



Texas Secretary
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Doing Business with the Secretary of State

Presented by:

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Office of the Secretary of State

Presented to:

2007 Partnerships, Limited Partnerships and LLCs

University of Texas School of Law Continuing Legal Education

July 19-20, 2007

Austin, Texas

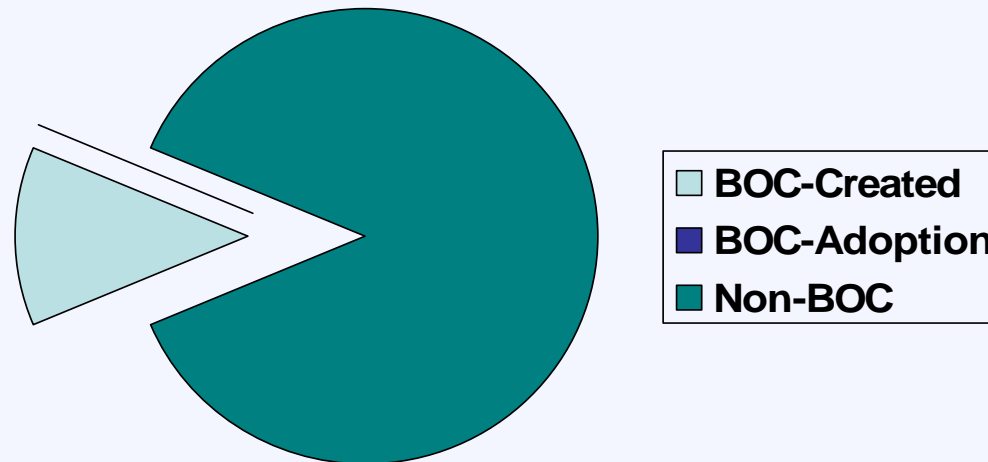


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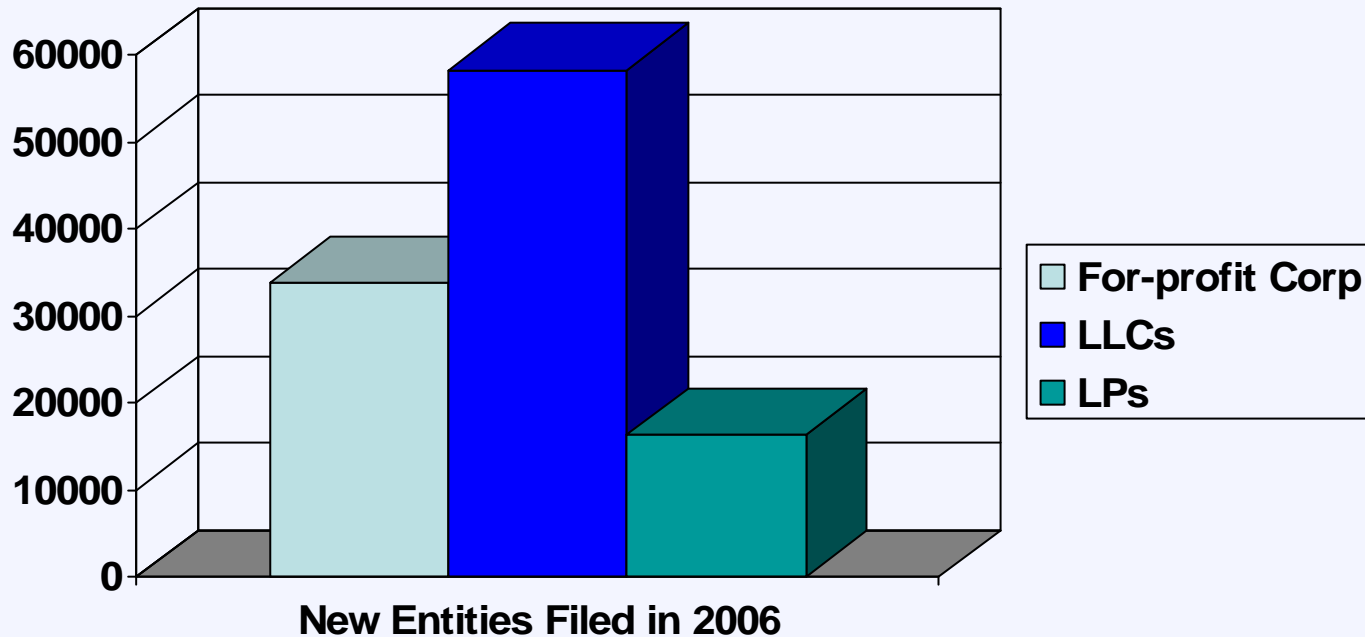
The Transitioning Landscape

The vast majority of existing entities are still governed by prior law.





