibits such use by an unincorporated entity.[48]

3. A common reason for rejection of a limited partnership name is the similarity between the name of the partnership and the name of its general partner. An entity name is deemed deceptively similar if the only difference between the names is a difference in organizational designations. (ABC, LP is deceptively similar to ABC, LLC). A deceptively similar name *cannot* be filed even if a letter of consent can be provided.

G. *Name Reservations* — Recommended document filing if you anticipate a delay between the client's name selection and your submission of the filing instrument.

1. A reservation under the Texas Business Corporation Act[49] may be submitted by a person intending to organize a corporation, a domestic corporation intending to change its name, a foreign corporation intending to make application for a certificate of authority, a foreign corporation with a certificate of authority intending to change its name, or a person intending to organize a foreign corporation and obtain a certificate of authority for the corporation.[50]

a. The filing fee for the reservation is $40.

b. The period of reservation is 120 days. Effective September 1, 2005, a current name reservation for a business corporation may be renewed for an additional 120-day reservation period by filing a new application for name reservation during the 30-day period preceding the expiration of the current reservation. The filing fee for the renewal of reservation is $40.

2. A reservation under the Texas Limited Liability Company Act[51] may be submitted by any person.

a. The filing fee for the reservation is $25.

b. The period of reservation is 120 days. Currently, there is no provision for renewal; consequently, a reservation period must expire before a new reservation is filed. However, section 5.105 of the BOC permits the renewal of a current name reservation. The reservation may be renewed for an additional 120-day period by filing a new application for name reservation during the 30-day period preceding the expiration of the current reservation. The BOC filing fee for a name reservation or renewal of name reservation is $40.

3. A reservation under the Texas Revised Limited Partnership Act[52] may be submitted by a person intending to organize a limited partnership, a domestic limited partnership or a foreign limited partnership registered in Texas intending to change its

name, a foreign limited partnership intending to register in Texas, or a person intending to organize a foreign limited partnership and obtain a certificate of authority.

a. The filing fee for the reservation is $50.[53]

b. The period of reservation is 120 days. Currently, there is no provision for renewal; consequently, a reservation period must expire before a new reservation is filed.[54]

However, section 5.105 of the BOC permits the renewal of a current name reservation. The reservation may be renewed for an additional 120-day period by filing a new application for name reservation during the 30-day period preceding the expiration of the current reservation. The BOC filing fee for a name reservation or renewal of name reservation is $40.

4. If there is a name reservation filed under one act and the applicant submits a document attempting to use the reserved name for filing under a different act, the secretary of state will reject the filing.

a. There are statutory provisions in the Texas Business Corporation Act,[55] the Texas Limited Liability Company Act,[56] and the Texas Revised Limited Partnership Act[57]permitting the termination of a name reservation before the expiration of the 120 day period of reservation.

b. If there were an error at the time of filing the reservation in selecting the applicable name reservation provisions, you should file a termination of the existing name reservation and then file a new reservation under the correct statute.

c. The statement of termination should set forth the name reserved, the name and address of the applicant, and clearly indicate that the registrant seeks to terminate the reservation prior to the expiration of its term. The fees for filing the termination of name reservation are:

(1) Corporations--$15
(2) Limited Liability Companies--$10
(3) Limited Partnerships--$25

5. *On and after January 1, 2006*: The BOC provisions relating to name reservations apply to all filing entity types; consequently, a name reservation filed on and after January 1, 2006, may be used in connection with a document filed by any foreign or domestic filing entity. For example, a name reservation filed for "Basic Filings, Inc." may be used to form a limited partnership styled "Basic Filings, L.P."

a. Currently, when filing a name reservation on-line or otherwise, you must specify the type of business entity for which the name is to be reserved. On or after January 1, 2006, when filing a name reservation on-line, the SOSDirect system will still require an applicant to indicate the entity type for which the reservation is to be applied. Although a name reservation filed under the provisions of Chapter 5 of the BOC is not limited to a specific entity type, the selection of a specific entity type will facilitate the review of the entity name as a name chosen for one specific entity type may imply or indicate an unlawful purpose for another entity type.

b. On or after January 1, 2006, the filing fee for a name reservation is a standard fee of $40.

c. As the termination provisions described in paragraph 4 of this section are not carried forward in the BOC, an applicant seeking to terminate a name reservation prior to the expiration of its 120-day term would file a withdrawal of the name reservation pursuant to section 5.104(2) of the BOC. There is no fee associated with the filing of a withdrawal of a name reservation.[58]

H. *Assumed Names* — The filing requirements for assumed name certificates for limited partnerships, limited liability companies, and registered limited liability partnerships are similar to filing requirements for assumed name certificates filed by an incorporated business or profession.

1. The execution requirements for assumed name certificates filed with the secretary of state differ from county level filing requirements. The execution requirements for corporations, limited partnerships, limited liability companies, and registered limited liability partnerships were amended to bring the requirements in line with the execution requirements for other documents filed with the secretary of state. Chapter 36, Business & Commerce Code, authorizes the secretary of state to accept photocopies of originally signed assumed name documents and eliminates the notarization requirement for assumed name documents filed with the secretary of state.

2. Dual filing of the assumed name certificate is required. An assumed name certificate is filed with the secretary of state *and* with the county clerk in the county where the entity maintains its registered office, principal office or principal place of business. [59] However, due to differences in filing requirements, the assumed name certificate form promulgated by the secretary of state should not be used to file an assumed name on the county level.

3. Assumed name is defined as:

a. for a corporation, any name other than the name stated in its articles of incorporation[60];

b. for a limited partnership, any name other than the name stated in its certificate;[61]

c. for a limited liability company, any name other than the name in its articles of organization or comparable document;[62] or

d. for a registered limited liability partnership, any name other than the name on its application for registration or comparable document.[63]

III. Reports, Registrations, and Renewals

A. *Periodic Reports for Limited Partnerships* — A document required to be filed by all limited partnerships when requested by the secretary of state.

1. History: With the passage of the Texas Revised Limited Partnership Act in 1987, the names of existing limited partnerships became hurdles to filing proposed corporations and limited partnerships names that might be the same as, deceptively similar, or similar to those of existing partnerships. Once a certificate of limited partnership was filed with the secretary of state, the name of the partnership was active on the records of the secretary of state and remained active until the limited partnership elected to cancel its certificate. In 1992, the secretary of state mailed notice of the impending applicability of the Act to all existing domestic and foreign limited partnerships. Fifteen thousand pieces of returned mail were a *clue* that many of the limited partnerships on the records of the secretary of state had either gone out of business or did not have current address information on file. It was going to be a difficult task to obtain a letter of consent to use of a similar name with a significant number of partnerships unreachable.

2. Solution: The Texas Revised Limited Partnership Act[64] was amended in 1993 to provide for the filing of a periodic report by both domestic and foreign limited partnerships.

3. Report Requirements: The secretary of state mails a report form to the registered office, if available, or principal office of each existing domestic and foreign limited partnership on a staggered basis and requests the following information:

a. the name of the entity and the jurisdiction of organization;

b. the current address of the registered office and the name of the registered agent;

c. the address of the principal office where records are kept; and

d. the name, mailing address, and street address of each general partner.

4. Information Update: To the extent possible, the secretary of state will preprint information previously reported by the partnership on the form sent to the limited partnership. The partnership may effect changes to the registered agent name and address, the principal office address, and the mailing or street address of a named general partner by making changes to the preprinted data. Changes to the preprinted data will be recorded in the secretary of state's database. Please note however, that a change of the limited partnership's name, and changes, additions or deletions of general partners require the filing of an amendment to the certificate of limited partnership and cannot be effected by including or changing this information in the report.

5. Failure to File: Failure to file the report will ultimately result in cancellation of the certificate or registration of the limited partnership, but does not affect the liability of any limited partner. The cancellation is a two step process:

a. The right of the limited partnership to transact business is forfeited. Unless revived, the partnership may not maintain an action, suit or proceeding in a court of this state. Forfeiture does not impair the validity of any contract. [65]

b. If the limited partnership forfeits its right to transact business in Texas and fails to revive that right, the secretary of state cancels the certificate of limited partnership for a domestic partnership or the registration for a foreign limited partnership. Cancellation means that the status of the limited partnership is changed on the records of the secretary of state from "in existence" to "canceled" (an inactive status). The change in status does not affect the liability of any limited partner.[66]

6. After Cancellation: The name of the canceled limited partnership is not a barrier to filing the name of another entity that may be the same as, deceptively similar, or similar to that of the canceled limited partnership. The limited partnership may be reinstated[67] at any time by filing the required report yet may be required to amend its certificate of limited partnership to change its name if another conflicting name has been granted in the interim.

7. Reports for BOC-entities: The periodic report provisions were carried over to the BOC and are contained in chapter 153, subchapter G of the BOC (sections 153.301 to 153.312). No substantive changes were made to filing requirements and procedures.

B. *Registrations and Renewals of Registered Limited Liability Partnerships* — Registration is only valid for one year. Limited duration of a registration is continued under the BOC.

1. The registration of a limited liability partnership (LLP) expires one year after the date of

registration or later effective date[68] unless the partnership files a renewal[69] *before* the expiration date.

a. The secretary of state is not required to send renewal notices, but may do so in order to facilitate renewals. The notice is addressed to the person who filed the prior application or to the partnership at the principal office noted in the application.

b. Failure of the secretary of state to send a renewal notice or of the partnership to receive the renewal notice does not extend the period of registration.

2. If an application for renewal is received after the one-year registration period, the renewal will be rejected and it will be necessary for the limited liability partnership to file an application for registration.

C. *Application of BOC to LLPs*—A domestic LLP and a foreign LLP are deemed to be "nonfiling" entities although these entities make filings with the secretary of state. A review of the BOC transition provisions revealed the need to provide further guidance regarding the applicability of BOC provisions to LLP registrations, both domestic and foreign. HB 1319 amended Section 402.001 of the BOC to provide this clarification.

1. Partnership formed and registered before January 1, 2006: As amended, section 402.001 of the BOC provides that the registration of a domestic or foreign limited liability partnership under prior law that is in effect on the effective date of the BOC will continue to be governed by the prior law until the expiration of its current term of registration, unless earlier revoked or withdrawn. Renewal governed by BOC. The provisions of the Texas Revised Partnership Act or Texas Revised Limited Partnership, as applicable, continue to govern other matters relating to the partnership until 2010, unless BOC earlier adopted.

2. Partnership formed before January 1, 2006 making an initial registration after January 1, 2006: Registration as an LLP, renewal, and liability of partners is governed by BOC. The provisions of the Texas Revised Partnership Act or Texas Revised Limited Partnership, as applicable, continue to govern other matters until 2010, unless BOC earlier adopted.

