FILINGS UNDER THE NEW TEXAS BUSINESS ORGANIZATIONS CODE

CARMEN I. FLORES
LORNA S. WASSDORF
Business and Public Filings Division
Office of the Secretary of State
P.O. Box 13697
Austin, Texas 78711-3697

State Bar of Texas
Annual Meeting
DEVELOPMENTS IN COMMERCIAL LAW AND REPRESENTATION OF BUSINESS ENTITIES
June 15, 2006
Austin, Texas

CHAPTER 6

Table of Contents

I. INTRODUCTION

As millions watched the ball drop in New York City's Times Square on December 31, 2005, staffers at the Office of the Secretary of State were working diligently to usher in not only a New Year but also a New World. After months of planning, rewriting, revision, development and testing, the time had come to implement the provisions of the Texas Business Organizations Code (BOC), which was enacted by the 78th Legislature in 2003 with the passage of House Bill 1156.

The BOC, which codified the provisions of the existing statutes governing domestic for-profit corporations, nonprofit corporations, professional corporations, professional associations, limited partnerships, limited liability companies, partnerships, real estate investment trusts, cooperative associations, and unincorporated nonprofit associations, represented a major restructuring of existing statutes.[1] In addition, the BOC made substantive changes to existing law. However, given the fact that the structure, organization, and language of the BOC differed from existing statutes, the Legislature provided a four-year period of transition before the repeal of existing law and the mandatory application of the BOC to existing entities on January 1, 2010.

Consequently, until January 1, 2010, both the secretary of state and the practitioner must be able to navigate confidently between the Old World (prior law) and the New World (BOC). While much of the landscape of the BOC world will appear familiar to the practitioner, other features remind us that this is indeed another world. There is a different language to learn and new rules to retain.

II. NAVIGATION OF THE BOC

The organizational structure of the BOC was designed to gather provisions and concepts common to various entity types in a single title (the "Hub") and place provisions and concepts unique to a specific entity type in a separate title (the "spoke"). The BOC is comprised of thirty chapters and divided into eight titles, which are:

- Title 1. General Provisions
- Title 2. Corporations
- Title 3. Limited Liability Companies
- Title 4. Partnerships
- Title 5. Real Estate Investment Trusts
- Title 6. Associations
- Title 7. Professional Entities
- Title 8. Miscellaneous & Transition Provisions

Title 1 of the BOC (the "Hub") is comprised of twelve chapters that contain provisions common to most forms of entities. In order to navigate the BOC, one must first look to Title 1 for the general provision and then refer to the specific title governing the entity to determine whether the specific title contains a provision that conflicts with or differs from the provision contained in Title 1. If the provision of Title 1 conflicts with the provision in the specific title, the provision in the specific title supercedes the provision in Title 1.[2]

This paper will provide the filing officer's perspective on the provisions of the Hub and spokes that relate to the formation, registration, reorganizations, and termination of domestic and foreign filing entities.

III. TITLE 1. CHAPTER 2: PURPOSES AND POWERS OF A DOMESTIC ENTITY

A. Purposes of a Domestic Entity

Chapter 2 contains provisions relating to the purposes and powers of domestic entities, including the restrictions and limitations on such powers and purposes.

1. Section 2.001 sets forth the general provisions, namely, that a domestic entity has any lawful purpose or purposes, unless otherwise restricted by the provisions of the BOC.

2. Many of the restrictions that are found under article 2.01 of the Texas Business Corporation Act were carried forwarded to the BOC. Consequently, a person cannot form or organize an organization under the provisions of the BOC for the purposes of operating as a: bank, trust company, savings association, insurance company, railroad company, or abstract and title company governed by the Insurance Code. In addition, a person who seeks to form a domestic entity for the purposes of operating a cemetery organization may only do so in accordance with the applicable provisions of the Health and Safety Code.

B. What's New for LLCs?

Chapter 2 contains some substantive changes with respect to the purpose of a domestic limited liability company.

1. Background: It was the Texas Secretary of State's position that there was no statutory basis or authority under Texas law for the formation of a "nonprofit" limited liability company under the provisions of the

Texas Limited Liability Company (TLLCA). A reading of various provisions contained in the TLLCA supported this interpretation.

a. Article 2.01 of the TLLCA states that an LLC formed under the Act may engage in any lawful business. The term "business" is defined in the TLLCA under article 1.02(6) to mean "every trade and occupation or profession."
b. Article 2.02, which relates to the powers of an LLC, states that each LLC shall have the power provided for a corporation under the Texas Business Corporation Act (TBCA) and a limited partnership under the provisions of the Texas Revised Limited Partnership Act (TRLPA).
c. The provisions of the TBCA specifically state that the TBCA cannot be used to form a corporation for the purpose of operating a non-profit organization. In addition, a partnership, under Texas law, is defined as an association of two or more persons to carry on *a business for profit* as owners. Also, article 8.12 of the TLLCA makes the provisions of the TBCA applicable to LLCs with respect to certain transactions and issues.
d. Therefore, the organization and formation of a non-profit LLC would be inconsistent with the various provisions and the intent of the TLLCA, TBCA, and the TRLPA.

2. Titles 2 and 3 of the BOC do not restrict the purpose of a limited liability company. As the BOC does not restrict the purpose of an LLC to a business, trade, or profession, a domestic entity formed as an LLC may be formed for a specific nonprofit purpose.[3]

3. An LLC may be organized solely for one or more nonprofit purposes specified by section 2.002of the BOC. Nonprofit purposes include:

a. Providing professional, commercial, or trade associations; and
b. Serving charitable, benevolent, religious, fraternal, social, educational, athletic, patriotic, and civic purposes.

4. An LLC with a nonprofit purpose is distinct from a nonprofit corporation or other nonprofit association. A BOC provision that is specifically applicable to a nonprofit corporation does not apply to an LLC formed for a nonprofit purpose. For example, the power of a nonprofit corporation to act as trustee in section 2.106 of the BOC and the default tax provisions contained in section 2.107 do not apply to an LLC formed for a nonprofit purpose.

5. The secretary of state will not distinguish between LLCs formed for a for-profit purpose and LLC created for a nonprofit purpose. Filing fees established under sections 4.151 and 4.154 apply to all LLCs regardless of purpose.

C. What's New for Nonprofit Corporations?

Chapter 2 contains a substantive change with respect to the purpose clause of a nonprofit corporation.

