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# Business Organizations Code: A View from the Trenches

Presented by:  
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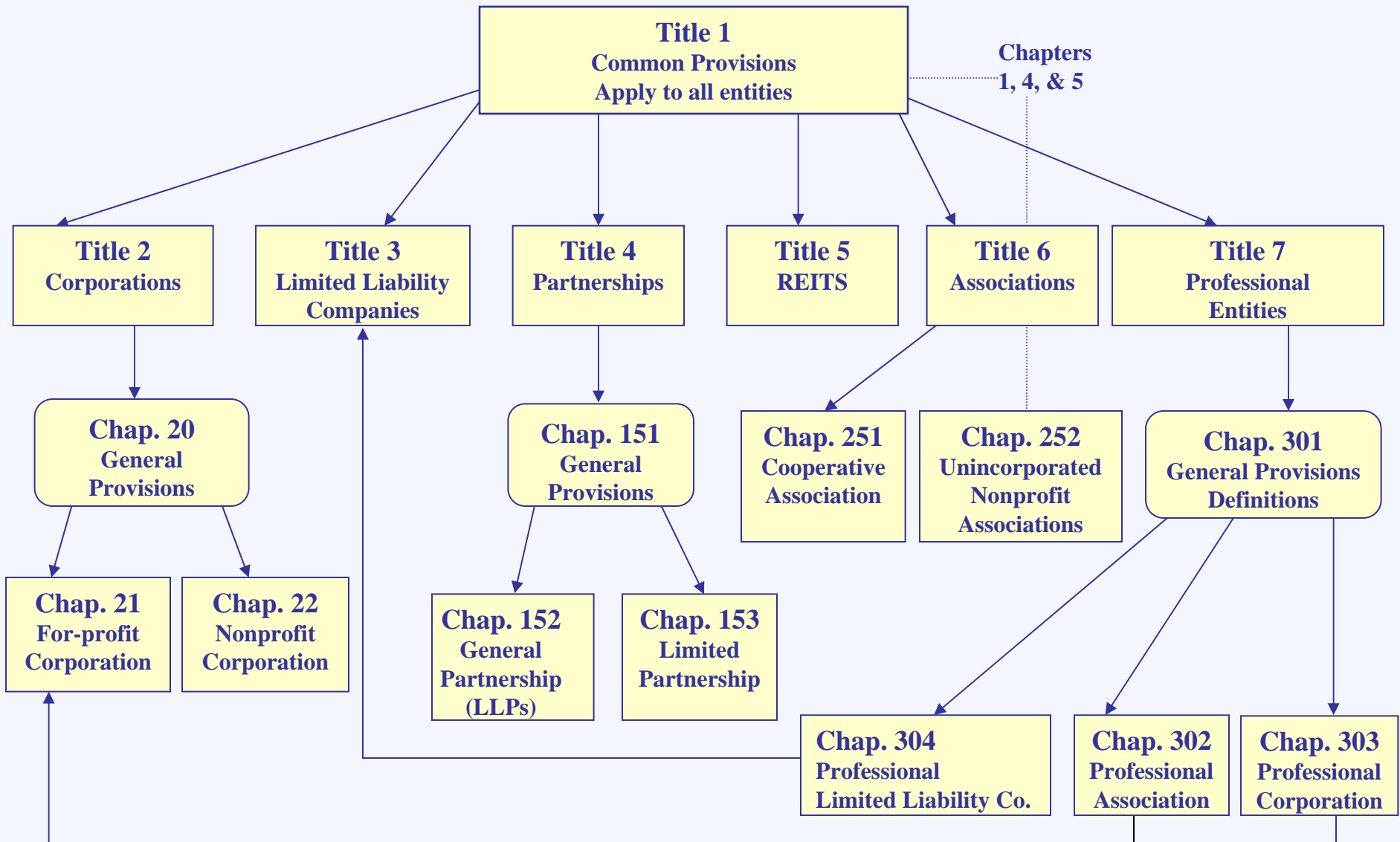
4th Annual Advanced Business Law Course  
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Austin, Texas



**Business and Public Filings Division**

# Structure and Organization

## Texas Business Organizations Code





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## Title 1 Chapters

- ◆ 1. Definitions & General Provisions
- ◆ 2. Purposes & Powers of Domestic Entities
- ◆ 3. Formation & Governance
- ◆ 4. Filings
- ◆ 5. Entity Names, Registered Agents/Office
- ◆ 6. Meetings & Voting
- ◆ 7. Liability



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## Title 1 Chapters

- ◆ 8. Indemnification & Insurance
- ◆ 9. Foreign Entities
- ◆ 10. Mergers, Interest Exchanges, Conversions,  
& Sale of Assets
- ◆ 11. Winding Up & Termination
- ◆ 12. Administrative Powers