3. Foreign partnerships: The provisions of the BOC apply to a foreign partnership regardless of its formation date in its jurisdiction of organization if its initial registration is on or after January 1, 2006.

IV. Fines

A. *Before January 1, 2006*—Under existing law, the secretary of state has authority to collect monetary penalties from foreign limited partnerships for late registration. In addition, the state can collect a penalty if a business corporation fails to file certain documents in a timely manner.

1. A foreign limited partnership[70] that is transacting business in Texas is required, like its corporate and LLC counterparts, to file an application for registration to transact business in Texas.[71]

2. If a foreign limited partnership transacts business in Texas before registration, the act requires the secretary of state to collect a fee, in addition to the filing fee for the registration, in the amount of $750 for each year or part of a year during which it transacted business without having first registered.[72]

a. A monetary penalty will be assessed and collected when the application for foreign registration indicates a beginning date of business in Texas that precedes the date of filing of the application.

b. While the secretary of state could collect the penalty if the application were submitted at any date following the date it first transacted business, as a matter of policy the secretary collects penalties only when the application follows the date of first transaction by a period exceeding ten calendar days. [73]

3. The failure of a business corporation to timely file a change of registered agent and office, certificates of withdrawal and termination, and articles of dissolution gives rise to a civil penalty.[74]

a. In 2001, the 77th Legislature amended article 9.07 of the Texas Business Corporation Act to provide a penalty for failure to file with the secretary of state a change of registered office or agent, an application for certificate of withdrawal, a termination or articles of dissolution within 30 days of the change, withdrawal or termination. A court may assess a civil penalty of not more than $2,500 for a violation of article 9.07. An action to recover the penalty can be brought by the Attorney General or a prosecuting attorney.

b. Additionally, the Attorney General may bring an action to enjoin a violation of the section, and a party bringing suit may recover expenses incurred in effecting service of process on the corporation.

B. *On and After January 1, 2006*— The BOC expands the application of late filing penalties with regard to foreign entity registrations, but limits application of the timely filing civil penalties to entities governed by chapter 21 of the BOC.

1. Assessing a late filing penalty for foreign filing entities doing business in the state is carried over to the BOC, but applies to all foreign filing entity registrations, including a registration by a foreign LLP.[75]

a. Section 9.054 of the BOC authorizes the secretary of state to collect a late filing fee equal to the registration fee for each year that the entity transacted business in the state without having registered. An application for registration of a foreign filing entity must include the date the foreign entity began or will begin to transact business in Texas.[76]

b. The secretary of state will not assess a late filing fee if the entity registers with the secretary of state within *90* days of doing business in the state.

2. The failure of a business corporation, professional corporation, or professional association to timely file a change of registered agent and office, a foreign certificate of withdrawal or termination, and a certificate of termination gives rise to a civil penalty within 30 days of the change, withdrawal, or termination.[77] The penalties are substantially the same penalties currently imposed under article 9.07 of the Texas Business Corporation Act.

V. Foreign Entity Filings

A. *Foreign LLPs* **—** Generally, foreign entities that are transacting business in Texas are required to file a certificate of authority, registration statement or comparable document with the secretary of state. Since September 1997, foreign LLPs transacting business in Texas have been required to file a statement of foreign qualification with the secretary of state.[78]

1. There is no definition of *transacting business*, however, the Texas Revised Partnership Act, section 10.04, like its counterparts for other business entities, lists activities that are not considered transacting business in Texas.

2. The registration of a foreign limited liability partnership is valid for a period of one year. Renew the registration annually prior to the expiration of the term to maintain an effective registration.

3. The fee for filing a statement of qualification is $200 per partner in Texas, but not less than $200 and not more than $750. For purposes of determining the number of partners in Texas and calculating the filing fee, the secretary of state has adopted administrative rules[79] that provide that a partner is considered to be in Texas if:

a. the partner is a resident of the state;

b. the partner is domiciled or located in the state;

c. the partner is licensed or otherwise legally authorized to perform the services of the partnership in this state; or

d. the partner, or a representative of the partnership working under the direct supervision or control of the partner, will be providing services or otherwise transacting the business of the partnership within the state for a period of more than 30 days.

4. Unlike a Texas registered limited liability partnership, a foreign LLP that files a statement of qualification is required to have and maintain a registered office and agent in Texas for the purpose of service of process.

5. A foreign LLP that is transacting business in Texas and that fails to file the qualification statement with the secretary of state may not maintain an action, suit, or proceeding in Texas until it has registered with the secretary of state. Failure of the foreign LLP to register does not impair the validity of a contract or act of the partnership and does not impose personal liability on any partner for the partnership's debts and obligations solely because the foreign LLP failed to register. In addition, a foreign LLP doing business in Texas on and after the effective date of the BOC is subject to the late filing penalty assessed on foreign filing entities.[80]

6. Out-of-state limited partnerships that are also LLPs (i.e., *limited liability limited partnerships or LLLPs*) are required to file a registration as a foreign limited partnership under the provisions of the TRLPA, as well as the annual statement of qualification under the TRPA as a foreign LLP. Please note that effective January 1, 2006, the failure to qualify a foreign LLLP within 90 days of doing business will result in the imposition of late filing fees *for each registration document*.

B. *"Foreign" Foreign Limited Partnerships*— Under existing law, a foreign limited partnership is defined as a limited partnership formed under the laws of another state or another jurisdiction of the United States.

1. Currently, a limited partnership formed outside of the United States is not required to file with the secretary of state in order to transact business in Texas as the current statutory definition precludes its qualification and registration under the Texas Revised Limited Partnership Act.

2. The BOC however defines "foreign" to mean, with respect to an entity, that the entity is formed under and governed by the laws of a jurisdiction other than Texas. Accordingly, a limited partnership formed in a jurisdiction outside of the United States, such as Canada, will be required to register with the secretary of state when transacting business in Texas.

C. *Qualification of Foreign LLCs*—The passage of House Bill 1637, which became effective September 1, 2003, greatly facilitated the filing of an application for certificate of authority on behalf of a foreign LLC.

1. The application for certificate of authority of a foreign LLC need not include a certification from the jurisdiction of organization regarding the existence of the foreign entity[81]. Instead, the application for certificate of authority should include a statement that the LLC exists as a valid entity under the laws of the entity's jurisdiction of formation. This legislative change brings LLCs in line with procedures established for the qualification of foreign LPs.

2. In addition to the certification of existence statement, the secretary of state's promulgated form requires the foreign LLC to provide information regarding the jurisdiction of its organization.

3. Although a certificate of existence from the jurisdiction of formation is no longer mandated, the secretary of state will not reject a submitted application for certificate of authority for a foreign LLC or foreign PLLC that has an attached certificate of existence rather than a certification statement.

D. *Foreign "LLCs" That Are Not LLCs* — The broad definition of foreign LLC permits qualification of other entities with limited liability as LLCs if you seek to qualify certain entities to transact business in the state before January 1, 2006.

1. The definition of a foreign limited liability company[82] not only includes limited liability companies formed under the laws of a jurisdiction other than Texas but also includes any other entity that:

a. *elects* to procure a certificate of authority pursuant to the act;

b. is formed under laws that provide that persons entitled to receive a distribution of assets, or to exercise voting rights shall not be liable for the debts, obligations or liabilities of the entity; and

c. for which there is no other statute under which the entity could be authorized to do business in Texas.

2. This definition was so worded to avoid the problems caused by the court decision in *Means v. Limpia Royalties*[83] which did not afford limited liability to a foreign business trust that was doing business in Texas, and for which there was no statutory provision regarding qualification.

3. Prior to September 1, 2003, as a condition to qualification, a foreign business trust or other entity with limited liability was required to add the words "Limited Liability Company" or "Limited Company" or the abbreviations "L.L.C," "LLC," "LC," or "L.C." to its name for purposes of transacting business in Texas. However, House Bill 1637, which was enacted by the 78th Legislature in its Regular Session, amended article 7.03 of the TLLCA to permit a foreign business entity meeting the definition of a "foreign limited liability company" under the provisions of article 1.02(9) of the TLLCA to obtain a certificate of authority without adding the phrase "Limited Liability Company," "Limited Company," or an abbreviation of such terms to its legal name or qualifying fictitious name.[84]

E. *Registration of Foreign Entities Under the BOC*— Chapter 9 of the BOC governs the registration of foreign entities. The term used to describe the document filed with the secretary of state is "certificate of registration."

1. The registration requirement applies to a foreign corporation, a foreign limited partnership, a foreign limited liability company, foreign business trust, foreign real estate investment trust, foreign cooperative, foreign public or private limited company, or another foreign entity, the formation of which, if formed in Texas, would require the filing of a certificate of formation with the secretary of state. Also, a foreign entity that affords limited liability for any owner or member under the laws of its jurisdiction of formation is required to register.

a. A foreign entity that fails to register when required to do so 1) may be enjoined from transacting business in Texas on application by the attorney general, 2) may not maintain an action, suit, or proceeding in a court of this state until registered, and 3) is subject to a civil penalty in an amount equal to all fees and taxes that would have been imposed if the entity had registered when first required.[85]

b. In addition, if the entity has transacted business in the state for more than ninety (90) days, the secretary of state may condition the filing of the registration on the payment of a late filing fee that is equal to the registration fee for each year of delinquency.

2. In accordance with section 9.003 of the BOC, a foreign entity that is eligible under other law of Texas to register to transact business in this state, but is not registered under that law, may file an application for registration under chapter 9 of the BOC unless that registration is prohibited by the other law.

3. A foreign entity that is authorized under other state law to transact business in Texas is not required to register under chapter 9 of the BOC. For example, a foreign financial institution registered to do business under the Finance Code.

4. A foreign entity required to register under chapter 9 of the BOC that has not registered with the secretary of state to transact business in Texas and that has transacted business in this state *must file an application for registration on or before January 30, 2006* in order to avoid assessment of the late filing penalty imposed under the BOC.[86]

5. As amended by HB 1319, the BOC permits the transfer or succession of a foreign entity's registration with the secretary of state.

a. A foreign entity that has registered under the BOC or that has elected an early adoption of the BOC may amend its application for registration to disclose a change that results from 1) conversion from one type of foreign filing entity to another type of foreign filing entity with the converted entity succeeding to the registration of the converting foreign filing entity; or 2) a merger into another foreign filing entity with the foreign filing entity making the amendment succeeding to the registration of the original foreign filing entity.[87]

b. For example, a Nevada LLC registered to transact business under the BOC that subsequently converts to a Delaware LP need only file an application for amended registration to reflect the change in organizational structure and jurisdiction of organization and need not obtain a new registration for the converted entity.