1. Under prior law, a nonprofit corporation was required to specify the purpose or purposes for which the nonprofit corporation was formed. However, pursuant to section 22.051 of the BOC, a nonprofit corporation may be formed for any lawful purpose or purposes not expressly prohibited under title 1, chapter 2, or title 2, chapter 22, of the BOC.

2. The form promulgated by the secretary of state for the formation of a nonprofit corporation, Form 202, contains a preprinted purpose clause that provides for the creation of a corporation with a general purpose. Please note that while the BOC allows a general purpose other laws, including the Internal Revenue Code, may require that the certificate of formation include more specific purposes as a basis for granting a license or tax-exempt or tax-deductible status. If utilizing the secretary of state form, please use the additional space provided in the "Supplemental Provisions/Information" section to set forth a more specific purpose or purposes.

D. What's New for Professional Entities?

Chapter 2 contains some substantive changes with respect to professional entities.

1. The provisions of the Texas Professional Corporation Act (TPCA), TLLCA, and the Texas Professional Association Act (TPAA) permit a professional entity to render only one type of professional service (and any ancillary services). This general rule is carried forward in the BOC.

2. Section 301.012 of the BOC however specifically provides for the joint practice of the following professionals.

a. 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.[4]

b. 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.[5]

c. 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, including a limited liability partnership, to perform professional services that fall within the scope of the practice of those practitioners.[6] 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.

3. Changes in the laws governing the professions may permit the joint practice of certain professionals not reflected in section 301.012, the joint professional practice provision of the BOC. In recognition of this fact, section 2.004 of the BOC provides that a professional entity may engage in only one type of professional service *unless the entity is expressly authorized to provide more than one type of professional service under the state law regulating the professional services*.

4. While section 2.004 provides for an exception to the general rule, please note that if a formation document contains a joint practice provision not specifically provided for in the BOC, the legal practitioner should be prepared to provide reference to the specific law permitting the stated joint practice.

IV. TITLE 1. CHAPTER 3: FORMATION AND GOVERNANCE

A. Certificate of Formation of a Domestic Entity

Chapter 3 contains general and specific requirements for the certificate of formation of a domestic entity.

1. Every certificate of formation must contain:

   a. The name of the filing entity to be formed.
   b. The type of filing entity to be formed.

      (1) Each secretary of state form (hereinafter "SOS form") promulgated for the formation of a domestic entity specifically identifies the type of filing entity as a preprinted statement within the form.
      (2) When drafting a certificate of formation remember to specifically identify the entity type being formed. This is especially critical when forming a corporation. As the term "corporation" includes a for-profit corporation, professional corporation, and a nonprofit corporation, it is not sufficient to simply identify the filing entity as a "corporation."

   c. The purpose of the entity, unless the entity being formed is a limited partnership.
   d. The duration of the entity, if not perpetual (except for LPs). Pursuant to section 3.003 of the BOC, a domestic filing entity exists perpetually unless otherwise provided in its certificate of formation.

      (1) Under prior law, the duration of existence of a limited partnership was not an element of the certificate of limited partnership filed with the secretary of state. The BOC carries forward this concept.
      (2) An SOS form for the formation of an entity does not contain a provision for the limitation of duration of the entity. If you wish to limit the duration of the filing entity, you may provide for a limited duration in the "Supplemental Provisions/Information" section of the SOS form.

   e. The registered office street address and the name of the registered agent at such office address.
   f. The name and address of each organizer. Section 3.004 of the BOC sets forth the general requirements for organizers. An organizer may be a natural person 18 years of age or older, or a corporation or other legal entity. Generally, only one organizer is required. There are however exceptions to this general rule.

(1) If forming a domestic limited partnership, the certificate must identify and be signed by each general partner of the partnership.

(2) If forming a domestic real estate investment trust, the certificate of formation must identify each trust manager. Each trust manager must sign and acknowledge the certificate of formation. The certificate of formation of a real estate investment trust is not filed with the secretary of state, but filed with the county clerk in the county where the trust's principal place of business is located.

(3) If forming a domestic professional association, the initial members of the association act as the organizers of the filing entity. Each initial member must be identified in the certificate of existence and each identified member must sign the certificate of formation.

(4) Although there are no residency requirements for an organizer under the BOC, other state or federal law may require an organizer, owner, or governing person to meet additional or more restrictive requirements.

g. Any supplemental information required to be included in the certificate of formation for the entity type. (See item 2 below.)

h. Any other information or provisions not inconsistent with the law governing the entity relating to the organization, ownership, governance, business, or affairs of the entity.

2. While section 3.005 sets forth the general requirements for the certificate of formation of a domestic entity, other provisions may require the provision of supplemental information for the creation of the entity. The supplemental requirements for certificates of formation are set forth in chapter 3 as follows:

- 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

3. The provisions of title 2, chapters 20 and 21, and title 7, chapters 301 and 303 govern a domestic professional corporation. Consequently, when drafting the certificate of formation of a professional corporation, you must provide the supplemental information required for a for-profit corporation under section 3.007 (e.g., capital structure and management information), in addition to the supplemental information required of professional entities under section 3.014.

a. The BOC effected a change to the ownership provisions for professional corporations. Under prior law, ownership in a professional corporation (other than a professional legal corporation) is limited to individuals who are licensed to render the same professional service for which the professional corporation is formed. Under the BOC, a "professional organization," as well as a "professional individual" may hold an ownership interest in the professional corporation.[7]

b. A professional corporation's officers and directors however must still be licensed individuals.

4. The provisions of title 2, chapters 20 and 21, and title 7, chapters 301 and 302 govern a domestic professional association.[8] Accordingly, if a professional association is to issue shares in the association, it must provide for its capital structure in its certificate of formation and provide the same information that would be required of a for-profit corporation under section 3.007 of the BOC.

a. Unlike the Texas Professional Association Act, the BOC, as amended, specifically describes the types of professionals that may form, own, and operate a professional association. A professional association may be formed only for providing a professional service rendered by a doctor of medicine, doctor of osteopathy, doctor of podiatry, dentist, chiropractor, optometrist, therapeutic optometrist, veterinarian, or licensed mental health professional. The listing of professionals reflects the professionals who were specifically authorized to form professional associations as of September 2003. Physician assistants, advance nurse practitioners, nurse anesthetists, and surgical assistants cannot form professional associations.[9]

b. Ownership and management in a professional association are still limited to individuals who are licensed to perform the

professional service for which the professional association was formed.

B. Amended and Restated Certificates of Formation

While chapter 3 contains the general requirements, look to the title governing the entity to obtain more specific information on the procedure governing the amendment or restatement of a certificate of formation for the entity.