Limited Liability Companies—Entity of Choice





Most Common Reason for Document Rejection



- Name availability conflicts
- Under the provisions of prior law and the BOC, an entity name shall not be the same as or deceptively similar to an existing entity name.
- Names may be similar with consent of existing entity.





Most Common Reason for Rejection

- Names cannot be deceptively similar with a letter of consent. *Steakley v. Braden*, 322 S.W.2d 363 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.)
- When the only difference between the name of the newly created GP and the name of the newly created LP is a different word of organization, the names are deceptively similar.

ABC Investors, Inc. is deceptively similar to ABC Investors LP.

Letter of consent is not an option.





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Limited Partnership Name Issues

Pursuant to Sec. 1.03 TRLPA, a limited partnership name cannot include the name of a limited partner unless:

- the name is also the name of a general partner; or
- the business of the partnership had been carried on under that name before admission of the limited partner.

The BOC *does not* carry this restriction forward.



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Limited Partnership as LLP Name Issues

HB 1737 amends Sec. 5.055 to simplify the naming convention for limited partnerships that also register as limited liability partnerships.

- The name of the LP complies with the requirements of Sec. 5.055 if the name of the partnership contains only the phrase “limited liability limited partnership” or the abbreviation “LLLP” or “L.L.L.P.”





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Other Limited Partnership Name Issues

Pursuant to Sec. 1.03 TRLPA, an LP name cannot contain a word or phrase indicating or implying that it is a corporation. (i.e., Incorporated, Inc., Corporation, or Corp.)

BOC *does not* carry this prohibition forward; however, sec. 17.46(b)(25) of the Business & Commerce Code prohibits use of a term of incorporation by an unincorporated entity.



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Name Reservations

- Name reservations are valid for 120 days and may be renewed. Standard fee for reservation or renewal--\$40. No fee for withdrawal before expiration.
- Name reservation may be applied to any filing entity type.
- No transfer or withdrawal of reservation necessary for applicant to file “New Business, Inc.” when “New Business, LLC” reserved by applicant.





Name Reservations

- Although a name reservation is not limited to a specific entity type, the SOS suggests that the reservation indicate an entity type to facilitate review.
- A name chosen for one specific entity type may imply or indicate an unlawful purpose for another entity type. E.g., “*E & O Medical Services*” is appropriate for a professional association, but not for the purpose of forming a for-profit corporation.





Assumed Names

- Sec. 5.051 of the BOC authorizes the use of an assumed name by a domestic entity or authorized foreign entity.
- Although domestic and foreign corporations, LLCs, LPs, and LLPs are authorized to file assumed names with the SOS, chapter 36 of the Business & Commerce Code *does not* authorize the SOS to accept assumed name certificates for a domestic or foreign REIT, or a foreign business trust.





Registration of Foreign Entities

Who's required to file?



- A foreign entity that affords limited liability for any owner or member under the laws of its jurisdiction of formation.
- Includes foreign business trusts and REITS.





Duplicate Registration of LLLP

- Required to register as a foreign LP under chapter 9 of the BOC.
- Also required to file the annual application for registration as a foreign LLP under sec.152.905.
- BOC late filing penalty will be assessed on both registrations if not filed within 90 days of *beginning date of doing business in Texas*.





Foreign Entities—Failure to Register

- ✓ Attorney General may enjoin entity from transacting business.
- ✓ Entity cannot maintain an action or proceeding in court until registered.
- ✓ Civil penalty in an amount equal to all fees and taxes that would have been imposed.





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Foreign Entities—Failure to Register

Late filing penalty equal to registration fee for each year of delinquency. *A partial calendar year is counted as a full year.*

Application for registration must be filed within 90 days of the beginning date of transacting business.

SOS will precondition filing of application on payment of the late filing fee.



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Beginning Date of Business vs. Late Fee

Calculation of the late fee may not always relate to the beginning date of business stated in the application.