VI. Mergers and Conversions

A. *How to Avoid Last Minute Problems with Tax Clearance*

1. Before filing articles of merger or conversion, the secretary of state is required to determine that all merging or converting entities subject to franchise tax[88] have paid all taxes due.

2. The secretary of state suggests two alternatives to avoid last minute refusal to file the articles of merger or conversion for tax reasons:

a. Submit the articles of merger or conversion with a certificate of account status from the comptroller of public accounts for each merging or converting corporation or LLC. The certificate of account status must specifically indicate that it is for the purpose of merger or conversion and will require the filing of a final tax return for any merging or converting entity; or

b. Include in the plan of merger or conversion, or in the alternative statement in lieu of a plan of merger or conversion, a statement[89] that one or more of the surviving, new or acquiring entities will be responsible for the payment of all fees and franchise taxes and that all of such surviving, new or acquiring domestic or foreign entities will be obligated to pay any fees and franchise taxes if not timely filed.

B. *Alternative Certified Statement in Lieu of a Plan of Merger*

1. The requirements for a plan of merger are set forth in Article 5.01B of the Texas Business Corporation Act, Sec. 2.11(b) of the Texas Revised Limited Partnership Act and Art. 10.03 of the Texas Limited Liability Company Act, Sec. 9.02 of the Texas Revised Partnership Act, and Sections 10.002 to 10.004 of the BOC.

2. The plan of merger must be set forth as part of the articles of merger unless the articles of merger include a statement certifying:[90]

a. the name and jurisdiction of formation of each domestic or foreign entity that is a party to the plan of merger or that will be created as a result of the merger and description of its organizational form;

b. that the plan of merger has been approved by each organization;

c. any amendments to the articles of incorporation, certificate of limited partnership or articles of organization or a statement that no amendments are to be effected by the merger;

d. that the articles of incorporation of each new Texas corporation, the certificate of limited partnership for each new Texas limited partnership or the articles of organization of each new limited liability company to be created as a result of the merger are being filed with the secretary of state as part of the articles of merger;

e. that an executed plan of merger is on file at the principal place of business of each surviving or newly created domestic or foreign corporation, limited partnership or limited liability company; and

f. that a copy of the plan will be furnished:

(1) in the case of a corporation, on written request and without cost, to any shareholder of any domestic corporation that is a party to or that is

created as a result of the merger, and if there are multiple survivors, to any creditor or obligee of the parties to the merger if such obligation is outstanding at the time of the merger;

(2) in the case of a limited partnership, to each partner in each domestic limited partnership that is a party to the merger at least 20 days before the merger is effected, unless waived by the partner;[91] or

(3) in the case of a limited liability company, to any member of each domestic limited liability company that is a party to or created by the merger and, in the case of a merger with multiple surviving domestic or foreign limited liability companies or other entities, to any creditor or obligee of the parties to the merger if such obligation is outstanding.

3. The articles of merger also must contain a statement that the plan of merger was authorized by all action required by the laws under which each entity was formed or organized or by its constituent documents.

4. As a result of the passage of HB 1154, effective September 1, 2005, Section 9.02 of the Texas Revised Partnership Act provides for the provision of an alternative statement in lieu of a plan of merger.

C. *Special Merger Provisions*

1. The following provisions are applicable to mergers between parent and subsidiary entities under article 5.16 of the Texas Business Corporation Act and article 10.05 of the Texas Limited Liability Company Act:

a. A short form merger of

(1) one or more subsidiary entities into a parent;

(2) the merger of a parent into a subsidiary; or

(3) the merger of one or more subsidiaries and the parent into another subsidiary.[92]

b. The parent or at least one of the subsidiaries in a short form merger must be a domestic corporation/LLC.

c. If the parent entity is a survivor, only articles of merger need be filed. If the parent will not survive the merger, the parent must adopt a plan of merger in the manner provided by law.[93]

d. The voting requirements of article 5.03 of the TBCA are not applicable to subsidiary corporations merging under the provisions of article 5.16; that is, the action of the parent corporation is sufficient to effectuate the merger without action on the part of any subsidiary.

2. Merger of a General Partnership:

a. A Texas partnership may adopt a plan of merger and merge with one or more partnerships or other entities.[94]

b. A certificate of merger on behalf of a general partnership is filed with the secretary of state *only* when the partnership merges with an entity other than a partnership.[95]

D. *Common Errors*—Generally, the most frequent reason for rejection of a merger document is the failure to set forth all necessary recitations in the articles of merger or alternative statement.

The most frequent omission in a merger involving a domestic or foreign limited liability company or limited partnership is the authorization statement.[96] Although a merger document drafted to contain the alternative statements certifies that the plan of merger has been approved, the articles or certificate of merger *also* must include the following statement for each domestic or foreign LLC or LP that is a party to the merger:

> "The plan of merger was authorized by all action required by the laws under which [the LLC or LP] was formed or organized and by its constituent documents."

E. *Conversions*

1. There are conversion provisions in the Texas Business Corporation Act,[97] the Texas Limited Liability Company Act,[98] the Texas Revised Limited Partnership Act,[99] and the Texas Revised Partnership Act.[100]

a. The filing scheme for conversion is similar for all of the different types of entities and involves filing of articles of conversion with the secretary of state under both the statute applicable to the converting entity as well as the statute applicable to the converted entity. The Acts speak of the *converting* entity as the entity before conversion with the *converted* entity being the entity after conversion. The organizational documents for the converted entity will appear in the plan of conversion.

b. Like a plan of merger, the plan of conversion can be, but is not required to be filed with the articles of conversion. In lieu of filing the plan, the converted entity may include a statement in the articles of conversion certifying:

(1) that the plan has been approved;

(2) that the plan is on file at the principal place of business of the converting entity and the address thereof; and that the plan will be on file from and after conversion at the principal place of

business of the converted entity and the address thereof; and

(3) that a copy of the plan will be furnished by the converted entity on written request and without cost to any shareholder or comparable interest holder of the converting or converted entity.

e.. The articles of conversion also must contain a statement that the approval of the plan of conversion was duly authorized by all action required by the laws under which the converting entity was incorporated, formed, or organized and by its constituent documents.

f.. While the organizational documents of the converted entity are included as part of the plan of conversion and are not required to be filed independently, the statutes anticipate that separate organizational documents for any domestic entity formed by conversion (other than general partnerships) will be submitted with the articles of conversion. This will allow the converted domestic entity to request and obtain copies of the organizational documents without the necessity of obtaining copies of the articles and plan of conversion.

g. If a converting entity is a taxpayer under the franchise tax statutes, all franchise taxes have to be paid. In the alternative, a statement may be included in the articles of conversion that the converted entity will be liable for the payment of all franchise taxes.

2. The conversion provisions apply to domestic as well as foreign entities. The foreign entities, of course, must have the ability to convert under the laws of their home jurisdiction.

a. A foreign entity that has a certificate of authority that converts to a domestic filing entity must file a termination of its certificate of authority. (See, for example, Article 8.14C of the Texas Business Corporation Act and Sec. 9.011(d) BOC.)

b. If a domestic entity converts to a foreign filing and the foreign entity will be transacting business in Texas, the *converted* entity will be required to file a certificate of authority under the statutes applicable to the converted entity.

3. Currently, a foreign entity that has a certificate of authority or registration to transact business and that converts to change its jurisdiction of formation to a jurisdiction other than Texas, but which does not change its organizational form, should file an application for amended certificate of authority. However, if the foreign filing entity converts to change its organizational form in its jurisdiction of formation or in another jurisdiction, it must file a termination of its certificate of authority or registration, unless the foreign filing entity is a BOC-entity.

4. Under existing law, there is no provision that would provide for the transfer of a certificate of authority under one statute to a certificate of authority under another statute. The BOC, as amended by HB 1319 permits a foreign filing entity to amend its application for registration to reflect the results of a conversion with the converted entity succeeding to the registration of the converting entity.

5. The Texas Non-Profit Corporation Act was not amended to permit conversion of a non-profit corporation; consequently a domestic non-profit corporation cannot convert to a foreign non-profit corporation or other entity. A domestic business corporation, limited liability company or limited partnership may convert to a Texas non-profit corporation by filing articles of conversion pursuant to the applicable conversion provisions and separately filing the articles of incorporation creating the domestic non-profit corporation under the provisions of the Texas Non-Profit Corporation Act.[101] However, although the BOC permits the creation of a domestic nonprofit corporation by conversion, section 10.108 of the BOC prohibits the conversion of a domestic nonprofit corporation into a for-profit entity.

6. Currently, the conversion of a general partnership to a foreign or domestic limited partnership or the conversion of a domestic or foreign limited partnership to a general partnership is governed and effected by section 9.01(a) of the Texas Revised Partnership Act rather than the provisions of section 9.05(e)[102]. However, in order to more closely align the conversion provisions relating to partnerships and other entities, HB 1154 repealed section 9.01 of the Texas Revised Partnership Act, effective September 1, 2005. On and after September 1, 2005, the general conversion provisions of section 9.05 apply to the conversion of a general partnership to a limited partnership and vice versa.

7. The conversion provisions also are not applicable when a limited liability company is changing its purpose to come under the provisions relating to professional limited liability companies and vice versa. Articles of amendment are sufficient to effectuate this change as there is not a change to the *type* of entity since the Texas Limited Liability Company Act is applicable to both. This principle holds true for BOC-entities as well.