1. While the BOC eliminates the need to provide specific voting information in a certificate of amendment or restated certificate of formation, the filing instrument still must provide a statement that the transaction was adopted and approved in the manner provided for in the BOC title governing the entity.

2. The secretary of state has promulgated a certificate of amendment form (SOS form 424), a form for filing a restated certificate of formation that makes further amendments to the certificate (SOS form 414), and a form for filing a restated certificate of formation that makes no further amendments (SOS form 415). These forms are designed for use by multiple entity types; however, use of these forms is not mandated.

3. The restated certificate of formation is to be attached to the applicable form as an exhibit. The restated certificate of formation may omit the name and address of each organizer, but must include information relating to the *governing authority*. In the case of a corporation, the restated certificate of formation must provide the names and addresses of the directors of the corporation. However, the names and addresses of the current board rather than the initial board may be provided. In the case of a limited partnership, the restated certificate of formation must include the name and address of each general partner.

4. As the filing requirements under prior law may differ from the filing requirements of the BOC, it is recommended that the practitioner determine whether the filing entity is a BOC or non-BOC entity prior to drafting and submission of a filing instrument. Use of SOS forms 414, 415, and 424 is not recommended for non-BOC entities and may result in the rejection of the filing instrument.

V. TITLE 1. CHAPTER 4: FILINGS

A. Execution of Filings

Chapter 4 contains general provisions applicable to the execution and submission of a filing instrument.

1. Section 4.003 provides the general provision relating to the execution of a filing instrument. Section 4.003 states that a filing instrument must be signed by a person authorized by the BOC to act on behalf of the entity in regard to the filing instrument.

2. Generally, a *managerial official* of the filing entity has the authority to execute a filing instrument. A "managerial official" means an officer or governing person of the entity. The attorney that prepared the document, an organizer of the entity, or the entity's registered agent is not a "managerial official" of the entity.

3. In order to determine who has the authority to act on behalf of the entity, you must look to the specific title governing the entity or to the specific provision applicable to the transaction.

a. In the case of a for-profit corporation, nonprofit corporation, professional corporation, and a professional association, an officer must sign a filing instrument. (§20.001 BOC)
b. In the case of a limited partnership, generally a general partner of the partnership must sign a filing instrument. Section 153.553 contains specific execution requirements for certain instruments. For example, all the general partners of the partnership must sign a certificate of formation. A certificate of amendment must be signed by at least one general partner and also must be signed by each new general partner added by the certificate of amendment. A withdrawing general partner need not sign an amendment that evidences the general partner's withdrawal.
c. Although title 3 does not contain a specific execution provision for filing instruments filed on behalf of a limited liability company, in general, the BOC did not intend any substantive change to the prior law. Consequently, in the case of an LLC that is managed by managers, a manager of the LLC would execute the filing instrument. In the case of an LLC that is not managed by managers, but is managed by its members, a managing or authorized member of the LLC should sign the filing instrument.

B. Facsimile Submission of Filings

Chapter 4 carries forward the authority to submit filing instruments by facsimile transmission available under prior law.

1. The Texas Miscellaneous Corporation Laws Act, article 1302-7.07' the Texas Revised Limited Partnership Act, article 6132a-1, section 13.04; and the

Texas Revised Partnership Act, section 3.08(b)(12), eliminate the requirement to file originally signed documents. These requirements are carried forward to the BOC and may be found in section 4.003.

2. The statutory provisions cited authorize the filing of any photostatic or facsimile copy of a signed instrument required or authorized to be filed with the secretary of state under a provision of the BOC, Texas Business Corporation Act, the Texas Non-Profit Corporation Act, the Texas Limited Liability Company Act, the Texas Revised Limited Partnership Act, and the Texas Revised Partnership Act. In addition to the provisions cited, the Texas Business & Commerce Code, section 36.18, authorizes the secretary of state to accept for filing photographic or similarly reproduced copies of originally signed assumed name documents.

3. The Corporations Section maintains four plan paper facsimile machines on a rotary line for the receipt of documents and messages. The facsimile number is (512) 463-5709. If a document is transmitted by fax, credit card information or LegalEase debit card information must accompany the transmission (SOS form 807). The secretary of state accepts only MasterCard, Visa, and Discover credit cards. Fees paid by credit card are subject to a statutorily authorized convenience fee, currently 2.7% of the total fees incurred.[10]

C. Enhanced Penalties for the Submission of a Fraudulent or False Filing

The BOC imposes both criminal and civil penalties for the submission of a false or fraudulent filing instrument.

1. Under prior law, it is a Class A misdemeanor to knowingly sign a document that is materially false with the intent that it be filed with the secretary of state. House Bill 1507, effective September 1, 2005, amended the Texas Business Corporation Act to increase the offense to a state jail felony if the person signing the document intended to defraud or harm another.

2. Section 4.008 of the BOC applies to all filing instruments under the BOC. Similar to provisions under prior law,[11] section 4.008 of the BOC provides for criminal penalties if a person signs or directs the filing of a filing instrument that the person knows is materially false. The BOC enhances the penalty to a state jail felony if the actor's intent is to defraud or harm another.

   a. A Class A misdemeanor is punishable by a sentence of up to 180 days, a fine of up to $4,000, or both.
   b. A state jail felony is generally punishable by a sentence of 180 days to 2 years plus a fine of up to $10,000.

3. Section 4.007 of the BOC provides, under certain circumstances, for a person to recover damages, court costs, and reasonable attorney's fees if the person incurs a loss caused by a forged filing instrument, or a filing instrument that constitutes a criminal offense under the BOC. An injured person may recover from:

   a. each person who forged or knowingly signed a false instrument;
   b. 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
   c. the entity that authorized the filing of the instrument.

4. The secretary of state does not have authority to initiate a criminal action or to pursue a civil suit for damages on behalf of injured parties.

D. Forms

The BOC authorizes the secretary of state to promulgate forms for filings required or permitted under the BOC. Use of all SOS forms is permissive and not mandatory.

1. Until January 1, 2010, prior law will continue to govern requirements for filing instruments submitted by existing entities that have not elected to adopt the BOC prior to its mandatory application date. While the enactment of the BOC did not substantially change filing requirements with respect to certain instruments (e.g., a statement of change of registered agent and/or office), with respect to other filing instruments (e.g., articles of dissolution and reinstatements), the requirements of prior law differ from the requirements of the BOC. Consequently, a person who chooses to use a promulgated form should exercise care when selecting the appropriate form.