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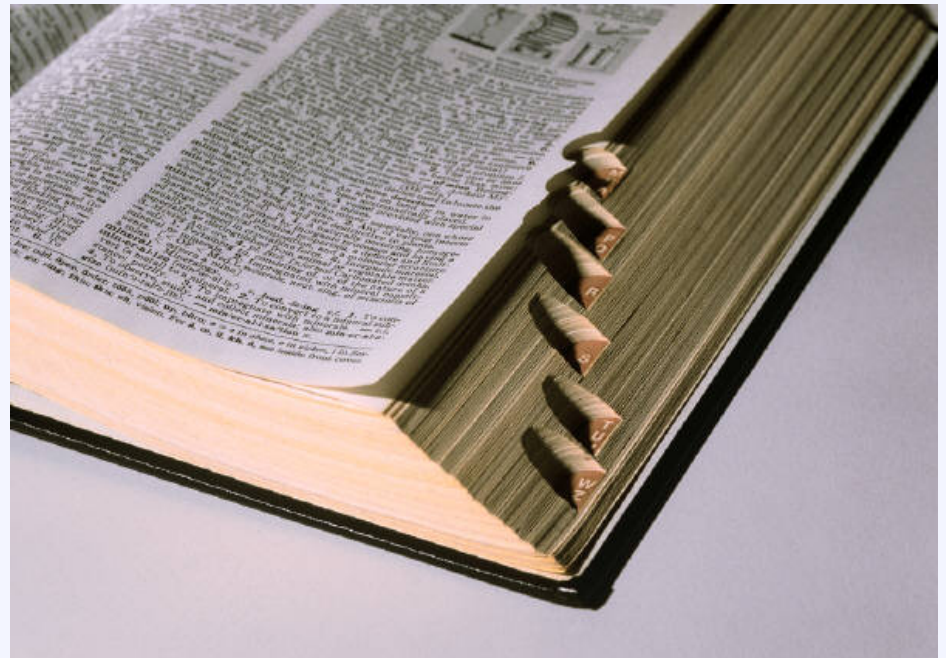


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## Title 1--Chapter 1

- ◆ Definitions,  
Synonymous Terms &  
Short Titles
- ◆ Key chapter to  
understanding the Hub  
provisions.



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## Chapter 1. Terminology is not a BIG Deal

- SOS will not reject a filing instrument because the instrument uses old terminology, refers to prior law, or makes reference to the BOC when entity is a non-BOC entity.



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## Chapter 2--Purposes & Powers

### Purposes & Powers

➤ Chapter contains permissible purposes and powers of domestic entities, as well as prohibitions and restrictions.

### *What's New?*

- A limited liability company may be formed for a nonprofit purpose.  
§§1.002(60), 2.002 et seq.
- A nonprofit corporation may be formed with a general nonprofit purpose.



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## Chapter 2--Purposes

- The SOS will not distinguish between LLCs created for a for-profit purpose and LLCs created for a nonprofit purpose.
- Professional LLCs, LLCs with a for-profit purpose, and LLCs with a nonprofit purpose are classified under the same entity type description:
  - domestic limited liability company.

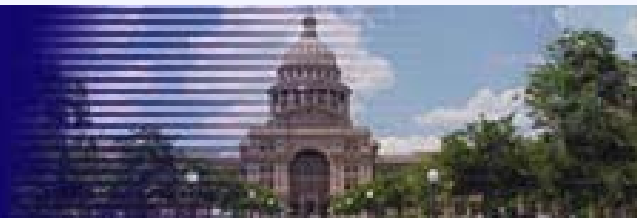


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## A Note About BOC “Nonprofits”

- ✓ A **nonprofit entity** includes nonprofit corporations, nonprofit associations, as well as LLCs or other entities that are organized solely for one or more of the nonprofit purposes specified by § 2.002 BOC.



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## A Note About BOC “Nonprofits”

- If the BOC refers to a **nonprofit corporation**, it does *not* include other nonprofit entities.
  - For example, fees for nonprofit corporations do *not* apply to LLCs that have a nonprofit purpose.
  - Periodic reports required to be filed by nonprofit corporations are not required of other nonprofit entities.



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## Title 1--Chapter 3

- ◆ Chapter 3: Formation and Governance

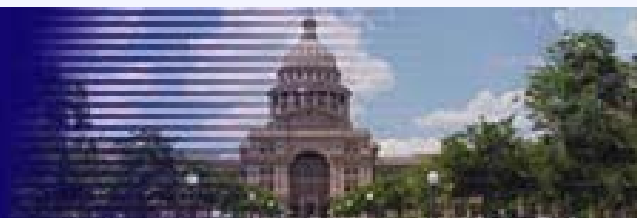
- ◆ Subchapter A-- Requirements for certificates of formation for all entities



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## Chapter 3. Formation, Existence and Certificate of Formation

- ◆ Certificates of formation are governed by § 3.001 et seq.
- ◆ Every certificate of formation must contain:
  - ✓ The name of the filing entity to be formed;
  - ✓ The type of filing entity to be formed (e.g., limited liability company)
  - ✓ Purpose (except for LPs);
  - ✓ Duration, if not perpetual (except for LPs);
  - ✓ Registered office street address; registered agent's name; and
  - ✓ Name and address of organizers.



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**CAUTION**

“Gotchas”

**CAUTION**

Sec. 3.004, which sets forth general requirements for organizers, states that each organizer must sign the certificate of formation, with two exceptions: GPs for LPs and Trust Managers for REITS.

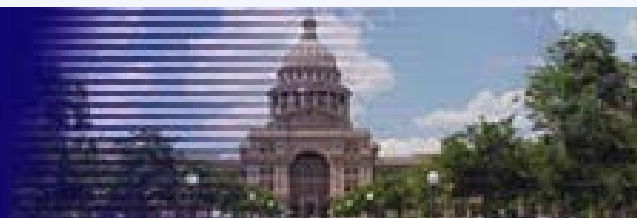
- ✓ Sec. 3.015(a)(1) requires that the certificate of formation of a professional association be signed by each original member of the PA.