8. Attorney General Opinions Regarding Conversion.

a. Attorney General Opinion JC-0015 (March 8, 1999) addressed the issues of whether a business corporation could convert to a Texas

nonprofit corporation. The Attorney General concluded that:

> A for-profit domestic corporation may, in accordance with article 5.17 of the Business Corporation Act, convert to a nonprofit corporation organized under the Non-Profit Corporation Act, Texas Revised Civil Statutes article 1396-1.01 through –11.01, or a water-supply corporation, created under chapter 67 of the Water Code, if the owners of the converting entity approve the plan of conversion consistent with Business Corporation Act article 5.17(A)(1). *Please note however since there is no provision in the Non-Profit Act providing for creation of a non-profit corporation by conversion, the non-profit corporation must be created by separate filing of the articles of incorporation prior to or simultaneously with the articles of conversion.* (Note: Effective January 1, 2006, pursuant to the provisions of the BOC, the creation of the nonprofit corporation would be effected solely by the filing of the certificate of conversion.)

b. Attorney General Opinion JC-0216 (October 13, 1999) addressed the issue of whether a state license held by a corporation is automatically continued when the corporation converts to another type of business entity under article 5.17 of the Texas Business Corporation Act. The attorney general concluded that:

> When a corporation converts to another type of business entity in accordance with the Texas Business Corporation Act, as a general rule a state license held by the converting corporation continues to be held by the new business entity. This rule may be subject to the particular statutory requirements or regulations of the specific state entity that issued the license.

c. Attorney General Opinion GA-0007 (January 6, 2003) addressed whether a corporation that holds a bingo commercial lessor license may convert to a limited partnership and related questions. The attorney general concluded:

> The Bingo Enabling Act, Tex. OCC. Code Ann. §§2001.001-.657 (Vernon 2002), and the rules promulgated thereunder by the Texas Lottery Commission, 16 TEX. ADMIN. CODE § 402.541-.572 (2002), do not preclude the continuation of a bingo commercial lessor license upon the conversion of a Texas corporation to a Texas limited partnership or of a Texas limited partnership to a Texas corporation assuming the converted entity is eligible for a bingo commercial lessor license. The converted corporation or limited partnership must apply for an amended license to the extent its name or address differs from that of the converting entity, assuming that each person who has a financial interest in or who is in any capacity a real party in interest in the converting entity's bingo-related business does not change. Finally, section 2001.160 of the Bingo Enabling Act does not permit a corporation that holds a bingo commercial lessor license to transfer the license to a limited partnership, but it does permit a licensed limited partnership to transfer the license to a corporation formed or owned by the limited partnership.

F. *Common Errors*—The most common reasons for rejection of a conversion document are similar to those experienced in merger transactions.

1. Failure to ensure tax clearance for the converting entity by either including the appropriate tax certificate or by including a statement relating to the payment of such taxes by the converted entity.

2. Failure to include additional statements relating to the conversion in the formation document of the converted entity is a frequent error. The formation document of a converted entity must include: (1) a statement that the entity is being formed pursuant to a plan of conversion; and (2) the name, address, date of formation, and prior form of organization and jurisdiction of organization of the converting entity.

G. *Merger and Conversion Fees—Before January 1, 2006*

1. Until December 31, 2005, the filing fee for a merger or conversion of a business corporation, a professional corporation, or a professional association is $300. The filing fee for the merger or conversion of a limited partnership is $200.[103] The filing fee for the merger or conversion of a partnership under the TRPA is $200.[104] The filing fee for the merger or conversion of a limited liability company is $200; however, any other filing fee paid under the corporation, partnership, or other entity statutes of this state is to be credited against the fee assessed for the limited liability company.

2. As the filing scheme for a merger or conversion involves the filing of articles of merger or conversion with the secretary of state under the statutes applicable to each domestic entity that is a party to the merger or conversion, this may result in the imposition

of additional filing fees under the applicable statute. For example, the total filing fee for a merger of a domestic business corporation into a domestic limited partnership would be $500. The total filing fee for the conversion of a domestic business corporation to a domestic limited partnership would be $500. ($300 under the TBCA and $200 under the TRLPA.) With the exception of the creation of a nonprofit corporation, the creation of a domestic entity by conversion does not require the submission of the organizational filing fee for such entity. A table of conversion and merger filing fees for multi-entity transactions is currently available as Form 808.

H. *Mergers, Interest Exchanges, and Conversions of BOC-Entities*— Chapter 10 of the BOC contains the general provisions relating to mergers, conversions, interest exchanges and sales of assets. Due to changes effected to existing statutes by the 79th Legislature and prior legislative sessions, the language relating to mergers, conversions, and interest exchanges is substantially similar to the provisions contained in the BOC, as amended.

1. There are some changes to filing requirements and procedures that are effective for BOC-entities and existing entities on and after January 1, 2006. The most important change to note is the change in filing fees. On and after January 1, 2006, the fees required by chapter 4 of the BOC apply to *all* filings made with the secretary of state, including comparable filings made under existing law by entities that have not elected to adopt the BOC. (Attached to this paper is a table of the fee changes effective January 1, 2006.)

a. The fee for filing a merger transaction is a common fee of $300 for all entities, other than nonprofit corporations or cooperative associations. For example, the merger of a Nevada business corporation with and into a Texas limited partnership is $300.

b. In addition, a certificate of merger that creates a new domestic filing entity also must include the filing fee for the formation of the newly created domestic filing entity. Consequently, the filing fee for a certificate of merger merging a domestic limited liability company and a foreign business corporation that creates a domestic limited partnership is $1050 ($300 for the certificate of merger and $750 for the certificate of formation of the domestic limited partnership.)

c. The fee for filing a conversion is a common fee of $300, plus the fee imposed for the certificate of formation of the converted entity. For example, the total fee for filing the conversion of a foreign LLC to a Texas business corporation is $600 ($300 for the conversion and $300 for the formation fee).

d. Currently, only limited partnership and partnership documents requesting pre-clearance are assessed a pre-clearance fee. However, effective January 1, 2006, a standard $50 pre-clearance fee will be applied to all pre-clearance documents.

2. Under current law, a nonprofit corporation may merge only with other domestic or foreign nonprofit corporations. Although the BOC has more permissive merger provisions for nonprofit corporations certain restrictions and limitations still apply.[105]

a. A nonprofit corporation may not merge into another entity if, the nonprofit corporation would, because of the merger, lose or impair its charitable status.

b. One or more domestic or foreign for-profit entities or non-code organizations may merge into one or more domestic nonprofit corporations if the nonprofit corporations continue as the surviving entity or entities.

c. A nonprofit corporation may merge with a foreign for-profit entity, but only if the domestic nonprofit corporation continues as the surviving entity.

d. One or more nonprofit corporations and non-code organizations may merge into one or more foreign nonprofit entities that continue as the surviving entity or entities.

3. Currently, there is no filing required with the secretary of state to evidence an interest exchange in a limited liability company or a limited partnership. However, under the provisions of the BOC, a certificate of exchange is required to be filed with the secretary of state if an ownership interest or membership interest in *any filing entity* is to be acquired in the interest exchange. The filing fee for an interest exchange is $300.

VII. Abandonment of a Filed Document

A. *LLC and LP Documents* — Documents filed under the Texas Limited Liability Company Act and the Texas Revised Limited Partnership Act that are to become effective on the occurrence of events or facts that may occur in the future may be abandoned if the event or transaction has not become effective.[106]

B. *Merger, Share Exchange or Conversion* — A merger, share exchange[107] or a conversion[108] filed under the Texas Business Corporation Act may be abandoned (subject to any contractual rights) at any time before the filing has become effective.

C. *Amendments to Articles of Incorporation* — House Bill 1165, which was enacted by the 78th

Legislature and which became effective September 1, 2003, amended article 4.02 of the TBCA to permit the abandonment of an amendment to the articles of incorporation under certain circumstances. An amendment to the articles of incorporation may be abandoned if the resolution authorizing the proposed amendment provides that at any time before the filing of the amendment with the secretary of state becomes effective, notwithstanding the authorization of the proposed amendment by the shareholders, the board of directors may abandon the proposed amendment without further action by the shareholders.

D. *Abandonment Under the BOC*— Section 4.057 of the BOC permits the parties to file a certificate of abandonment of a filing instrument if the instrument has not taken effect.

E. *Secretary of State Actions* — On filing, the secretary of state records the filing of a document with a delayed effective date or condition and takes necessary action at that time to create new entities, change the status of merged or converting entities, and change names when amended by the filed document. Consequently, when a statement of abandonment is submitted under either the Texas Limited Liability Company Act, the Texas Revised Limited Partnership Act, the Texas Business Corporation Act, or the BOC, the secretary will determine whether the former name of any entity is available or whether the organizational documents need to be amended to change the name.[109]

F. *Occurrence of a Future Event* — When the effectiveness of a document is conditioned on the occurrence of a future event within 90 days of the submission of the document (delayed effective condition), the entity is required to file a statement with the secretary of state within the 90 day period stating that the condition has been satisfied or waived, and the date on which the satisfaction or waiver occurred.[110] The statement is to be executed by each organization required to execute the document filed. Failure to file the statement regarding the satisfaction or waiver of the delayed effective condition does not effect an abandonment of the document.

VIII. Revocation of a Filed Document

A. *Judicial Revocation of Fraudulent Terminations*—House Bill 1165, which was passed by the 78th Legislature in 2003, amended the TBCA and the TNPCA to provide for the court ordered revocation of articles of dissolution when the corporation was dissolved as a result of actual or constructive fraud. The secretary of state is authorized to take any action necessary to reactive the corporation and implement the court order. These legislative changes were carried over to the BOC and apply to all entities. House Bill 1319, amended chapter 11 of the BOC to add section 11.153, relating to the court ordered revocation of a fraudulent termination.

B. *Revocation of Voluntary Terminations*

1. Under the provisions of article 6.05, TBCA, a corporation may revoke its dissolution proceedings at any time prior to the issuance of a certificate of dissolution, or within 120 days thereafter. The dissolution may be revoked by unanimous written consent of all shareholders, or by an act of the corporation; i.e., a resolution of directors and affirmative vote of two-thirds of the outstanding shares of the corporation. A corporation that revokes voluntary dissolution proceedings prior to the issuance of a certificate of dissolution by the secretary of state may again carry on its business as though voluntary dissolution proceedings had not occurred. Please note that only a dissolution filed pursuant to article 6.06 may be revoked since a revocation requires shareholder action.

2. House Bill 1637, which became effective September 1, 2003, amended the Texas Limited Liability Company Act to permit an LLC to revoke a dissolution within 120 days of its filing with the secretary of state. The provision is similar to the revocation of dissolution provided under article 6.05 of the TBCA.

3. House Bill 1154, effective on September 1, 2005, amended the Texas Revised Limited Partnership Act to provide for the revocation of a voluntary cancellation of a certificate of limited partnership. The revocation must be filed with the secretary of state within 120 days of the filing of the cancellation.

4. Prior to filing the articles of revocation of dissolution, the secretary of state must determine whether the name of the dissolved corporation or LLC is the same as, or deceptively similar to that of an existing entity or a corporate, limited partnership, or limited liability company name registration or reservation. If the entity name does not conform to statutory or administrative requirements for entity names, the articles of revocation will be returned and the entity will be required to adopt articles of amendment changing the name.