2. In an effort to facilitate the selection process, the secretary of state's web site contains a new form selection page. The forms selection option page is at http://www.sos.state.tx.us/corp/forms_option.shtml.

   a. A domestic or foreign filing entity formed or registered before January 1, 2006, that has not elected to adopt the provisions of the BOC by filing an early adoption statement with the secretary of state must click on the "bar" entitled "For Entities Formed Before January 1, 2006" to obtain an appropriate form for submission of a filing instrument.

b. A domestic or foreign filing entity formed on or after January 1, 2006, must click on the "bar" entitled "For Entities Formed On or After January 1, 2006." An entity formed or registered before January 1, 2006, that has filed an early adoption statement with the secretary of state to adopt the BOC before its mandatory application date would select forms in the same manner.

c. Once the appropriate option has been selected, an index of forms suitable for filing will appear. The forms are provided in Word and PDF formats.

3. When filing requirements under prior law did not substantially differ from the filing requirements under the BOC, an SOS form was designed for use by both BOC and non-BOC filing entities. A shared form is identified by the same SOS form number and appears on the BOC forms index page and the non-BOC forms index page.

4. Use of an SOS BOC form by a non-BOC entity is not recommended. However, a filing instrument will not be rejected solely on this basis. If the BOC form used also complies with the filing requirements of prior law, the instrument will be filed. This filing action however does not effect an early election to adopt the BOC. In order to adopt the BOC, the non-BOC entity must take affirmative action pursuant to section 402.003(a) of the BOC and file an early adoption statement (SOS form 808 or 809).

E. Effectiveness of Filings

The general rule is that filings take effect on filing by the secretary of state, except when the effectiveness of the instrument is delayed as provided by subchapter B of chapter 4.

1. Pursuant to sections 4.052 and 4.053 of the BOC the effectiveness of an instrument may be delayed to a date not more than ninety (90) days from the date the instrument is signed (Option B on SOS forms with an effectiveness of filing provision). The effectiveness of the instrument also may be delayed on the occurrence of a future event or fact, other than the passage of time (Option C on SOS forms with an effectiveness of filing provision).

2. If the effectiveness of an instrument is delayed on the occurrence of a future event or fact, the instrument must also state the manner in which the event or fact will cause the instrument to take effect and the date of the 90th day after the date the instrument is signed. In order for the instrument to take effect, the entity must, within ninety (90) days of the date of the filing of the instrument, file with the secretary of state a statement regarding the event or fact pursuant to section 4.055 of the BOC (SOS form 805). The statement is to be executed by each organization required to execute the instrument filed.

3. On the filing of an instrument with a delayed effective date or condition, the computer records of the secretary of state will be changed to show the filing of the document, the date of the filing, and the future date on which the document will be effective or evidence that the effectiveness of the instrument was conditioned on the occurrence of a future event or fact. In addition, at the time of such filing, the computer records of the secretary of state will reflect the action taken by the filing instrument. For example, if the effectiveness of a certificate of amendment changing the name of an entity is delayed as provided by law, the new entity name will receive a status of "in use" and be shown as the legal name of the entity on the records of the secretary of state as of the date of filing by the secretary of state.[12] Further, the former name of the entity will be given an inactive name status of "prior name."

4. The delayed effectiveness provisions of prior law listed the types of documents the effectiveness of which could be delayed. Instead of listing the filing instruments that may have a delayed effectiveness, the BOC provides a list of filing instruments the effect of which *cannot* be delayed. Pursuant to section 4.058 of the BOC, the following instruments may not contain a delayed effective date or condition:

a. a name reservation;
b. a name registration;
c. a statement of event or fact relating to an instrument filed with a delayed effective condition; and
d. a certificate of abandonment.

F. Abandonment of Documents

When determining whether a particular filing instrument can be abandoned after filing with the secretary of state, it is important to know whether prior law or the BOC governs the filing.

1. Article 9.03F of the Texas Limited Liability Company Act and section 2.12F of the Texas Revised Limited Partnership Act permit a filed document, which has had its effectiveness delayed, to be abandoned if the event or transaction has not become effective.[13]

2. Except as noted below, documents filed pursuant to the Texas Business Corporation Act cannot be abandoned after filing with the secretary of state.

a. A merger, share exchange[14] or a conversion[15] filed under the Texas Business Corporation Act may be abandoned (subject to any contractual rights) at any time before the filing has become effective.

b. Article 4.02 of the Texas Business Corporation Act permits 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.

3. 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.

4. On filing, the secretary of state records the filing of an instrument 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 as permitted by law, the secretary must determine whether the former name of any entity is available or whether the organizational documents need to be amended to change the name.[16] If the likelihood exists that the parties might abandon the transaction, consider filing a name reservation for the prior or former name of an entity that may need to be reactivated.

5. When the effectiveness of a document is conditioned on the occurrence of a future event other than the passage of time (delayed effective condition), the entity is required to file a statement with the secretary of state within ninety (90) days from the date of execution of the instrument in order to effect the transaction evidenced by the filing.[17] Please note that the failure to file the statement regarding the satisfaction or waiver of the delayed effective condition *does not effect an abandonment of the filed document.* In order to abandon the document, a certificate of abandonment must be filed with the secretary of state.

G. Filing Fees

All filing fees are contained in a single chapter of the BOC and are made applicable to comparable filings submitted under prior law.

1. Section 4.151 contains a list of filing fees that are applicable to all filing entities. This section contains the fees relating to name reservations, name registrations, certificates of correction, certificates of merger, conversion or exchange, and the preclearance of a filing instrument.

2. Sections 4.152 through 4.161 contain the filing fees for instruments filed by specific entity types. In general, the BOC standardized filing fees for comparable filings using the TBCA filing fees in effect at the time of passage as the standard. As a result, filing fees for LLC filing instruments increased and many of the filing fees for limited partnership filings decreased. In general, the filing fees for nonprofit corporations remained the same.

3. Section 402.002 of the BOC makes BOC filing fees applicable to comparable filings made under prior law. When submitting a filing under the provisions of the Texas Business Corporation Act, Texas Non-Profit Corporation Act, Texas Professional Corporation Act, Texas Professional Association Act, Texas Limited Liability Company Act, Texas Revised Limited Partnership Act, and the Texas Revised Partnership Act, refer to the filing fee provisions of chapter 4 of the BOC rather than prior law.

4. Effective January 1, 2006, a standard $50 preclearance fee will be applied to all documents that are precleared by the secretary of state. The $50 fee was based on the preclearance fee established for the preclearance of a limited partnership document under the Texas Revised Limited Partnership Act.