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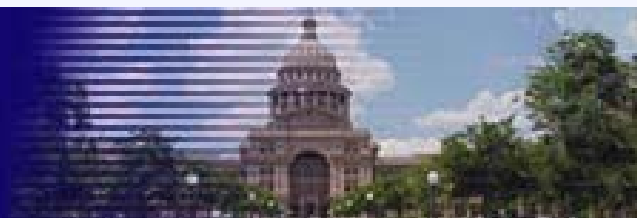


- Supplemental requirements:
  - For-profit corporations § 3.007
  - Close corporations § 3.008
  - Nonprofit corporations § 3.009
  - Limited Liability Companies § 3.010
  - Limited Partnerships § 3.011
  - Real Estate Investment Trusts § 3.012
  - Cooperative Associations § 3.013
  - Professional Entities § 3.014
  - Professional Associations § 3.015





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**CAUTION**

“Gotchas”

**CAUTION**

Sec. 3.007 sets forth the supplemental requirements for the certificate of formation of for-profit corporations--share information, board of directors or management information.

When forming a professional corporation, also look to Sec. 3.007 and Sec. 3.014, when drafting. Certificate of formation should include share structure and management information.



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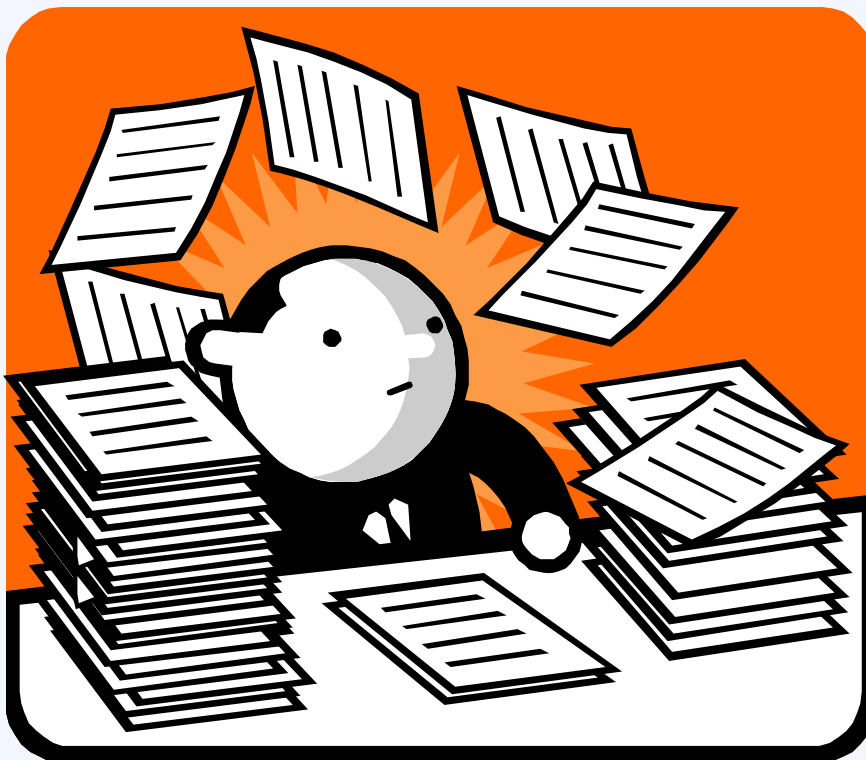


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## Chapter 4: Filings

- ◆ Subchapter A--  
Contains general provisions applicable to signatures, liability for false filing instruments, and facsimile copies.

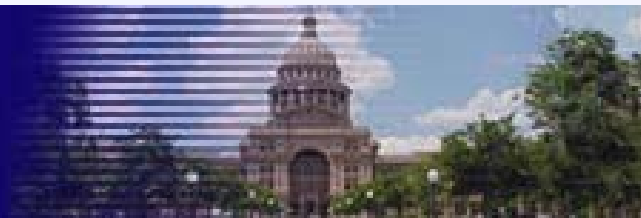


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## False or Fraudulent Filings

BOC penalties for false or fraudulent filing apply to all entities.

**As of Jan. 1, 2006**, it is a **Class A misdemeanor** to knowingly sign a filing instrument that is materially false with the intent that it be filed with the SOS. §4.008.

BOC increases offense to a State jail felony if there is intent to defraud or harm another.



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## Civil Liabilities

A person may recover **civil damages** if the person incurs a loss caused by:

- ◆ a forged filing instrument;
- ◆ a filing instrument that constitutes an offense under § 4.008;
- ◆ reasonable reliance upon a false statement of material fact in a filed filing instrument; or
- ◆ the omission of a material fact that is required to be in a filing instrument. § 4.007(a)



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## Civil Liabilities

An injured person may recover from:

- ✓ each person who forged or knowingly signed a false instrument;
- ✓ any managerial official who directed the signing and filing of the filing instrument who knew or should have known of the false statement or omission; or
- ✓ the entity that authorizes the filing of the filing instrument. §4.007(b)



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## Enforcement

The SOS does *not* have authority to initiate criminal action or bring civil suit on behalf of parties harmed by a fraudulent filing.



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## Certificate of Correction

Correction permitted when:

- ✓ inaccurate record of the event or transaction referenced in or evidenced by the filing instrument;
- ✓ contains an inaccurate or erroneous statement;
- ✓ defectively or erroneously signed, sealed, acknowledged, or verified



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## Certificate of Correction

Correction does not mean and will not result in:

- ✘ abandonment or revocation of the filing instrument.