C. *BOC-Entities Reinstate Rather Than Revoke*— One of the substantive changes effected by the enactment of the BOC.

1. Sections 11.201 and 11.202 of the BOC permit a voluntarily terminated (i.e., dissolved/cancelled) domestic entity to reinstate its existence *no later than the third anniversary of the effective date of the filing of a certificate of termination* if:

a. the termination was by mistake or was inadvertent;

b. the termination occurred without the approval of the entity's governing persons (i.e., directors, managers, general partners) when approval is required by the BOC title governing the entity;

c. the process of winding up before termination had not been completed by the entity; or

d. the legal existence of the entity is necessary to convey or assign property, to settle or release a claim or liability, to take an action, or to sign an instrument or agreement.

2. The owners, members, governing persons or other persons specified by the BOC must approve the reinstatement of the entity in the manner provided by the BOC title governing the domestic entity.

3. Prior to filing the reinstatement, the secretary of state must determine whether the name of the terminated entity being reinstated is the same as, or deceptively similar to that of an existing entity or a corporate, limited partnership, or limited liability company name registration or reservation. If the entity name does not conform to statutory or administrative requirements for entity names, the reinstatement will be returned and the entity will be required to change its name.[111]

4. A letter of eligibility from the Texas Comptroller of Public Accounts stating that the filing entity has satisfied all franchise tax liabilities and may be reinstated must be filed with the certificate of reinstatement if the filing entity is a for-profit corporation or limited liability company.[112]

5. The certificate of reinstatement must include the name of the entity's registered agent and its registered office address.

6. An entity that was involuntarily terminated by the secretary of state, had its existence forfeited under the Tax Code, or was terminated by court order may not be reinstated under section 11.201 of the BOC.

IX. Reinstatement Under the BOC

A. *After an Involuntary Termination*

1. Existing law establishes a certain timeframe, 36 months, within which a nonprofit corporation, for-profit corporation, and limited liability company must submit an application for reinstatement following an involuntary dissolution/revocation by the secretary of state.[113] Failure to file an application for reinstatement within this timeframe requires an entity to create a new entity or submit a new application for certificate of authority.

2. Section 11.253 of the BOC does not establish a timeframe for filing an application for reinstatement following an involuntary termination. However, if the entity is reinstated prior to the third anniversary of the involuntary termination, the entity is considered to have continued in existence without interruption.

3. The filing of the reinstatement shall have no effect on any issue of personal liability of governing persons during the period between the involuntary termination and the entity's reinstatement.

B. *After a Tax Forfeiture*— Reinstatement following a forfeiture of existence under the Texas Tax Code is governed by the Tax Code and not by the BOC.

C. *Entities in a Forfeited or Involuntarily Terminated Status*

1. On or after January 1, 2006 and before January 1, 2010, a domestic filing entity or foreign filing entity whose certificate of formation/authority has been canceled, revoked, involuntarily dissolved, or forfeited under the law in effect prior to January 1, 2006, may reinstate its existence or authority pursuant to the prior law or pursuant to the BOC.

2. If the entity elects to reinstate under the provisions of the BOC, the entity must simultaneously file an early election to adopt the BOC.

X. Professional Entities

A. *Professional Associations: Expansion of Permitted Professions* — Before June 1999, the only professionals permitted to form professional associations were doctors of medicine, doctors of osteopathy, and doctors of podiatric medicine. However, the Legislature has expanded the types of professionals permitted to form professional associations in recent legislative sessions. The 76th Legislature amended the Texas Professional Association Act to include dentists, as well as mental health professionals such as psychologists, clinical social workers, licensed professional counselors, and licensed marriage and family therapists. Bills passed during The 77th Legislature permit optometrists and

therapeutic optometrists and chiropractors to form professional associations. The 78th Legislature passed HB 3213, which became effective June 20, 2003, allowing veterinarians to create professional associations. The BOC, as amended, specifically describes the professionals that may form, own, and operate a professional association. Professional associations, unlike PLLCs and PCs, are not subject to franchise tax

Attorneys may not form professional associations. In 1999, the secretary of state was sued for refusal to file articles of association for a professional association with a purpose to practice law. Decision was rendered in favor of the secretary of state on a motion for summary judgment in the trial court. This was appealed to the Court of Appeals in Austin and a decision favorable to the secretary of state issued by the Court of Appeals in 2001.[114] A motion for review was filed with the Texas Supreme Court in April 2001, but the petition for review was denied in June 2001.

B. *Multi-Practice Professional Entities —* Generally, both professional associations, PLLCs and PCs are organized for the purpose of providing one specific kind of professional service. The following exceptions are applicable:

1. Persons licensed as doctors of medicine and persons licensed as doctors of osteopathy by the Texas State Board of Medical Examiners and persons licensed as podiatrists by the Texas State Board of Podiatric Medical Examiners may jointly form and own a professional association or a PLLC to perform professional services that fall within the scope of the practice of those practitioners.[115]

2. Professionals, other than physicians, engaged in related mental health fields such as psychology, clinical social work, licensed professional counseling, and licensed marriage and family therapy may form a professional association, PLLC or PC that is jointly owned by those practitioners to perform professional services that fall within the scope of the practice of those practitioners.[116]

3. Persons licensed as doctors of medicine and persons licensed as doctors of osteopathy by the Texas State Board of Medical Examiners and persons licensed as optometrists or therapeutic optometrists by the Texas Optometry Board may, subject to the provisions regulating those professionals jointly form and own a partnership or limited liability partnership to perform professional services that fall within the scope of the practice of those practitioners.[117] Professional entities formed under the BOC would be permitted to form a professional association or a professional limited liability company for the joint practice of medicine, osteopathy, and optometry or therapeutic optometry.[118]

4. When doctors of medicine, osteopathy, and podiatry; or doctors of medicine, osteopathy, and optometry or therapeutic optometry; or mental health professionals form a jointly owned professional entity as permitted by law, the authority of each of the practitioners is limited by the scope of the practice of the respective practitioners and none can exercise control over the other's clinical authority granted by their respective licenses, either through agreements, bylaws, directives, financial incentives, or other arrangements that would assert control over treatment decisions made by the practitioner.[119] The state agencies exercising regulatory control over professions to which these joint practice provisions apply continue to exercise regulatory authority over their respective licenses.

C. *Accountants*

1. In 2001, the legislature amended Chapter 901 of the Occupations Code permitted accounting firms to include non-CPA members or owners. This amendment presented organizational issues for which no provision was made in the Texas Business Corporation Act, the Texas Professional Corporation Act, or the Texas Limited Liability Company Act.

2. These issues were resolved when the Attorney General issued Opinion No. JC-0536 on August 5, 2002, which opinion concluded that:

> A public accounting firm with owners who are not certified public accountants that is eligible for a firm license under the Public Accountancy Act, Tex. Occ. Code Ann. §§ 901.001-.605 (Vernon 2002), may incorporate under the Texas Business Corporation Act, Tex. Bus. Corp. Act Ann. Arts. 1.01-13.08 (Vernon 1980 & Supp. 2002), or the general provisions of the Texas Limited Liability Company Act, Tex. Rev. Civ. Stat. Ann. Art. 1528n (Vernon 1979 & Supp. 2002).

D. *BOC Qualification of Out-of-State Professional Entities*

1. Currently, the provisions of the Texas Professional Corporation Act only permit a professional legal services corporation to obtain a certificate of authority to transact business in the state. In addition, the provisions of the Texas Professional Association Act do not provide for the qualification of an out-of-state

professional association. Consequently, an out-of-state professional corporation or professional association seeking to transact business in the state qualified as a "foreign professional limited liability company" under the Texas Limited Liability Company Act.

2. The provisions of the BOC however permit a foreign professional corporation or professional association to register as a foreign professional corporation or foreign professional association. A foreign professional corporation or foreign professional association currently registered as a foreign professional limited liability company may wish to consider filing an election to adopt the BOC for the purposes of filing an application for amended registration to correctly identify its organizational form.

XI. BOC Transition Issues

A. *Early Adoption of the BOC*

1. Existing domestic and foreign filing entities may elect to adopt the BOC prior to its mandatory application date by filing an early adoption statement with the secretary of state. (A draft of the secretary of state BOC early adoption statement is included with these materials.) If necessary, a certificate of amendment should be submitted to cause the entity's formation document to comply with the BOC.

2. Early adoption statements cannot be filed earlier than January 1, 2006, the effective date of the BOC.

3. The filing fee for an early adoption of the BOC is the fee established under chapter 4 for the filing of an instrument for which no express fee is provided. For example, the filing fee for an early adoption filed by a limited partnership, limited liability company, or a for-profit corporation would be $15.

B. *End of Year Filings*

1. The effective date of the BOC coincides the peak filing period for mergers, conversions, and certificates of formation. Please note the secretary of state goes by the date of receipt and not by the date of mailing or execution so timing is critical. The date of receipt of a formation document will determine whether it is subject to prior law or the BOC.

2. If formation is desired under current law, file early, use assured delivery methods, and use a delayed effective date if a file date of December 31, 2005 is required. A formation filing received on and after January 1, 2006 is subject to the provisions of the BOC.

3. A domestic filing entity created with a delayed effective date on or after January 1, 2006 is subject to the BOC. A conversion or merger filing submitted with a delayed effective date on or after January 1, 2006 is subject to the fees and requirements of the BOC.

C. *Forms*

1. The secretary of state is promulgating forms for filings under the BOC; however, the use of the promulgated forms is permissive and not mandatory. The secretary of state is promulgating the following forms:

a. entity specific certificates of formation;
b. entity specific applications for registration;
c. certificates of amendment;
d. restated certificates of organization, with and without further amendments;
e. certificates of termination;
f. entity specific certificates of conversion; and
g. certificates of merger

2. BOC forms for change documents (e.g., certificates of amendment, restated certificates of formation, mergers) are generic and apply to multiple entity types.

3. BOC forms will be available from the secretary of state web site beginning in December. Promulgated forms for filings under existing law will also be maintained on a separate forms page and will continue to be maintained until the mandatory application date.

XII. Miscellaneous Matters

A. *Limited Liability Companies*

1. Limited liability companies are subject to franchise taxes like corporations.

2. Certain provisions of the Texas Business Corporation Act are applicable to LLCs:[120]

a. Article 2.07;
b. Article 2.08;
c. Article 4.14;
d. Article 5.14; and
e. Part Seven.

3. As amended by HB 1154, certain provisions of the Texas Miscellaneous Corporations Laws Act[121] are also applicable to LLCs:[122]

a. Articles 2.05 and 2.06;
b. Article 3.01;
c. Articles 7.01 through 7.05; and
e. Article 7.07.