5. Expedite fees are authorized under section 405.032 of the Texas Government Code. Consequently, the enactment of the BOC did not affect the procedures or fees relating to expedited processing of documents and orders with the Office of the Secretary of State. The expedite fee remains at $25 per document expedited. The expedite fee for certificates of fact and certified copies remains at $10 per certificate ordered.

H. Acknowledgment of Filing

1. Section 4.002 of the BOC provides that the secretary of state shall deliver a "written or electronic acknowledgment of filing to the entity or its representative."

2. Unlike the predecessor statutes, the language of the BOC does not require the secretary of state to issue certificates in acknowledgment of the filing action. The language does not however preclude the issuance of a certificate that acknowledges the filing. Accordingly, the secretary of state will continue the practice of issuing a certificate under the signature and seal of the secretary of state.

I. Certificate of Correction

The correction of a filing instrument, and not the revocation of the filing.

1. A corporation, limited liability company, or limited partnership[18] 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 instrument. The articles/certificate of correction may not be used to alter, include, or delete a statement that 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/certificate of correction relates back to the original date of the filing except as to those persons who are adversely affected by the correction. In the case of a person adversely affected by the correction, the filing instrument is considered to have been corrected on the date the certificate of correction is filed.

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.[19] The BOC carries forward the provisions of prior law in Sections 4.101 through 4.105.

VI. TITLE 1. CHAPTER 5: NAMES OF ENTITIES, REGISTERED AGENT AND REGISTERED OFFICE

A. Entity Name Issues: Name Availability

1. 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.

2. 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 can be found in chapter 5 of the BOC. Section 5.053 sets forth the general standards for name availability, namely, that a filing entity may not have a name that is the same as, or that the secretary of state determines to be deceptively similar or similar to a name of another existing filing entity or an entity name that is reserved or registered with the secretary of state. 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 1, Part Four of the Texas Administrative Code (TAC), which may be viewed from the secretary of state's web site at www.sos.state.tx.us/tac/index.html.

3. Chapter 79 rules apply to all name availability determinations made for foreign and domestic corporations (for-profit, professional, and nonprofit), limited liability companies, limited partnerships, as well as professional associations formed before, as well as after, January 1, 2006. See 1 TAC §§79.30 and 79.50 to 79.52.[20] These sections do not apply to limited liability partnerships. Section 3.08 of the TRPA and section 5.063 of the BOC do not require the secretary of state to determine the availability of a limited liability partnership's name.

4. There are three categories of name similarity:[21]

   a. Names that are the same; that is, a comparison of the names reveals no differences. (1 TAC §79.36)
   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. (1 TAC §79.37) In accordance with 1 TAC §79.39, if any of the following conditions exist a proposed name is deemed to be deceptively similar to that of an existing entity:

      (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 names consists in the appearance of periods, spaces, 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. (1 TAC §79.40) In accordance with 1 TAC §79.43, if any of the following conditions exists, a name is deemed similar and a letter of consent is required:

(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 a 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.

5. 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.[22]

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 issued by the secretary of state to a domestic filing entity under the BOC specifically provides a statement that the issuance of the certificate of filing for the formation of an entity or the reservation of an entity name does not authorize the use of the entity name in this State in violation of the rights of another under the federal Trademark Act of 1946 (15 U.S.C. Section 1501 et. seq.), the Texas trademark law (Chapter 16, Texas Business & Commerce Code), or the common law. This restatement of the common law and of prior law[23] is codified in section 5.001 of the BOC.

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 domestic and foreign filing entities, as well as name reservations and name registrations on file with the secretary of state. 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 on 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.[24] 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 of that term may not be used in a context that implies the purpose to exercise the powers of a bank.[25] 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.[26]

(1) 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.

(2) Submission of a written request and provision of certain information, together with a $100 filing fee, is required for consideration of the proposed name. Submission of the materials and fee is not a guarantee that the name will be approved. You may wish to contact the Corporate Activities Division of the Department of Banking for current processing time for the letter of no objection.

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 registering under the provisions of the BOC that utilizes the term *trust* in its name is not required to obtain a letter of no objection for purposes of filing the application for registration.

e. *Cooperative* and *Co-op* should be used only by an entity operating on a cooperative basis.[27] A firm or business that uses such terms in its business name or that represents itself as conducting business on a cooperative basis when not authorized by law to do so commits an offense. The offense is classified as a misdemeanor that is punishable by the imposition of fines or by confinement in the county jail or both.

f. *Perpetual care* or *endowment care*, or any other terms that suggest "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.[28]

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 statues 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, and words of similar meaning* must obtain prior approval of the Texas Higher Education Coordinating Board.[29]

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.[30]

4. The use of some words is prohibited.

a. A domestic or foreign filing entity formed on or after the effective date of the BOC may not use the term *lotto* or *lottery* in its entity name.[31]

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.[32]

D. Words of Organization

In general, 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. Organizational designations are found in chapter 5 of the BOC.

1. The names of Texas for-profit corporations must include one of the following words or abbreviations: company, incorporated, limited, Co., Corp., Inc., or Ltd. (Sec. 5.054 BOC)

2. The names of foreign for-profit corporations must include one of the following words or abbreviations: company, corporation, incorporated, limited, Co., Corp., Inc., or Ltd. (Sec. 5.054 BOC) If the name of a foreign corporation registering to do business in Texas 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.[33]

3. The names of limited partnerships must contain the word limited, the phrase limited partnership, or an abbreviation of that word or phrase. (Sec. 5.055 BOC) Unlike prior law, section 5.055 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 use.

4. The names of limited liability companies must contain the words limited liability company, limited company, or the abbreviation of one of those phrases. (Sec. 5.056 BOC) Unlike prior law, section 5.056 is not specific regarding the punctuation, capitalization, or abbreviation of the words of organization.

5. The names of limited liability partnerships should use the phrase limited liability partnership or an abbreviation of that phrase. (Sec. 5.063 BOC) Unlike prior law, section 5.063 does not mandate that the terms 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 the requirements of section 5.055 of the BOC rather than section 5.063. Under section 5.055, the name of a limited partnership that is also registering as a limited liability partnership must include the phrase limited liability partnership, limited liability limited partnership, or an abbreviation of one of those phrases.[34]

7. Nonprofit corporations are not required to use an organizational designation. (Sec. 5.054(b) BOC)

8. No specific organizational designations are required of foreign REITS or business trusts registering to transact business.