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## Forms

Section 4.006 of the BOC authorizes the SOS to promulgate forms for any filing instrument or report required or permitted to be filed with the SOS.

★ Available on the SOS web site at:

[http://www.sos.state.tx.us/corp/forms\\_option.shtml](http://www.sos.state.tx.us/corp/forms_option.shtml)

★ Split into BOC Forms and Pre-BOC Forms.

★ When possible, SOS promulgated forms that complied with BOC as well as prior law.

★ **Use of SOS forms permissive not mandatory.**



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## Title 1-Chapter 5

Names of Entities;  
Registered Agents  
and  
Registered Offices



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## Names

Name availability standards and rules remain the same.  
§ 5.001 et seq. Shall not be the same or deceptively similar. Can be similar with a letter of consent.

➤ Names cannot be deceptively similar with letter of consent.

*Steakley v. Braden, 322 S.W.2d 363*

*“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.”*



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## Names

BOC **did not** carry forward the restriction in section 1.03 of TRLPA that the name of a limited partner could not be included in the name of the limited partnership unless:

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



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## Change of Name of Registered Agent

- BOC provides that a registered agent that changes his/her/its name may file statement with the SOS to show the name change.
  
- Form 408 may be used for this purpose.



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## Chapter 9--Foreign Entities



Transacting Business in Texas  
After January 1, 2006



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## Foreign Entities Required to Register

A foreign entity must register to transact business in Texas if:

- ✓ The entity affords limited liability under the laws of its jurisdiction of formation for any member or owner, unless the foreign entity is authorized to transact business under other state law.



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## Foreign Entities

★ New types of foreign entities will be required and permitted to register with the Secretary of State under BOC, including

Real estate investment trusts

Business trusts

Professional corporations

Professional associations

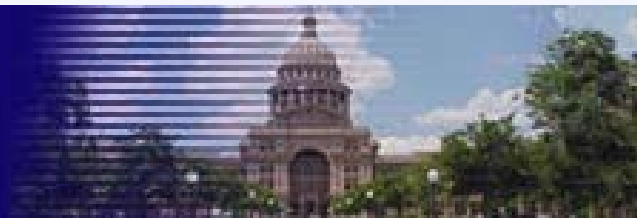
★ **Before January 1, 2006, these entities could only file as a foreign LLC.**



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## What's New?

- Terminology: *Application for Registration* not Certificate of Authority
- Application must state date entity began transacting business in Texas.
- Application must include an appointment of the SOS as agent for service of process under certain circumstances. (See § 5.251)
- Statement of existence included in application; no certificate of existence from home state required.



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## 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.**

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

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



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## Date Entity First Began Transacting Business

Consequences to misstating date:

➤ *Coastal Liquids Transportation, L.P. v. Harris County Appraisal District, 46 S.W.3d 880 (Tex. 2001)*

Foreign LP could not maintain a suit challenging a tax appraisal because it had failed to comply with TRLPA when it did not correctly state the first date of transaction of business and did not pay late filing fee.



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## 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 into a newly created Texas entity.



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## Duplicate Registration of LLLP

- ✓ Required to file as a LP under chapter 9 of the BOC.
- ✓ Also required to file the annual application for registration as a LLP under section 152.905.



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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.



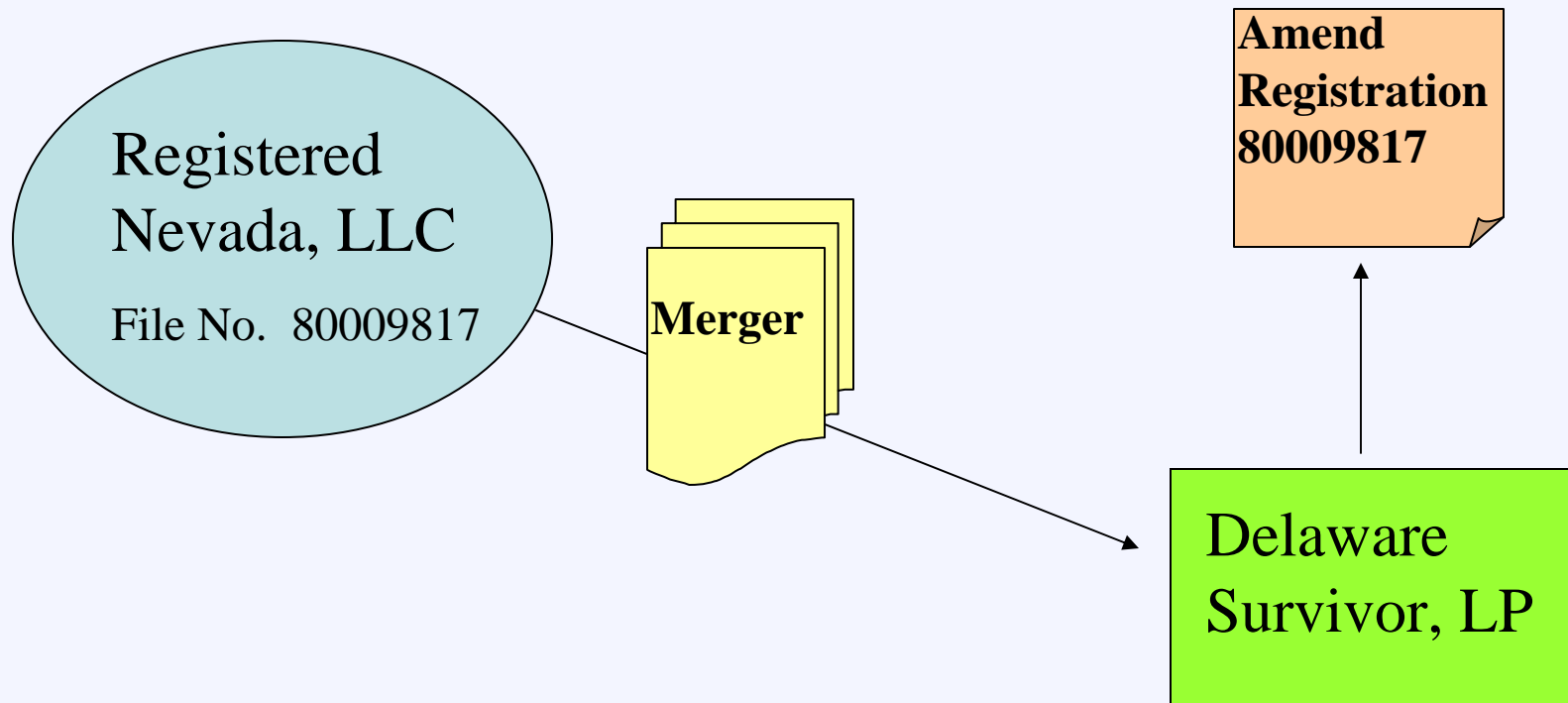
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## BOC--Foreign Entities