- A foreign entity that was not required under prior law to register, but that is required to register under the BOC, will be assessed a late fee for a period beginning no earlier than January 1, 2006. (e.g., foreign REIT or business trust)





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Misstating Beginning Date of Business

May affect ability to maintain suit: See, *Coastal Liquids Transportation, L.P. v. Harris County Appraisal District, 46 S.W.3d 880 (Tex. 2001)*

➤ While a certificate of correction may be filed to correct a misstated beginning date of business, this will result in the imposition of additional fees if the date as corrected would have resulted in the imposition of a late filing fee at the time of registration.



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Efforts to Facilitate and Encourage Compliance

- ✓ SOS elects to exercise discretionary authority under Sec. 9.054 by:
 - Placing a cap on the number of calendar years for which a late filing penalty is assessed;
 - Determining the requirements that must be met before a foreign filing entity qualifies for a cap on its late fees; and
 - Setting the cap on late fees at 5 years.





Efforts to Facilitate and Encourage Compliance

Conditions for obtaining 5 year cap on late fees:

- Entity must be able to establish that it is current on all taxes and fees owed to any Texas state agency or, if the entity is tax-exempt, the entity must be able to provide a letter from the comptroller of public accounts to that effect.
- Entity has not been contacted by the SOS regarding the need to register or, if contacted by the SOS, the entity complied with SOS request within 45 days of initial contact.





Efforts to Facilitate and Encourage Compliance

- ✓ Comptroller offers amnesty for penalties and interest for taxes owed by foreign entities that have never registered and never established a tax account.
 - Amnesty period runs from June 15th to August 15th 2007—limited time offer!
 - Amnesty does not apply to taxpayers already under audit or review by the comptroller. Comptroller web site provides further information and instructions. (www.cpa.state.tx.us)





Avoidance of Late Filing Fee



If there is no overriding reason for entity to be a foreign entity, consider whether to convert to a Texas entity or merge the entity into a newly created Texas entity.





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Foreign Entities Involved in Merger or Conversion

A foreign filing entity may amend its application for registration ([Form 422](#)) to disclose a change that results from:

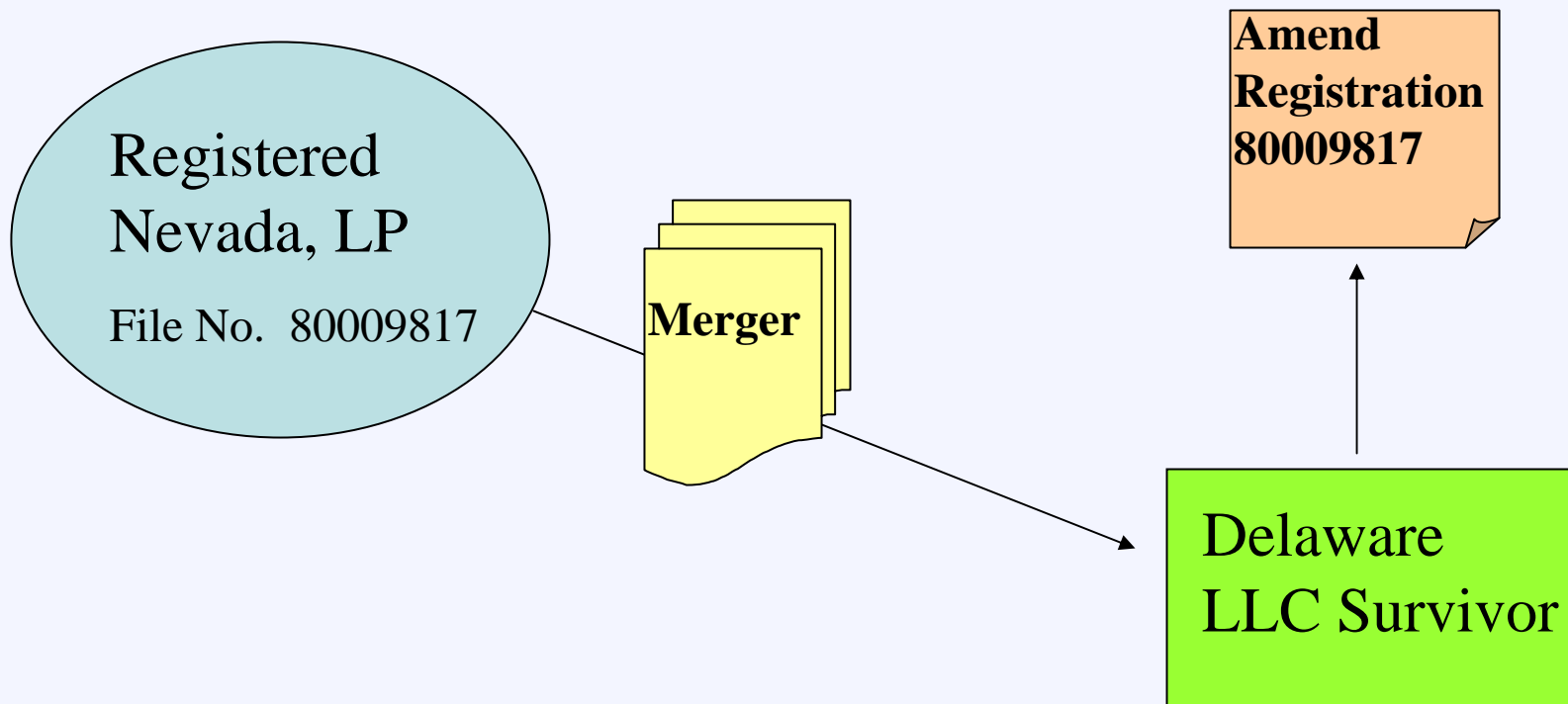
- a conversion of one type of foreign filing entity to another; or
- a merger into another foreign filing entity with the surviving entity succeeding the original filing entity on the registration.