E. Name Issues for Professional Entities

There are additional hurdles before selecting a name for an entity that will be rendering professional services.[35]

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

2. The name of a professional limited liability company must contain the words *professional limited liability company* or the abbreviation P.L.L.C. or PLLC. (Sec.5.059 BOC) The name of a professional corporation must include a word or an abbreviation required for a for-profit corporation, or it may contain the phrase *professional corporation* or an abbreviation of the phrase. (Sec. 5.054(c) BOC) The name of a professional association must contain the word *associated*, *associates*, or *association*, the phrase *professional association*, or an abbreviation of one of those words or that phrase. (Sec. 5.058 BOC)

3. The name of a professional entity may not be contrary to law or to the ethics of the profession involved. (Sec. 5.060 BOC) The following professions have advised the secretary of state of rules or opinions concerning permissible names:[36]

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 the abbreviation are used in such a way as to make clear that the credentials relate to an individual in the professional entity rather than the firm or the other associates of the firm.[37] Additionally, the name of the professional entity must include the name of at least one current or former member of the professional entity.

c. Attorneys: The name of the professional entity must not be misleading as to the identity of the persons practicing in the professional entity. "Legal Clinic of John Smith, PLLC" would be permissible, but not "Legal Clinic, PLLC."[38]

d. Engineers:[39] If the If the words "engineer," "engineering," or "engineered" appear in the name of the professional entity or for-profit corporation, 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.[40]

e. Architects:[41] A professional entity or for-profit corporation 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 of architects or interior designers.[42]

f. Registered Public Surveyors:[43] A professional entity that uses any name that 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 prior law, a limited partnership name could not contain the name of a limited partner unless that name was 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.[44] This prohibition *was not* carried forward in the BOC.

2. Prior law specifically prohibited the name of a limited partnership from containing a word or phrase indicating or implying that it is a corporation.[45] The secretary of state considers the following words and abbreviations as indicating or implying corporate status: "Incorporated," "Corporation," "Inc.," and "Corp." Although this specific prohibition is not carried forward to the BOC, section 17.46(b)(25) of the Texas Business & Commerce Code (commonly referred to as the Texas Deceptive Trade Practices-Consumer Protection Act) prohibits such use by an unincorporated entity.

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. (For example, 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. 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. Effective March 10, 2006, when submitting a name reservation online, the SOSDirect system will no longer require an applicant to indicate the entity type for which the reservation is to be applied. To submit an application to reserve an entity name online a subscriber selects *Application for Name Reservation* as the entity type from the drop down menu. The revised web filing incorporates the flexibility and standardization envisioned by the BOC.

b. Although a name reservation is not limited to a specific entity type, the selection of a specific entity type when submitting a name reservation in person or by mail will facilitate review of the entity name. A proposed entity name for one entity type may imply or indicate an unlawful purpose for another entity type. For example, *Derma Medical Services* implies an unlawful purpose for a corporation, but does not imply an unlawful purpose for a professional association or professional limited liability company.

c. Under the BOC, the filing fee for a name reservation is a standard fee of $40.

2. 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 renewal of name reservation is $40.

3. The applicant of record must submit the name reservation renewal. If the renewal of reservation lists an applicant other than the applicant of record with the secretary of state, a transfer of the name reservation will be required. The fee for a transfer of name reservation is $15.

4. 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 as the secretary of state is specifically prohibited from imposing a fee under section 5.1041 of the BOC.

H. Assumed Name

Section 5.051 of the BOC specifically authorizes the use of an assumed name by a domestic entity or foreign entity having authority to transact business in

Texas and its filing under Chapter 36, Business & Commerce Code.

1. Pursuant to section 36.02(7) of the Business & Commerce Code, an assumed name is defined as:

   a. for a corporation, any name other than the name stated in its articles of incorporation;
   b. for a limited partnership, any name other than the name stated in its certificate;
   c. for a limited liability company, any name other than the name stated in its articles of organization or comparable document; and
   d. for a limited liability partnership, any name other than the name on its application for registration or comparable document.

2. The filing requirements for assumed name certificates for limited partnerships, limited liability companies, and limited liability partnerships are similar to filing requirements for assumed name certificates filed by an incorporated business or profession.

3. 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 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.

4. 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.[46] However, due to differences in filing requirements, the assumed name certificate form promulgated by the secretary of state (SOS form 503) should not be used to file an assumed name certificate on the county level.

I. Registered Agent and Registered Office

Subchapter E of Chapter 5 of the BOC contains provisions relating to service of process, including provisions relating to registered agents and the registered office.

1. The registered agent must be an individual resident of Texas or a domestic or foreign entity that is registered to do business in Texas. The secretary of state cannot be designated as the entity's registered agent. In addition, the entity cannot act as its own registered agent.

2. Although the registered office address need not be the business office address of the entity, it must be the business office address of the registered agent. The address of a commercial business that provides "private mail box" services or telephone answering services is not sufficient as a registered office address, unless the commercial enterprise is the *business* of the designated registered agent.

3. The registered office address must be located at a street address where process may be personally served on the registered agent during normal business hours so that the agent may receive and accept service of process.[47] For this reason, a post office box address is generally insufficient as the registered office address.[48]

4. Section 5.203 of the BOC allows a registered agent to change its name or its address by filing a statement of the change with the secretary of state. A registered agent may file a statement under this section that applies to more than one entity and that includes multiple types of entities. However, please note that there are individual fees as well as maximum fees for each different type of entity. Therefore, the statement must group the entities by type to properly calculate the fees applicable to each type of entity (SOS form 408).

VII. TITLE 1. CHAPTER 9: FOREIGN ENTITIES

A. Registration under Prior Law

1. Under the provisions of the Texas Business Corporation Act, the Texas Non-Profit Corporation Act, and the Texas Revised Limited Partnership Act, entities formed as for-profit and nonprofit corporations, and limited partnerships under the laws of a jurisdiction other than Texas were required to register with the secretary of state before transacting business in Texas. However, certain types of foreign entities were unable to register under prior law due to the lack of specific statutory authority[49] or due to specific exclusionary language found in prior law.[50]

2. With the enactment of the Texas Limited Liability Company Act, those foreign entities that were not able to obtain authorization to transact business under other business organization statutes were provided a means of registering with the secretary of state. The broad definition of a foreign LLC in the Texas Limited Liability Company Act permitted qualification of other legal entities with limited liability as *"foreign LLCs"* even though the entities were not characterized as LLCs in their jurisdiction of formation.