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## Chapter 10: Mergers, Conversions & Exchanges

Chapter 10 of the BOC governs the general requirements for mergers, interest exchanges, and conversions.



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## Chapter 10 of the BOC

- ✓ 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.



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## Chapter 10

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

For example, Chapter 162 of the Utilities Code will continue to govern telephone cooperative consolidations and mergers, or conversions of a corporation to a telephone cooperative.



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## Transitional Filings

✓ An existing entity that continues to be governed by “prior law” needs to comply with the prior law governing the entity in order to effect a merger, consolidation, exchange, or conversion.



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## Other Issues

- ✓ Although the merger and conversion provisions of the BOC are modeled on existing law, existing law still contains some differences in filing requirements.
- ✓ Namely, information relating to the number of outstanding shares & corporate shareholder approval required of an existing domestic corporation.
- ✓ These differences must be kept in mind when drafting the articles of merger between a BOC entity and an existing entity that is a “non-code organization.”



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## Merger between a BOC entity and a Non-Code Organization

- ✓ Avoid the complexity of drafting documents under BOC and prior law by electing early adoption of the BOC if non-Code organizations will not survive the merger.



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## What's New?



### Merger and Conversion Fees

Fees for filing certificate of merger or conversion standardized to \$300.

*In addition*, fee imposed for filing the certificate of formation for a converted domestic filing entity or for each new domestic filing entity created by a merger.



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## What's New?



### SOS Promulgates Forms for Certificates of Merger and Conversion

SOS forms only designed for BOC entity transactions when all entities have been formed under or elected early adoption of the BOC.

SOS did not design forms for certificates of formation for any entity created as a result of a merger or the converted entity in a conversion.



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## SOS Promulgates Merger and Conversion Forms

- ✗ Designed for BOC entity transactions; not cross-statutory transactions.
- ✗ Plan of merger or conversion not included. 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 be used when the jurisdiction of formation of the converted or converting entity is outside Texas.



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## SOS Merger and Conversion Forms

**CAUTION**

The 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.



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## What's New for Nonprofits?



Under existing law, a nonprofit corporation may merge only with other domestic or foreign nonprofit corporations.

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



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## Nonprofit Merger 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 authorize the creation of a nonprofit corporation by conversion.

BOC authorizes creation of a nonprofit corporation by conversion. Certificate of formation of converted entity must contain the additional statements relating to the conversion.

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



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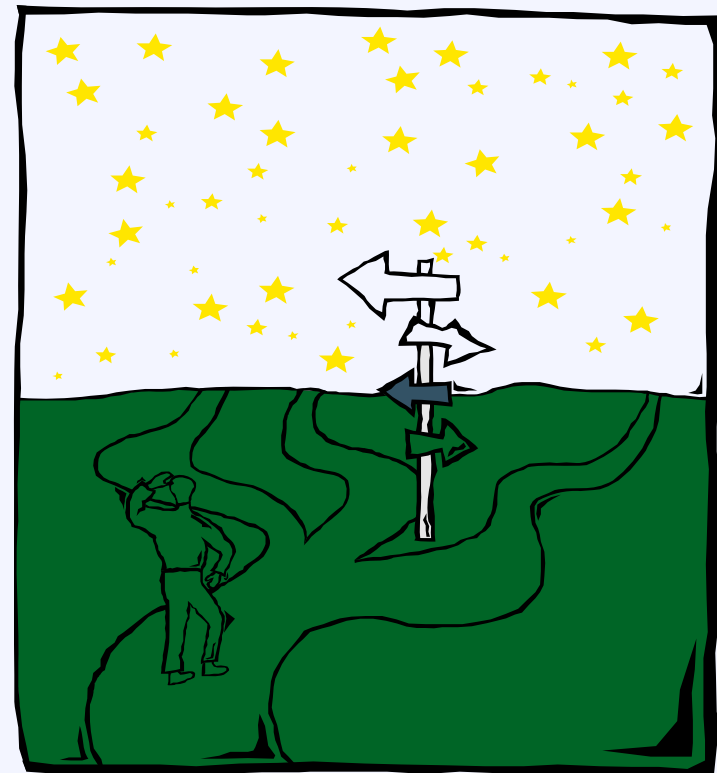