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BOC--Foreign Entities





Registration of Foreign Series LLCs

- A series LLC treated as a single legal entity in its jurisdiction of formation will be treated as a single legal entity for qualification purposes.
- The LLC, rather than the individual series of the LLC, should obtain the application for registration.
- If a series does business under a name that differs from the legal name of the LLC, the LLC should file an assumed name certificate.





Mergers and Conversions

The filing of a certificate of merger is required if:

- ✓ any domestic entity that is a party to the merger is a filing entity; or
- ✓ any domestic entity to be created under the plan of merger is a filing entity.

A general partnership is not a *filing entity*.





Mergers and Conversions

Mergers, consolidations, or conversions controlled by other statutes continue to be governed by those statutes.

- ✓ Chapter 162 of the Utilities Code will continue to govern telephone cooperative consolidations and mergers.
- ✓ Part 5 of the TBCA continues to govern the merger of a corporation governed by the TBCA until January 1, 2010, unless the entity has elected to adopt the BOC.





Mergers and Conversions—Transitional Filings

BOC merger and conversion provisions modeled on prior law. However, source law still contains some differences in filing requirements with respect to for-profit corporations.

- ✓ Namely, information relating to the number of outstanding shares & corporate shareholder approval required of a non-BOC domestic corporation.

Alternative—follow procedures to adopt the BOC.





Mergers and Conversions—SOS Forms

- Designed for BOC-entity transactions only.
- **Do not include a plan of merger or conversion.** A copy of the plan of merger or conversion may be attached to the form, or the alternative statements may be completed.
- Not designed to address filing requirements of other jurisdictions or cross-statutory transactions.
- Not designed to effect a re-domestication of a foreign or domestic entity.





Mergers and Conversions—SOS Formation Forms

SOS certificates of formation do not include the additional language required by § 3.005(7).

- A statement that the entity is formed under a plan of merger or conversion.
- If conversion, the name, address, date of formation, prior form of organization, and jurisdiction of formation of the converting entity.





Mergers and Conversions—Common Rejections

- ❌ Use of SOS merger form by a non-BOC corporation.
- ❌ Failure to include additional statements in the certificate of formation of converted domestic entity or domestic entity created by merger. If using SOS form, provide additional statements as supplemental information.
- ❌ Entity status (e.g., involuntary termination of LP, etc.).
- ❌ Tax clearance issues.





Avoid Tax Clearance Issues

- ✓ Submit a certificate of account status for each merging or converting domestic entity and registered foreign entity;
or
- ✓ Include statement that one or more of the surviving or new entities in the merger, or the converted entity in a conversion, will be responsible for the payment of all fees and franchises taxes and will be obligated to pay any fees and franchise taxes if not timely paid.