3. As defined by article 1.02(9) of the Texas Limited Liability Act, a foreign limited liability company not only included limited liability companies formed under the laws of a jurisdiction other than Texas, but also included 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.

4. This definition was so worded to avoid the problems caused by the court decision in *Means v. Limpia Royalties*,[51] 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.

B. Required Registration of Foreign Entities under the BOC

Chapter 9 of the BOC governs the registration of foreign entities. The term used to describe the filing instrument filed with the secretary of state is "certificate of registration."

1. The BOC registration requirements apply to a foreign corporation, foreign limited partnership, 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.

2. A foreign entity that affords limited liability for any owner or member under the laws of its jurisdiction of formation is also required to register under the BOC.

3. A foreign entity that fails to register when required to do so is subject to the following penalties:

   a. the entity may be enjoined from transacting business in Texas on application by the attorney general;
   b. the entity may not maintain an action, suit, or proceeding in a court of this state until registered; and
   c. the entity 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.[52]

4. A foreign entity that has transacted business in the state for more than ninety (90) days is subject to a late filing penalty for each year the entity transacted business in this state without having registered. The BOC authorizes the secretary of state to condition the filing of the registration on the payment of this late filing fee. The late filing fee is equal to the registration fee for each year of delinquency. The late filing fee is similar to the late fee assessed on foreign limited partnerships registrations under the Texas Revised Limited Partnership Act.

   a. The late filing fee is a penalty for noncompliance with state law registration requirements. The late filing fee applies as soon as the 90-day period expires and it relates back to the date of first transaction of business stated in the application.
   b. With respect to entities that were not previously required to register with the secretary of state in order to transact business in the state, the late filing penalty will relate back no earlier than January 1, 2006, the date the entity was required to register under chapter 9 of the BOC. For example, a foreign business trust that has been doing business in the state since January 1, 2003 and that registers on February 14, 2006 will be subject to a late filing penalty of $750. A late filing penalty will not be imposed for the years the foreign entity transacted business in Texas before it was required to register (January 1, 2003 to January 1, 2006).

5. 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 is not required to submit an application for registration under the BOC.

C. Permissive Registration of Foreign Entities Under the BOC

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 that 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.

D. Registration Requirements

A foreign filing entity makes an *application for registration* rather than an application for certificate of authority.

1. The application for registration forms promulgated by the secretary of state are entity specific. Use of the promulgated forms is not mandated; however, if drafting an application for registration, please note the following new requirements:

a. The application must clearly identify the filing type of the foreign entity. As the term "corporation" may describe a for-profit, nonprofit, or professional corporation, it is not sufficient to merely identify the foreign entity as a "corporation."
b. The application must include the federal employer identification number (FEIN) of the foreign filing entity. If the foreign filing entity has not been issued an FEIN number at the time of making the application, a statement to that effect should appear in the application for registration.
c. The application must provide the date the entity began or will begin to transact business in the state.
d. The application must include an appointment of the secretary of state as agent for service of process under the circumstances described in section 5.251. Pursuant to section 5.251 of the BOC, the secretary of state is an agent for purposes of service of process if:

(1) the entity fails to appoint or maintain a registered agent in the state;
(2) the registered agent cannot with reasonable diligence be found at the registered office address;
(3) the entity's registration to do business is revoked; or
(4) the entity transacts business in Texas without being registered under chapter 9.

e. While a certificate of existence or status from the home jurisdiction is no longer required, the application for registration must contain a statement certifying that the entity exists as a valid foreign filing entity of the stated type under the laws of the entity's jurisdiction of formation.

2. When drafting an application for registration, please note that section 9.006 of the BOC contains supplemental requirements for the registration of nonprofit corporations. In addition, section 301.005 contains supplemental requirements for the application for registration for professional entities.

3. When drafting an application for registration for a foreign limited liability partnership, refer to sections 9.007 and 152.905 of the BOC rather than section 9.004 for filing requirements.

E. Foreign LLPs

Since September 1997, foreign LLPs transacting business in Texas have been required to qualify with the secretary of state.[53] Although not defined as a "*foreign filing entity*," the BOC applies many of the provisions of chapter 9 to foreign LLPs and requires a foreign LLP to register with the secretary of state before transacting business in Texas.

1. 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.

2. The fee for filing an application for registration for a foreign limited liability partnership 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[54] 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.

3. Unlike a Texas limited liability partnership, a foreign LLP that files an application for registration is required to have and maintain a registered office and agent in Texas for the purpose of service of process. Under the BOC, the failure to maintain a registered office or registered agent is grounds for the revocation of the foreign LLP's registration.

4. A foreign LLP that is transacting business in Texas and that fails to file an application for registration with the secretary of state is subject to subchapter B of chapter 9 of the BOC to the same extent as a foreign filing entity. This means that the

foreign LLP 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.

5. Pursuant to section 152.910 of the BOC, a foreign LLP doing business in Texas on and after the effective date of the BOC is subject to the same late filing penalty assessed on foreign filing entities. A late filing fee will not be charged if: 1) the foreign LLP held a prior registration for the time stated as its beginning date of doing business; and 2) the new application for registration is submitted to this office within ninety (90) days of the date of expiration of its lapsed registration.

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 chapter 9 of the BOC, as well as the annual application for registration under section 152.905 of the BOC 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*.

7. It is unclear whether the BOC intended to exclude LLPs formed under the laws of another country from registration. Confusion is caused by the use of the term "state" rather than "jurisdiction" in section 152.901(b) of the BOC. While the LLP is predominantly a business entity that exists under the laws of the states of the United States, at least one Canadian jurisdiction has recently adopted LLP provisions. Consequently, the secretary of state is taking the position that the definitions of "*foreign nonfiling entity*" and "*foreign entity*" authorize the filing of an LLP formed under the laws of another country.[55]

F. "Foreign" Foreign Limited Partnerships

Whether deemed a foreign entity that provides limited liability to its owners or a limited partnership, the entity must register to transact business in Texas.

1. Under the Texas Revised Limited Partnership Act, a foreign limited partnership is defined as a limited partnership formed under the laws of *another state or another jurisdiction of the United States*. Thus, under prior law, a limited partnership formed outside of the United States was not required to file with the secretary of state in order to transact business in Texas as the statutory definition precluded its qualification.

2. 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. In contrast, section 151.001(3) of the BOC specifically defines a "foreign limited partnership" to mean "a partnership formed under the laws of *another state* that has one or more general partners and one or more limited partners." It is unclear whether the BOC intended to exclude LPs formed under the laws of another country from registration as foreign limited partnerships.