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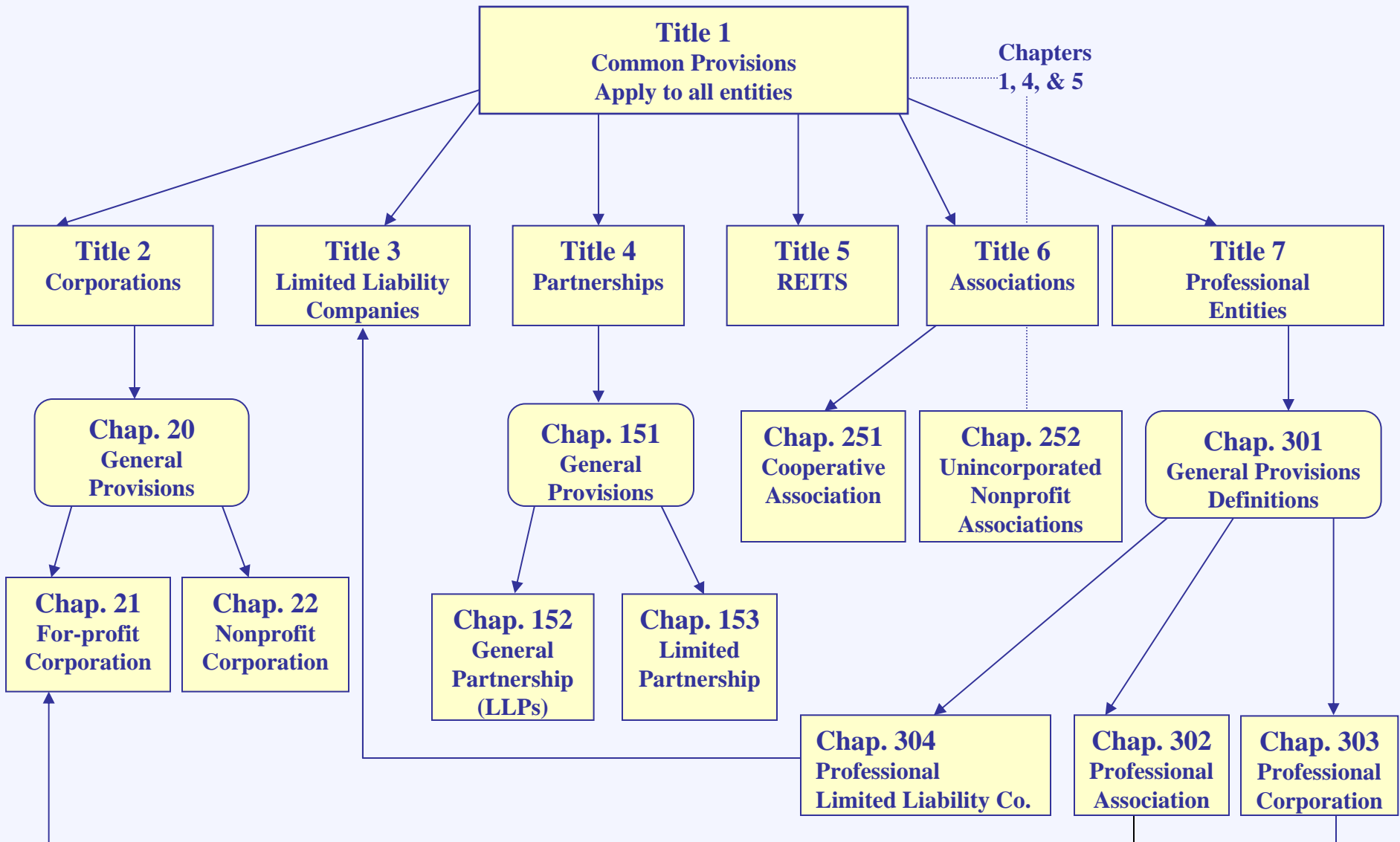
## Title 1-Chapter 11

Winding Up and  
Termination of Domestic  
Entity



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# Structure and Organization Texas Business Organizations Code





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## Chapter 11: Winding Up & Termination

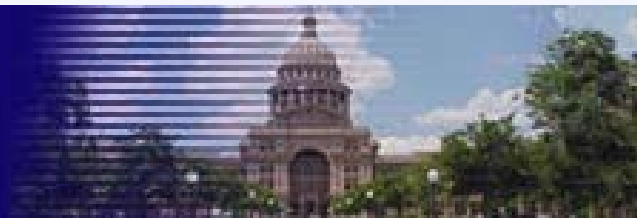
- ◆ In general, winding up is required when:
  - ✓ the entity's duration expires, if not perpetual;
  - ✓ a voluntary determination to wind up the domestic entity has been made by the domestic entity or the owners, members, or governing authority in the manner specified in the BOC for such entity; or
  - ✓ an event specified by the BOC requires the winding up or termination of the entity.



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## Involuntary Termination

Circumstances giving rise to an involuntary termination by the SOS.