4. Pursuant to article 2.23H of the Texas Limited Liability Company Act, the affirmative vote, approval or consent of *all* the managers or members is required to amend the articles of organization if any capital has been paid into the LLC or if the LLC has otherwise commenced business.[123] This unanimity requirement is similar to the requirement for unanimous approval of amendments to the partnership agreement.[124]

5. House Bill 1637, which was effective September 1, 2003, amended article 2.23 to provide that a majority of the managers named in the articles of organization may amend or dissolve an LLC if: (1) the LLC has no members; (2) the LLC has not received any capital; and (3) the LLC has not otherwise commenced business. Current law also provides that if the LLC is member-managed, a majority of the members named in the articles of organization may amend or dissolve the LLC if the LLC has not received any capital and has not otherwise commenced business.

6. The passage of House Bill 1154 simplified the statutory language of article 2.23G and H to more closely align the voting requirements to BOC provisions. Accordingly, effective September 1, 2005, a limited liability company that has members must obtain the approval of all its members to amend the articles of organization, except as provided otherwise in its articles of organization or the regulations. House Bill 1154 also amended article 2.23G to simplify voting procedures when a limited liability had not commenced business. House Bill 1154 also facilitated filings by standardizing the signature requirements for filing instruments.

7. An amendment to change the status of an LLC from one in which the management is reserved to the members to one in which the management is vested in one or more managers (or vice versa) is approved in the same manner as any other amendment to the articles of organization. The requirements with respect to approval of most actions by the managers of a limited liability company are found in section E of article 2.23.

8. The original legislation relating to LLCs limited the duration to 30 years. If LLCs were formed with a limited duration, the LLC must upon expiration file articles of amendment to extend the duration or to make it perpetual. Because Part Seven of the Texas Business Corporation Act is applicable to LLCs, the LLC may, during the three-year period following the date of expiration, amend its articles of organization to extend its duration.[125]

9. House Bill 1154 amended the Texas Limited Liability Company Act to address the winding up and dissolution of a limited liability company in the case of a dissolution caused by the termination of the continued membership of the last remaining member of the limited liability company. The Act provides that the winding up may be accomplished by the legal representative or successor of the last remaining member or by one or more persons designated by the legal representative or successor.

10. Section 2.001 of the BOC states that a domestic entity may pursue any lawful purpose or purposes, unless otherwise provided by the BOC. As chapter 2 and title 3 do not prohibit the pursuit of a not-for-profit purpose by a limited liability company, on and after January 1, 2006, the secretary of state will accept a limited liability company with a not-for-profit purpose.

B. *Limited Partnerships and LLPs*

1. The passage of House Bill 1637 by the 78th Legislature in 2003 expanded the types of legal entities that may act as a registered agent for an LP. Consequently, an LLC or another LP may act as the registered agent of an LP.

2. House Bill 1637 did not amend the TRPA provisions relating to the qualification of foreign limited liability partnerships. Accordingly, until the foreign limited liability partnership's renewal or registration is governed by the BOC, the registered agent for service of process on a foreign LLP must be either an individual resident of the state or a domestic or a foreign corporation with a certificate of authority as required by article 6132b-10.05(a)(2), TRPA.

3. Currently, the secretary of state has no statutory authority to cancel the certificate or registration of a limited partnership that fails to maintain a registered agent at its registered office address as required by law. However, a limited partnership formed or registered on and after January 1, 2006, or an existing limited partnership that elects to adopt the BOC may be involuntarily terminated for its failure to maintain a registered agent and registered office address.

C. *Ministerial Duties* — The filing duties of the secretary of state are ministerial and mandatory.

1. The secretary of state does not determine whether the person signing a document has the capacity claimed or that the signature affixed to a document is, in fact, the signature of the named person.[126]

2. The secretary of state cannot be enjoined from filing a document that on its face conforms to law.[127]

3. Unless otherwise authorized by law, the secretary of state has no statutory or administrative authority to revoke a filing because the document contained false statements.[128]

4. There are criminal penalties[129] for signing a false document and, in the case of a limited partnership, civil remedies.[130] Under the provisions of the BOC, both civil remedies and criminal penalties are provided for the submission of a false or fraudulent document.[131]

D. *Changes to Official Certifications*

1. House Bill 1154, House Bill 1507, and House Bill 1319 include amendments to the Texas Revised Limited Partnership Act, the Texas Business Corporation Act, and the BOC that clarify that the secretary of state shall regard an entity as being "in existence" until a certificate of termination is filed with the secretary of state.

2. As a result of this legislative action, modifications have been made to certificates of status (existence) issued by the secretary of state. A certificate of status of an entity that has not been dissolved will indicate that the entity is in existence.

3. An entity that has an active status (i.e., that has not been judicially, voluntarily or involuntarily terminated or forfeited under the Tax Code), but that has an outstanding notice, deficiency, or delinquency will have its "in existence" status clarified by other identifying phrases. The following are phrases that describe an active status:

a. *In existence*—an active status. No certificate of dissolution/termination/revocation has been issued by the secretary of state.

b. *Delinquent*—an active status indicating that a professional association has failed to submit its annual statement by June 30, and has not yet been involuntarily dissolved/terminated.

c. *Forfeited Rights*—an active status indicating that a nonprofit corporation or a limited partnership has failed to submit its periodic report within 30 days after mailing by the secretary of state, and has not yet been involuntarily dissolved/cancelled/terminated.

d. *RA Notice Sent*—an active status indicating that the registered agent of the entity has resigned and a new registered agent has not been designated or that an allegation has been made that the entity is not maintaining a registered agent. Notice of the need to appoint a new registered agent has been mailed by the secretary of state.

e. *Report Due*—an active status indicating that a nonprofit corporation or a limited partnership has been requested to file a periodic report, or a professional association has been requested to file an annual statement. The due date for the report or annual statement has not passed.

4. Effective September 1, 2005, the cost of an apostille or official certification issued in connection with a certified copy or certificate of fact will increase from $10 to $15.[132]

E. *Articles of Correction* — Correction not Revocation of Filing.

1. A corporation, limited liability company, or limited partnership[133] may correct an instrument that was filed with the secretary of state when the instrument is an inaccurate record of the action referred to in the instrument, contains an inaccurate or erroneous statement, or was defectively executed.

2. Documents may be corrected to contain only those statements that lawfully could have been included in the original documents. Articles of correction may not be used to alter, include, or delete a statement, which by its alteration, inclusion or deletion would have caused the secretary of state to determine that the document did not conform to law.

3. The filing of the articles of correction relate back to the original date of the filing except as to those persons who are adversely affected by the correction.

4. Corrections do not *void* or revoke the original filing as the statutory provisions for correction specifically provide that any certificate issued by the secretary of state with respect to the effect of filing the original instrument is considered to be applicable to the instrument as corrected.[134]

F. *Financial Institution* —Required registrations and discretionary filings

1. Required Registration: An out-of-state financial institution is required to qualify with the secretary of state prior to opening up a branch office or other office in the state under the provisions of the Texas Finance Code[135] and the Texas Trust Company Act.[136] An out-of-state financial institution means a bank, savings bank, savings association, savings and loan association, credit union or trust company that is not chartered under the laws of the state and that has its main or principal office in another state or country. It includes institutions created under federal law. The secretary of state does not issue interpretive opinions on whether an out-of-state financial institution is required to register. The secretary of state has promulgated a form for the qualification of out-of-state financial institutions.

2. Discretionary Filing: Section 201.103 of the Finance Code permits a Texas financial institution to file a statement with the secretary of state designating an agent for purposes of service of process. The filing of the statement is *discretionary*. A Texas financial institution includes a state or national bank, savings bank, savings association, savings and loan association, credit union and trust company whose home state is Texas. The secretary of state has promulgated a form for the appointment of an agent for service of process for a Texas financial institution.

3. Information on financial institutions is available by calling (512) 463-5555.

G. *Non-Profit Healthcare Organizations* — In general, a non-profit corporation cannot engage in any activity that cannot lawfully be engaged in without first obtaining a license when such license cannot be issued to a corporation. The 76th Legislature effected an exception to this general rule with an amendment to the Texas Non-Profit Corporation Act to permit podiatrists and doctors of medicine or osteopathy to create and jointly control a non-profit corporation for the purpose of providing professional health care services that fall within the scope of practice of the licensed practitioners. This permissible purpose is carried forwarded to the BOC.

XIII. Doing Business with the Secretary of State

A. *Accessing Public Information*

1. Information on corporations, professional corporations, professional associations, limited partnerships, limited liability companies, and registered limited liability partnerships is maintained by the secretary of state in a common computer database. Consequently, only one search is required to determine whether an entity under a particular name is registered with the secretary of state. Information is available through SOSDirect, a web access electronic self-service business system maintained by the secretary of state, or by calling the Corporations Section general information lines at (512) 463-5555. You also may direct requests for name availability advice and information on a specific business entity to corpinfo@sos.state.tx.us.

2. Copies and certificates of filed documents also are available from SOSDirect. Copies and certificates are provided in a pdf format and sent to you by e-mail. There are images of all documents filed with the Corporations and UCC Sections of the office since August 2001. As requests for other documents are processed, we convert those hard copy documents to images so that they are also available over the web. Turn time on certificates and documents for which an image is available on SOSDirect is usually two to four hours.

3. If you are not comfortable using the electronic resources available, request copies or certificates from secretary of state staff by calling (512) 463-5578, by e-mailing corpcert@sos.state.tx.us, or by faxing your request to (512) 463-5709.

B. *Use of Technology* — The secretary of state has upgraded computer technology and the agency's use of technology.

1. The secretary of state has a presence on the World Wide Web. Our home page can be located at http://www.sos.state.tx.us. Currently, you will find all administrative rules and all of the business organization forms that have been promulgated by the office on the Web. FAQs relating to filing issues are also available in the forms section. Forms can be faxed on demand by calling (900) 263-0060.

2. Secretary of state records, including corporation, limited partnership, limited liability company, assumed name, trademarks, and UCC filings, are available from the web. In accordance with Section 405.018 of the Government Code, the secretary of state has set a fee of $1.00 for searches over SOSDirect.

3. Texas currently permits EDI filing of UCC documents using the ANSI 154 transaction set.

4. SOSDirect provides subscribers with an electronic self-service business center that permits online access to filing functions and certification or copy orders. In general, SOSDirect is available twenty-four hours a day Sunday through Saturday. Further information regarding use and features of the SOSDirect system can be obtained from the SOSDirect home page at http://www.sos.state.tx.us/corp/sosda/index.shtml.

5. Most employees in the office can be reached via Internet e-mail. The e-mail address is name of the employee@sos.state.tx.us and the naming convention for any employee is first initial followed by last name. For example, the e-mail address for Robert Sumners is rsumners@sos.state.tx.us.