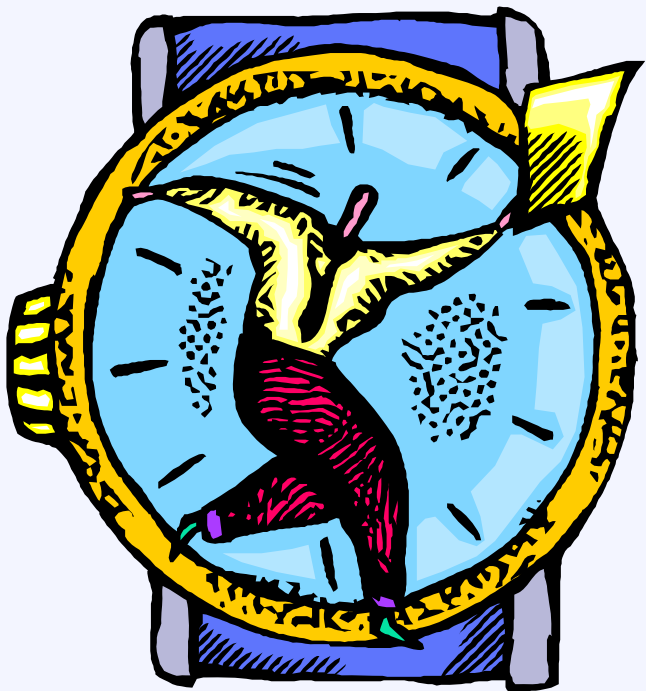
Abandonment of Merger or Conversion

- A merger or conversion that has not become effective may be abandoned.
- When effectiveness is conditioned on the occurrence of a future event (delayed effective condition), parties must file a statement with the SOS within 90 days of execution in order for the transaction to become effective.
- Failure to file the statement of satisfaction or waiver of condition *does not* effect an abandonment.





Other Merger Abandonment Issues



- Once a merger becomes effective there is no statutory filing that can undo the merger transaction.
- A non-surviving domestic entity in a merger is not a “terminated entity” for purposes of reinstatement under section 11.202 of the BOC.





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Nonprofit Mergers

Under TNPCA, a nonprofit corporation may merge only with other domestic or foreign nonprofit corporations and may have only one surviving corporation.

BOC has more permissive merger provisions for nonprofit corporations *with limitations*.



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Nonprofit Mergers—Limitations

The domestic nonprofit *may not* merge with a for-profit entity if:

- ✓ The domestic nonprofit corporation does not continue as the surviving entity; or
- ✓ If the nonprofit corporation will lose or impair its tax-exempt status.

Filing fee for this type of transaction: **\$300.**





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Nonprofit Conversions

TNPCA did not specifically authorize the creation of a nonprofit corporation by conversion.

BOC specifically authorizes creation of a nonprofit corporation by conversion.

Domestic nonprofit corporation may not convert to a for-profit entity.



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Professional Entities—Title 7 of the BOC



Professional entity means a professional corporation, professional association and a professional LLC.

Term does not include partnerships that provide a professional service.



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Is the Service Provided a Professional Service?

“Any type of service that requires, *as a condition precedent to the rendering of the service*, the obtaining of a license *in this state*, including the personal service rendered by an architect, attorney, certified public accountant, dentist, physician, public accountant, or veterinarian.”

Rule 1. Look to Law Governing Service Provided





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Look to Law Governing Profession

If legislation governing the licensed activity only licenses individuals to perform the professional service, must form a professional entity.

If legislation authorizes the issuance of a license to provide the professional service to a corporation, as well as an individual, the licensed professional may form a professional entity or a for-profit corporation. See, Tex. Att'y Gen. Op. JC-536 (2002)



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Professional Entities—Changes Effected by HB 1737

- Sec. 3.007 (supplemental information required in a certificate of formation of a for-profit corporation) amended to clarify that provision also applies to a PC.
- Sec. 3.008 amended to clarify that a PC may be formed as a close corporation.
- Sec. 301.003(3) amended to exclude practice of medicine as a professional service that may be rendered through a PC.





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Professional Entities—Changes Effected by HB 1737

Sec. 3.015 amended to require that a certificate of formation for a professional association include information regarding management structure:

- state whether governed by a board of directors or executive committee; and
- provide names and address of each individual on the initial board or executive committee.



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Professional Entities—Changes Effected by HB 1737

Sec. 3.015 amended to eliminate the statement that “a member of the association may not dissolve the association independently of other members of the association.”

- ✓ The SOS *will not* reject a formation document that includes this statement.
- ✓ The SOS *will* have authority to reject the certificate of formation if it fails to include the management statement and information required under amended Sec. 3.015.





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Effects of HB 3 and HB 3928

Christmas...*in June*???



HB 3928 resulted in a record number of filings as entities reorganized and merged out of existence before the June 30, 2007 deadline.



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When is Certificate of Good Standing Required?