- ☑ Failure to file a report within the period required by law;
- ☑ Failure to pay a fee or penalty prescribed by law when due and payable;
- ☑ Failure to pay a filing fee, or payment of the fee was dishonored when presented by the state for payment; or
- ☑ Failure to maintain a registered agent or registered office.

[New for LPs and foreign LLPs](#)



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## Reinstatements

- ✓ BOC Sections 11.201 and 11.202
- ✓ Reinstatements under the BOC have longer time periods during which a reinstatement can be filed.
- ✓ Change in substantive law
- ✓ Time frames similar for all Code entities

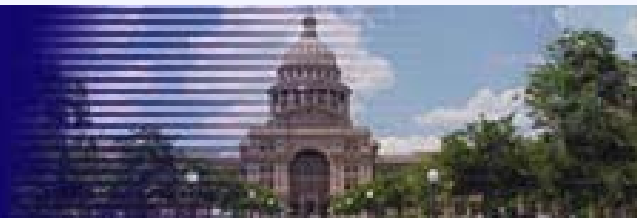


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## Reinstatements under the BOC

- ★ Revocation of voluntary dissolution under prior law is a reinstatement under BOC.
- ★ Reinstatement following a voluntary termination must be filed no later than the 3rd anniversary of the date of filing of termination.
- ★ Revocation under prior law must be filed within 120 days of filing of dissolution.



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## Reinstatement

### Following a Voluntary Termination

- Entity terminated inadvertently or by mistake;
- Termination occurred without the approval of the entity's governing persons when approval required by BOC;
- Entity terminated before winding up completed; or
- The entity's legal existence is necessary to convey or assign property, to settle or release a claim or liability, to take an action, or sign an instrument or agreement.



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## Reinstatements after Involuntary Terminations

- ★ Domestic filing entity involuntarily terminated by the Secretary of State may file a certificate of reinstatement *at any time*. No time limit.
- ★ However, entity is considered to have continued in existence without interruption *only if the reinstatement is filed within 3 years of its involuntary termination.*



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## Reinstatements after Tax Forfeiture

Tax Code Reinstatements (Revivals of Charter) continue to be governed by the Tax Code. See, §§ 171.312 through 171.315 of the Texas Tax Code.

BOC sets the fee for reinstatements following a tax forfeiture for for-profit corporations and LLCs at **\$75**.

No fee for reinstatement of a nonprofit corporation following a tax forfeiture.



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## BOC Reinstatement Requirements

- Reinstatement must be approved in manner provided by the BOC;
- Entity name must be available;
- Tax clearance for reinstatement; and
- If involuntarily terminated, entity must correct circumstances giving rise to involuntary termination.
- **Reinstatement must provide registered agent/office information.**



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## Filings Outside the HUB Provisions

### ⇒ Close Corporations:

Statement of Operation **21.718**

Termination **21.709**

### ⇒ For-Profit Corporations:

Bylaw or Agreement Restricting Transfer of Shares **21.212**

Actions with Respect to Series of Shares **21.157**

### ⇒ Nonprofit Corporations:

Reports of domestic and foreign nonprofit corporations

**22.357**



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## Filings Outside the HUB Provisions

### ⇒ Limited Partnerships:

Statement Required for Liability Protection	<b>153.107</b>
LP Withdrawal from participation in profits	<b>153.106</b>
Periodic Reports	<b>153.301</b>

### ⇒ Limited Liability Partnerships:

Registration, amendment, renewal and withdrawal of a domestic LLP	<b>152.802</b>
Registration of a foreign LLP	<b>152.905</b>
Withdrawal of a foreign LLP	<b>152.906</b>
Renewal of a foreign LLP	<b>152.908</b>



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## Filings Outside the HUB Provisions

### ⇒ Cooperative Associations:

Annual Report of Financial Condition **251.353**

### ⇒ Unincorporated Nonprofit Associations:

Authority with respect to real estate filed with the county clerk  
**252.005**

Appointment of agent to receive service of process  
**252.011**



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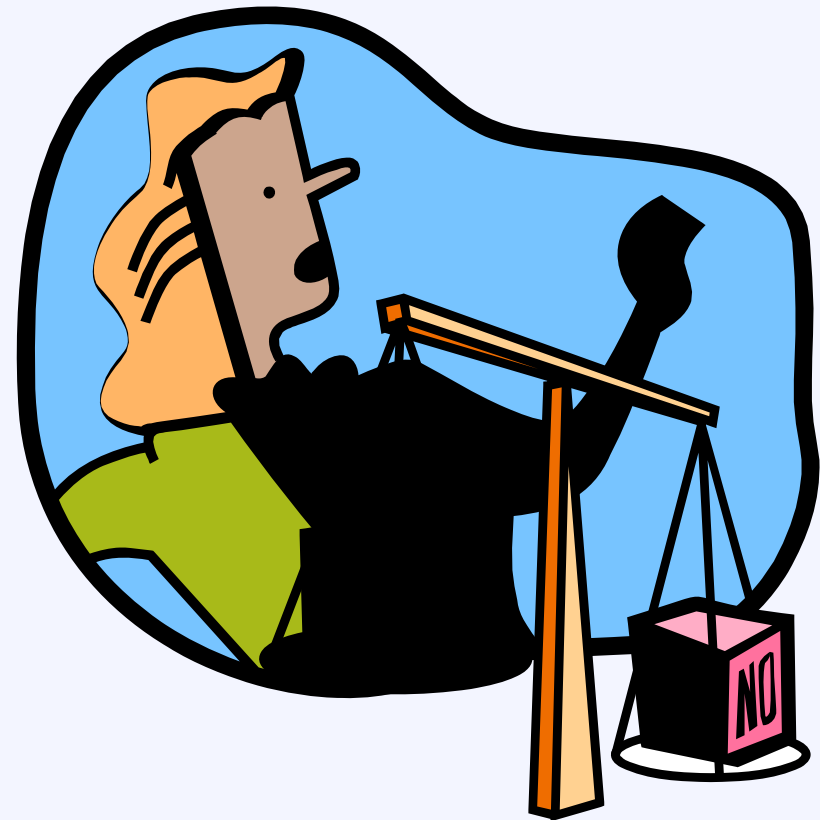