C. *Existing Services* — Some filing procedures currently in use by the secretary of state that we hope facilitate transactions with our office.

1. Fax filings: There are currently four fax machines in a rotary configuration as well as a voice mail box to accept facsimile transmission of filings.

2. Credit and debit cards: In payment of filing fee and copy/certificate requests, the secretary of state accepts payment by Visa, MasterCard, and Discover credit cards as well as the LegalEase debit system. Fees paid by credit card are subject to a statutorily authorized convenience fee, currently 2.1% of the total fees incurred.[137] The convenience fee will increase to 2.7% effective September 1, 2005.

3. Filing Guide for Business Organizations and Nonprofit Associations. Rather than publishing the Filing Guide in print format, the secretary of state has placed the Filing Guide on the Internet on our home page. As an electronic publication, it will be updated more frequently. It is available in Word, HTML, or Adobe formats. There are links to the Texas Administrative Code and all forms promulgated by the Secretary of State. Also, there are links to referenced statutes on the site of the Texas Legislature Online. The URL for the Filing Guide is: http://www.sos.state.tx.us/corp/forms/filingguide/index.shtml

4. Expedited Handling: If a document, other than a trademark document, must be reviewed in an expeditious manner, you may request "expedited handling." The fee for this service is $25 per document expedited.[138] The service generally provides for notification of filing disposition by close of business the first business day following the day of receipt.

ENDNOTES

[1] House Bill 1156 codified provisions of the following statutes: the Texas Business Corporation Act; the Texas Miscellaneous Corporation Laws Act (article 1302-1.01 et. seq. Vernon's Ann. Civ. St. (V.A.C.S.)); the Texas Non-Profit Corporation Act (article 1396 V.A.C.S.); the Cooperative Association Act (article 1396-50.01, V.A.C.S.); the Texas Uniform Unincorporated Nonprofit Association Act (article 1396-70.01, V.A.C.S.); the Texas Professional Corporation Act (article 1528e, V.A.C.S.); the Texas Professional Association Act (article 1528f, V.A.C.S.); the Texas Limited Liability Company Act (article 1528n, V.A.C.S.); the Texas Revised Limited Partnership Act (article 6132a-1, V.A.C.S.); the Texas Revised Partnership Act (article 6132b-1.01, et. seq. V.A.C.S.); and the Texas Real Estate Investment Trust Act (article 6138A, V.A.C.S.).
[2] *See*, Texas Business Organizations Code (BOC), § 1.001.
[3] You may view HB 1319 and its corresponding analysis at http://www.capitol.state.tx.us. From the Bill Status Page, select 79th Regular Session—2005 from the dropdown box and select the Text option.
[4] Art. 2.05 and 8.03 of the Texas Business Corporation Act (hereinafter "TBCA"); Sec. 1.03 of the Texas Revised Limited Partnership Act, article 6132a-1(hereinafter "TRLPA"); and Art. 2.03 and 7.03 of the Texas Limited Liability Company Act, article 1528n (hereinafter "TLLCA")
[5] Section 5.063(b) of the BOC was amended by House Bill 1319 to correct a typographical error, thereby conforming the subsection to existing standards and practice.
[6] *See* 1 TAC §79.35 and *Steakley v. Braden* 322 S.W. 2d 363 (Tex. Civ. App.--Austin 1959, no writ).
[7] *See* 1 TAC §79.36
[8] *See* 1 TAC §79.37
[9] *See* 1 TAC §79.39
[10] *See* 1 TAC §79.40
[11] *See* 1 TAC §79.43
[12] *See* 1 TAC §79.38 and *Steakley v. Braden*, *id at* 365 wherein the Texas Court of Civil Appeals held that the provision regarding filing of name with a letter of consent did not apply to deceptively similar names. "If the word 'deceptive' were read into the proviso then the Legislature would have empowered an individual or a single corporation to authorize, by giving consent, the practice of unfair competition, confusion and fraud."
[13] Sec. 5.053 BOC
[14] Art. 2.05C TBCA
[15] Sec. 5.001 BOC
[16] Art. 2.05A(2) TBCA; Art. 2.03A(2) TLLCA; Sec. 1.03(2) TRLPA, and Sec. 5.052 BOC
[17] Sec. 31.005 Texas Finance Code
[18] Persons seeking the issuance of a letter of no objection are to contact the Corporate Activities Division of the Texas Department of Banking at 2601 North Lamar Blvd., Austin, Texas 78705-4294. Submission of a written request and provision of certain information, together with a $100 filing fee, is required for consideration of the proposed name. Further information may be obtained at www.banking.state.tx.us or by calling (512) 475-1300.
[19] Sec. 39 of Art. 1396-50.01, Sec. 5.057(b) BOC, and Sec. 251.452 BOC
[20] Art. 711.021(h), Tex. Health & Safety Code.
[21] Sec. 61.313 Texas Education Code
[22] Art. 1302-3.01 Texas Miscellaneous Corporations Laws Act (hereinafter "TMCLA") and Sec. 5.062 BOC
[23] Art. 2.05A(4) TBCA
[24] Sec. 5.061 BOC
[25] Sec. 16.30 Texas Business & Commerce Code (hereinafter "TB&CC"); Amateur Sports Act 36 U.S.C. §380 (1978)
[26] Art. 2.05 TBCA
[27] Act of May 3, 2005, 79th Leg., R.S., ch. 67. § 1, House Bill 1507, effective September 1, 2005
[28] Art. 8.03 TBCA
[29] Art. 8.05A(2) TBCA. The name that the corporation elects for use in Texas with the appropriate word of incorporation or abbreviation denoting incorporation should be set forth on the application for certificate of authority. Because the name of the corporation as stated on its articles of incorporation from its jurisdiction of incorporation will differ from the name on its certificate of authority, the corporation should consider whether an assumed name should be filed under Chapter 36 of the TB&CC.
[30] Sec. 1.03 TRLPA
[31] Art. 2.03A(1) TLLCA. Please note that while this statute is very specific regarding punctuation and capitalization of the words and the abbreviations of organization, the secretary of state will not refuse to file articles of organization or other documents for a limited liability company if, for example, the punctuation is missing or the abbreviation CO. is in all caps.
[32]Art. 6132b-3.08 Texas Revised Partnership Act (hereinafter "TRPA") Note that the secretary of state will file a registration under this section for a limited liability partnership if the abbreviation R.L.L.P. is used. As a result of the passage of House Bill 1637 by the 78th Legislature in its Regular Session, the phrase "limited liability partnership" may be used to denote organization, effective September 1, 2003.

[33] Art. 6132b-3.08(e) TRPA, Sections 5.055 and 153.351 BOC
[34]Art. 2.14(a)(3) TRLPA
[35] These comments are also applicable to professional corporations and associations.
[36]Art. 11.02A TLLCA and Sec. 5.059 BOC
[37]Art. 11.02A TLLCA and Sec. 5.060 BOC
[38]The secretary of state does not have experts on the rules and regulations that may apply to different professions. Consequently, we suggest that the licensing board be consulted if questions arise about the appropriateness of the name of a PLLC or PC. If a name is determined to be in violation of the statutes or ethics of the profession, articles of amendment must be filed to change the name.
[39] John Smith, Certified Public Accountant, PLLC is a correct usage of the credential; John Smith and Associates, PLLC, CPA is incorrect.
[40] Professional Ethics Opinion No. 393 (1978)
[41] The Attorney General of Texas has opined that engineers form business corporations rather than professional corporations. *See,* Op. Tex. Att'y Gen. No. M-551 (1970). The definition of " professional service" in the Texas Professional Corporation Act differs from that in the TLLCA in that the first definition requires that in order to be considered a professional service the service could not by reason of law be performed by a corporation prior to the passage of the Act. Since the definition in the TLLCA does not contain this restriction, the secretary of state will file articles of organization providing for the creation of a PLLC to engage in the practice of engineering.
[42] Texas Engineering Practice Act, Sec. 1001.004 Texas Occupations Code. At the request of the Texas Board of Professional Engineers, the secretary of state after filing sends a copy to the Board of all articles of organization that contain the word Engineer or Engineering in the name in order that the Board may investigate and determine compliance with this section.
[43] The Attorney General of Texas has opined that architects form business corporations rather than professional corporations. *See,* Op. Tex. Att'y Gen. No. M-539 (1970). The definition of " professional service" in the Texas Professional Corporation Act differs from that in the TLLCA in that the first definition requires that in order to be considered a professional service the service could not by reason of law be performed by a corporation prior to the passage of the Act. Since the definition in the TLLCA does not contain this restriction, the secretary of state will file articles of organization providing for the creation of a PLLC to engage in the practice of architecture.
[44] After filing, the secretary of state sends a copy to the Texas Board of Architectural Examiners of all articles of organization that contain certain words in the name in order that the Board may investigate and determine compliance with their rules and regulations.
[45] After filing, the secretary of state sends copies of documents utilizing the words registered public surveyor to the Texas Board of Professional Land Surveying for the board to determine compliance with the Professional Land Surveying Practices Act (Sec. 1071.251 Texas Occupations Code).
[46] Sec. 1.03 TRLPA
[47] Sec. 1.03(4) TRLPA
[48] Sec. 17.46(b)(25) TB&CC
[49] Art. 2.06 TBCA
[50] House Bill 1507, which becomes effective September 1, 2005, amended section A of article 2.06 of the TBCA to eliminate language tying the name reservation to a person's intent and purpose. This amendment aligns the name reservation provisions of the TBCA to the BOC.
[51] Art. 2.04 TLLCA
[52] Sec. 1.04 TRLPA
[53] Effective September 1, 1997, the filing fee for a name reservation for a limited partnership was decreased from $75.00 to $50.00 as a result of the passage of SB 555 during the 75th Legislative Session.
[54] SB 555 also eliminated the renewal provisions for a name reservation for a limited partnership. However, the renewal of a name reservation is permitted under the provisions of the BOC.
[55] Art. 2.06D TBCA
[56] Art. 2.04D, TLLCA
[57] Sec. 1.04(c) TRLPA
[58] House Bill 1319 amended the BOC to add new section 5.1041, which specifically prohibits the secretary of state from imposing a fee for the withdrawal of a name reservation.
[59] §36.11(a) TB&CC
[60] §36.02(7)(F) TB&CC
[61] §36.02(7)(D) TB&CC
[62] §36.02(7)(H) TB&CC
[63] §36.02(7)(G) TB&CC
[64] Sec. 13.05 TRLPA
[65] Sec. 13.06 TRLPA and Sec. 153.309 BOC
[66] Sec. 13.08 TRLPA and Sec. 153.311 BOC
[67] Sec. 13.09 TRLPA and Sec. 153.312 BOC
[68] Art. 6132b-3.08(b)(5) TRPA and Sec. 152.802(e) BOC