Certain filing transactions require a certificate of good standing as a pre-condition to filing:

- ✓ Voluntary dissolution filed under TBCA;
- ✓ Voluntary dissolution filed under TLLCA; and
- ✓ Voluntary termination filed under chap. 11 BOC when entity is a for-profit corporation, professional corporation, or limited liability company.



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When is Certificate of Good Standing Required?

Neither HB 3 nor HB 3928 amended the BOC or its source statutes. A certificate of good standing *is not* required as a condition for filing:

- ✓ Voluntary dissolution filed by PA under TPAA;
- ✓ Cancellation of LP certificate under TRLPA;
- ✓ Voluntary termination filed under chap. 11 BOC when entity is a PA or LP; and
- ✓ Withdrawal or termination of LLP registration.





When is Tax Clearance Required?

Some transactions require a determination that all required taxes have been paid as a condition for filing:

- ✓ Mergers and conversions filed pursuant to TBCA, TLLCA, TRLPA, TRPA, and BOC;
- ✓ A reinstatement following an involuntary dissolution filed by a for-profit corporation, professional corporation, professional association, or LLC under the TBCA and TLLCA; and
- ✓ A reinstatement filed under chapter 11 BOC when filed by a for-profit corporation, professional corporation or a LLC.





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Other Changes Effected by HB 3928

SOS authorized to:

- Forfeit certificate or registration of a taxable entity after receiving notification from comptroller;
- Revive the certificate or registration of a forfeited taxable entity; and
- Adopt administrative rules relating to revival process.



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LPs Registered as LLPs

❖ While a domestic limited partnership subject to the margin tax may forfeit its privileges and be subject to forfeiture of its certificate, it is our understanding that the LLP registration itself will not be subject to forfeiture by the SOS.





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Public Information Report (PIR)

PIRs provide information on an entity's management and information relating to parent and/or subsidiary entities.

HB 3928 maintains PIRs for corporations and LLCs.

It is still not clear whether other taxable entities will be required to file similar reports as a matter of public record.



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Homeland Security & Business Entity Formation

Federal government concerns:

- ✓ U.S. companies used by foreign nationals and others to engage in money laundering and other illicit activities.
- ✓ State filing officers not collecting sufficient information to enable law enforcement agencies to investigate and prosecute companies/individuals.



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Homeland Security & Business Entity Formation

State government concerns:

- ✓ Collection and verification of information will increase processing time, costs and workloads, and derail legitimate business transactions.
- ✓ Authority under state business statutes to require provision of such information.
- ✓ Maintaining information raises privacy issues.



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Homeland Security & Business Entity Formation

Possible solutions:

- ✓ Amend business entity statutes.
- ✓ Require annual reports to state filing officials.
- ✓ Impose duty on governing persons for maintaining and providing lists of beneficial owners.
- ✓ Require entities to provide information to state official on written request.
- ✓ Post notice regarding “watch list.”



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Texas Scorecard

Texas may already address certain federal concerns.

- ✓ Certificates of formation require management information.
- ✓ Corporations and LLCs file PIRs annually containing management and parent/sub information.
- ✓ Texas checks management information against the Watch List.
- ✓ SOS's interrogatory powers under the BOC. (However, information is public information).
- ✓ AG's authority to inspect books and records under BOC, which is not subject to disclosure.





Other Privacy Issues

- The SOS is required to provide any information deemed to be public information and cannot limit or restrict the purposes for which it may be used.
- All filed documents are scanned into the computer system and the document image is accessible online through SOSDirect.
- Use client's business address when required to provide management information for filings and PIRs.





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Need Help?

Contact SOS by Email

Name availability & general entity information:

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

Request copies or certificates of fact:

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

Legal questions relating to filing issues:

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

SOSDirect assistance & issues:

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



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Need Help?

Contact SOS by Email

Contact individual at SOS:

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

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cflores@sos.state.tx.us



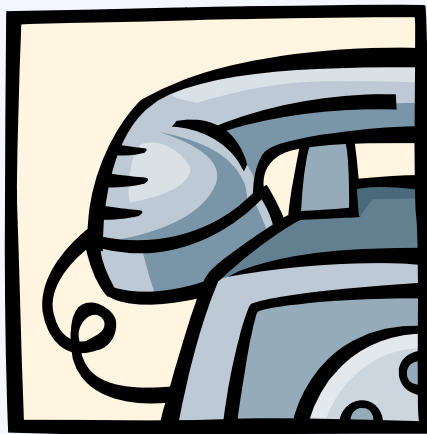
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Need Help? Call



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