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1. LP name includes name of limited partner
2. Reinstatement Issues
3. Amend registration to identify true entity type of foreign entity qualified as foreign LLC
4. Cross-entity mergers
5. Amend registration to reflect change relating to merger or conversion
6. Nonprofit LLC
7. Professional organizations as authorized persons for PCs
8. More permissive NP mergers
9. Change of name of RA

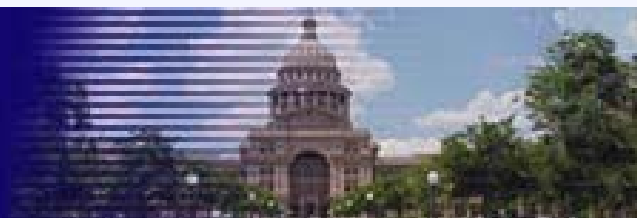
## *Why Opt In?*



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## Transition Issues

### Early Adoption of the Code

Does the Secretary of State have “opt in” or “early adoption” forms? **YES**

*Use Form 808 for early election by domestic entities; use form 809 for early election by foreign or out-of-state entities.*



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## Transition Issues

### Early Adoption of the Code

What is the filing fee for an early adoption statement?

*The filing fee for a domestic or foreign entity, other than a nonprofit corporation or cooperative association, is \$15. The filing fee for a nonprofit corporation or cooperative association is \$5.*



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## Opt-in and Comply?

- Sec. 402.003 of the Code states that a domestic filing entity may adopt the Code by following amendment procedures to opt-in and by causing “its governing documents to comply with this Code”.
- SOS will not require amendments to governing documents as a precondition to filing the opt-in statement.



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## Transition Issues

What does a domestic filing entity need to do on January 1, 2010?

*No action is necessary. The BOC is automatically applicable to the domestic entity on January 1, 2010. If necessary, the entity shall conform its governing documents to the BOC when it next files an amendment to its certificate of formation.*



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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*

*lwassdorf@sos.state.tx.us*

*cflores@sos.state.tx.us*



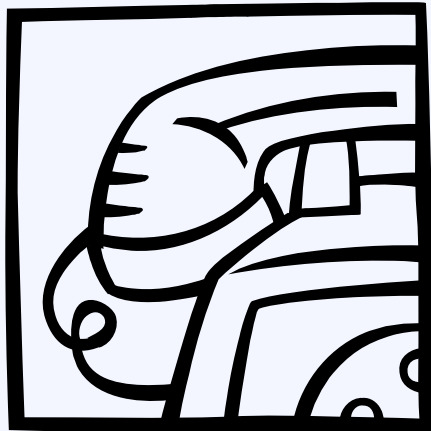
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## Need Help? Call



Robert Sumners

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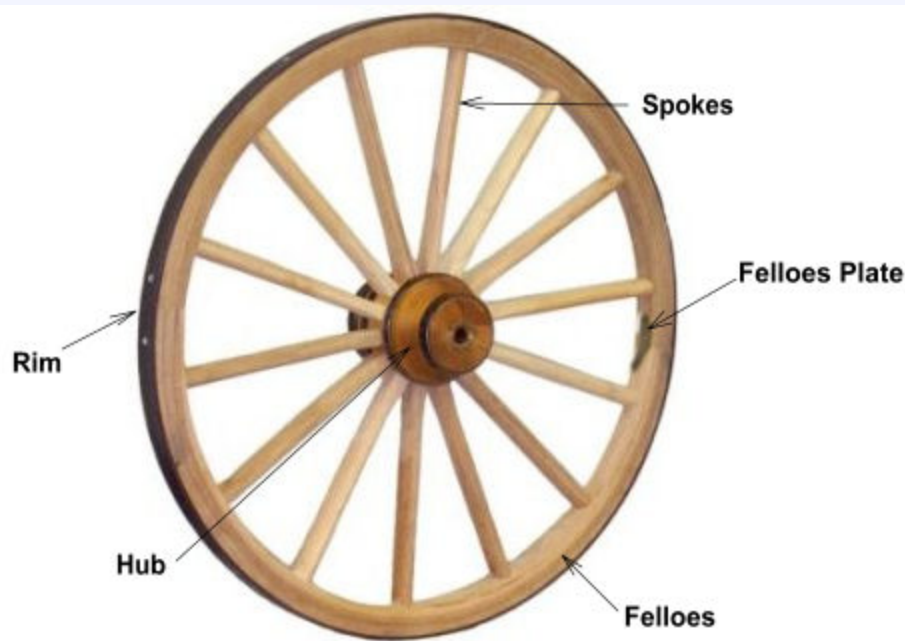


Business and Public Filings Division





Texas Secretary of State  
Roger Williams



## The View from the Trenches

The wheels are on the track and the train is running on time .



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