[69] Art. 6132b-3.08(b)(7) TRPA and Sec. 152.802(g) BOC
[70] Sec.1.02(3) of the TRLPA defines a "foreign limited partnership" as a partnership formed under the laws of *another state.* As specified in subsection (14) "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any state, territory, possession or other jurisdiction of the United States. This definition precludes the registration under this Act of a limited partnership created under the laws of another country. However, the BOC defines "foreign" to mean, with respect to an entity, that the entity is formed under and governed by the laws of a jurisdiction other than Texas. Accordingly, a limited partnership formed in a jurisdiction outside the United States will be required to register when transacting business in Texas.
[71] Sec. 9.02 TRLPA and Sec. 9.001 BOC
[72] Sec. 9.07(d) TRLPA. Please note that the authority to collect fines under this provision dates back to September 1, 1987. The secretary of state does not assess a fine for any activity prior to that date.
[73] 1 TAC §83.4. The secretary of state has been more proactive in pursuing foreign entities that are transacting business in Texas without a certificate of authority, registration statement or comparable document. In the case of a business corporation or limited liability company, the secretary of state currently has no authority to collect monetary penalties, but will refer the matter to the attorney general for collection of statutory penalties. The permissible penalties under the TBCA and the Texas Limited Liability Company Act are potentially significantly higher than the penalty imposed under the TRLPA. Under those Acts, the attorney general may seek fines of not less than $100 nor more than $5,000 for each *month* the entity has transacted business without a certificate of authority. In addition, the entity is liable for all unpaid franchise taxes, penalties and interest.
[74] This would apply to professional corporations as well as professional associations as the provisions of the Texas Professional Corporation Act [hereinafter "TPCA"] and the Texas Professional Association Act [hereinafter the "TPAA"] make the TBCA applicable to such entities. Sec. 5 TPCA and Sec. 25 TPAA.
[75] Sec. 152.910(a) BOC makes subchapter B of chapter 9, which contains the late filing fee provision, applicable to foreign LLP registrations.
[76] Sec. 9.004 BOC and Sec. 9.007 BOC, as amended.
[77] Sec. 21.802 would apply to professional corporations as well as professional associations as Sec. 302.001 and Sec. 303.001 make the provisions of Chapter 21 applicable to these professional entities.
[78] Sec. 10.02 TRPA and Sec. 152.905 BOC. As of July 1, 2005, approximately 770 statements of foreign registration have been filed since the enactment of the qualification requirements in 1997. As of July 1, 2005, approximately 390 foreign limited liability partnerships are currently registered.
[79] 1 TAC §80.2(f)
[80] Sec. 152.910 BOC
[81] Certificate of authority procedures were facilitated for business corporations in 2003 by the passage of House Bill 1165, which amended the TBCA to eliminate the need for a foreign corporation to include a certification from its home jurisdiction when making an application for certificate of authority. The Act however did not amend the qualification provisions of the Texas Non-Profit Corporation Act; consequently, the qualification of a foreign non-profit corporation still requires a certificate of existence from the entity's jurisdiction of formation.
[82] Art. 1.02(9) TLLCA
[83] 115 S.W.2d 468 (Tex. Civ. App. 1938)
[84] House Bill 1637, 78th Legislature, effective September 1, 2003.
[85] Sec. 9.051 to Sec. 9.052 BOC
[86] Sec. 402.012 BOC
[87] Sec. 9.009 (a-1) BOC
[88] Sec. 10.156(2) BOC requires franchise tax clearance as a condition of acceptance. The secretary of state will require tax certification or the alternative statement for business and professional corporations and limited liability companies that are parties to a merger or conversion. Limited partnerships and professional associations are not subject to franchise taxes at this time.
[89] Art. 5.04C TBCA; Art. 5.18C TBCA; Art. 10.03B TLLCA, Art. 10.09C TLLCA, and Sec. 10.156(2) BOC
[90] Art. 5.04A(1) TBCA; Sec. 2.11(d)(1) TRLPA
[91] The provisions of Sec. 2.11(d)(1) also permit the filing of a summary of the plan of merger and for the partnership agreement to dictate the provisions regarding furnishing partners with copies or summaries of the plan of merger or notices regarding the merger.
[92] The short form merger of one or more subsidiaries into another subsidiary is only permitted if at least 90% of the ownership interests are owned by the parent entity.
[93] In the case where the parent entity is a Texas corporation, the plan of merger must be adopted pursuant to the provisions of article 5.03 of the TBCA.
[94] Art. 6132b-9.02 TRPA
[95] Partnership includes a foreign or domestic limited partnership and a joint venture.
[96] Art. 10.02A(2) TLLCA and Sec. 2.11(d)(2) TRLPA
[97] Art. 5.17, 5.18, 5.19 and 5.20 TBCA
[98] Art. 10.08, 10.09, 10.10, and 10.11 TLLCA
[99] Sec. 2.15 TRLPA
[100] Art. 6132b-9.05 TRPA

[101] Op. Tex. Att'y Gen. No. JC-0015 (March 8, 1999). Sec. 162.253 of the Texas Utilities Code specifically allows a domestic corporation authorized to furnish communication service to consolidate and convert to a telephone cooperative.
[102] Pursuant to section 9.01, articles of conversion are not filed with the secretary of state to evidence the conversion of a general partnership to a limited partnership and vice versa. Before September 1, 2005: When converting from a general partnership to a Texas limited partnership, the certificate of limited partnership must include, in addition to the other matter required: a) a statement that the partnership is converting from a partnership that is not a limited partnership to a limited partnership; b) the name or names of the partnership before the conversion to a limited partnership; c) the names of the general partners before the conversion; d) the state in which the partnership was organized before the conversion; e) the change in name required, if any, in connection with the operation of the partnership as a limited partnership in this state; and f) the effective date of the conversion if different from the date the certificate is filed by the secretary of state. When converting from a Texas limited partnership to a general partnership, a cancellation of the certificate of limited partnership would be filed with the secretary of state and the partnership's agreement would be amended to reflect its change in status and any change in name.
[103] This conversion fee applies to a conversion governed by Sec. 2.15 of the TRLPA, and not Sec. 9.01 TRPA.
[104] Sec. 9.06 TRPA. This filing fee applies to a conversion governed by Sec. 9.05 TRPA, and not Sec. 9.01 TRPA.
[105] Sec. 10.010 BOC
[106] Art. 9.03F TLLCA and Sec. 2.12F TRLPA require a certificate of abandonment to be filed with the secretary of state.
[107] Art. 5.03L TBCA requires the filing of a statement of abandonment with the secretary of state.
[108] Art. 5.17E TBCA requires the filing of a statement of abandonment with the secretary of state.
[109] 1 TAC Sec. 79.82
[110] Art. 10.03A(3) TBCA; Art. 1396-10.07A(3) Texas Non-Profit Corporation Act (hereinafter "TNPCA"); Sec. 2.12A(3) TRLPA; Art. 9.03A(4) TLLCA, Sections 4.052 to 4.056 BOC
[111] Sec. 11.203 BOC
[112] Sec. 11.202(e) BOC
[113] Art. 7.01E and art. 8.16 TBCA, Art. 7.01E and art. 8.15 TNPCA, Art. 7.11E TLLCA.
[114] Forrest N. Welmaker, Jr. v. The Honorable Henry Cuellar, Secretary of State, 37 SW 3d 550, (Tex. Civ. App.—Austin 2001, pet. denied)
[115] Sec. 2A(2) TPAA; Art. 11.01A(3), Sec. 301.012 BOC
[116] Sec. 2A(3) TPAA; Sec. 4(b) TPCA; Art. 11.01A(3) TLLCA, Sec. 301.012 BOC
[117] Sections 162.051 and 351.366 of the Texas Occupations Code [Tex. Occ. Code] authorize physicians, optometrists and therapeutic optometrists to jointly own and manage certain types of business entities. Although Sections 162.051(a)(3) and 351.366(a)(3) authorize the joint ownership of a limited liability company by such professionals, the provisions of the TLLCA do not permit a professional limited liability company to be jointly owned or formed to engage in the joint practice of medicine and optometry. However, section 301.012 BOC authorizes this joint practice.
[118] Sec. 301.012 BOC authorizes this joint practice.
[119] Sec. 2A(4) TPAA; Sec. 4(b) TPCA; Art. 11.01A(3) TLLCA.
[120] Art. 8.12A TLLCA
[121] Art. 1302-1.01 *et seq.*,TMCLA
[122] Art. 8.12B TLLCA
[123] See also Art. 2.23E TLLCA regarding the affirmative vote or approval of the managers of the limited liability company.
[124] An amendment to a partnership agreement may be effected only with the consent of all partners. Art. 6132b-4.01(i) TRPA
[125] Art. 7.12E TBCA
[126] 1 TAC §§79.21, 80.3, and 83.3
[127] *Beall v. Strake* 609 S.W. 2d 885 (Tex. Civ. App.--Austin 1981, writ ref'd n.r.e.)
[128] House Bill 1165, which was enacted by the 78th Legislature, amended the TBCA and the TNPCA to provide for the court ordered revocation of articles of dissolution when the corporation was dissolved as a result of actual or constructive fraud and authorizes the secretary of state to take any action necessary to reactivate the corporation. See, Art. 6.08, TBCA and Art. 1396-6.07 of the TNPCA.
[129] Art. 10.02 TBCA; Art. 1396-9.03A TNPCA; Art. 9.02A TLLCA; Sec. 2.04(c) TRLPA
[130] Sec. 2.08 TRLPA
[131] Sections 4.007 and 4.008 BOC
[132] Senate Bill 1377 also creates a separate fee of $10 for issuance of an apostille in connection with an adoption and limits the total fees that can be charged for apostilles related to an adoption of a single child to $100.
[133] Art. 1302-7.01 through 7.05 TMCLA applicable to corporations and LLCs; Sec. 2.13 TRLPA; Sections 4.101 to 4.105 BOC
[134] Art. 1302-7.04C TMCLA; Sec. 2.13(c)(3) TRLPA
[135] Sec. 201.102 Texas Finance Code
[136] Sec. 9.004 Texas Trust Company Act
[137] Sec. 405.031(e) Texas Government Code
[138] Sec. 405.032 Texas Government Code. The passage of Senate Bill 570 by the 76th Legislature increased the fees from $10.00 to $25.00 for the expedited handling of documents and from $5.00 to $10.00 for the expedited handling of certified copies or certifications effective September 1, 1999.