3. Chapter 9 of the BOC however requires registration of a foreign entity the formation of which, if formed in this state, would require the filing of a certificate of formation, or that affords limited liability under the law of its jurisdiction of formation to any owner or member. 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.

G. BOC Qualification of Out-of-State Professional Entities

1. The provisions of the Texas Professional Corporation Act only permit a professional legal 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, prior to the BOC, an out-of-state professional corporation or professional association seeking to transact business in Texas 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 to register as a foreign professional corporation and a foreign professional association to register as a foreign professional association. A foreign professional corporation or professional association currently registered as a "foreign professional limited liability company" may wish to consider filing an election to adopt the BOC for purposes of filing an application for amended registration to correctly identify its organizational form.

H. Transaction of Business

There is no definition of *transacting business* under prior law or under the BOC.

1. Rather than defining what is meant by "the transaction of business," prior law and the BOC provide a laundry list of activities that are not considered transacting business in Texas. Section 9.251 of the BOC carries forward the nonexclusive list of activities found under prior law. Activities that do not constitute the transaction of business for purposes of registration under chapter 9 include:

a. maintaining a bank account in the state;
b. holding a meeting of the shareholders, owners, or members or carrying on another activity concerning the entity's internal affairs;
c. creating, as a borrower or a lender, or acquiring indebtedness or other security interest in real or personal property;
d. transacting business in interstate commerce; or
e. conducting an isolated business transaction that is completed within a period of thirty (30) days, and that is not in the course of a number of repeated, similar transactions.

2. Whether certain activities constitute "transacting business" in Texas is often difficult to answer. There are numerous cases, and a few Attorney General Opinions, interpreting the provisions of article 8.01 of the Texas Business Corporation Act, which would be useful in determining whether a foreign entity's activities in the state require registration under the BOC. For example, the Texas Attorney General has stated that a foreign corporation acting as a general partner in a Texas partnership is transacting business in the state for purposes of qualification with the secretary of state. *See* Op. Tex. Att'y Gen. No. JM-7 (1983).

3. Although the secretary of state does not have the authority to issue formal or binding opinions, the legal staff of the Corporations Section does handle inquiries relating to the transaction of business.

4. Although a foreign entity may engage in certain limited activities without being deemed to be "transacting business" for purposes of registration, the nexus required for taxation is less than that required for qualification purposes. Therefore, an entity may be doing business in Texas for purposes of taxation, but not considered to be transacting business for purposes of qualification under the BOC. If the entity is a taxable entity, the comptroller of public accounts has a questionnaire regarding an entity's activities in Texas that may provide some assistance in making a determination. Based on the answers to the questionnaire, the comptroller will issue an opinion about whether the taxable entity (currently a corporation or an LLC) is doing business in Texas for franchise tax purposes. This determination also is an effective indication for purposes of filing an application for registration. To obtain a Texas nexus questionnaire (Form AP-114), visit the web site of the comptroller of public accounts at http://www.cpa.state.tx.us/taxinfo/taxforms/05-forms.html or contact the Texas Comptroller of Public Accounts, Business Activity Research Team, P.O. Box 13003, Austin, Texas 78711 or call toll-free (1-800-252-1381).

I. Post Registration Filings

An amendment to the application for registration is required when a foreign filing entity changes its name or its purpose.

1. There are several SOS forms that relate to amending the registration of a foreign entity. SOS form 406, "*Amendment to Registration*," may be used by BOC and non-BOC foreign filing entities to effect an amendment to the registration of a corporation, limited liability company, or limited partnership. SOS form 407, "*Amendment to Registration of a Foreign Limited Liability Partnership*," may be used to effect an amendment to the registration of a foreign LLP. SOS form 411, "*Amendment to the Registration of a Foreign Financial Institution*," should be used to effect an amendment to the registration of an out-of-state financial institution under the Finance Code. SOS form 422, "*Amendment to Registration to Disclose a Change Resulting from a Conversion or Merger*," may only be used by a BOC foreign filing entity to effect a transfer of the registration to a successor foreign filing entity. Please take care in selecting the correct form for submission.

2. Under the Texas Business Corporation Act, the Texas Limited Liability Company Act, and the Texas Revised Limited Partnership Act, there is no provision for an amendment to an existing certificate of authority to show the continuation of the certificate under the name of the surviving entity. In fact, the cessation of the existence of the entity holding the certificate of authority requires a termination of that certificate.[56] This means that the surviving entity would be required to file a new registration in order to conduct business in Texas.

3. Section 9.009 of the BOC permits the transfer or succession of a foreign entity's registration with the secretary of state after a merger or conversion.

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.[57]

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 file number for the converted entity.

c. The secretary of state has promulgated an amendment to registration form (SOS form 422) specifically designed for this type of amendment. When submitting SOS form 422, please note that you also must include a completed application for registration applicable to the entity type that is succeeding to the converting/merged entity's registration.

4. A termination of a registration (SOS form 612) is required under section 9.011(d) of the BOC, and under the relevant provisions of prior law, if:

a. The registered foreign filing entity merges with another registered foreign filing entity.

b. The registered foreign filing entity merges with a domestic filing entity.

c. The registered foreign filing entity terminates its existence by dissolution or termination in its jurisdiction of formation.

5. 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 (SOS form 406). 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.

J. Transition Issues for Foreign Entities Currently Qualified as Foreign "LLCs"

1. Prior to September 1, 2003, as a condition to qualification, a foreign business trust or other entity with limited liability that registered as a "foreign LLC" 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 an application for certificate of authority without adding the phrase "Limited Liability Company," "Limited Company," or an abbreviation of such terms to its legal name or qualifying assumed name.[58]

2. It may be advantageous for a foreign entity that is not characterized as an LLC in its jurisdiction of formation but that obtained its certificate of authority as a foreign LLC to simply elect early adoption of the BOC. Doing so will clarify the public record regarding the nature of the entity type that is registered. The foreign entity may file an early adoption statement and an amended registration to reflect its true entity type, and if registered prior to September 1, 2003, to delete the designation of LLC from its qualifying assumed name.

VIII. TITLE 1. CHAPTER 10: MERGERS, CONVERSIONS, AND EXCHANGES

A. Certificate of Merger Required

A certificate of merger is required to be filed in accordance with the provisions of Chapter 10 of the BOC when any party to the merger is a domestic filing entity or when any entity created pursuant to a plan of merger is a domestic filing entity.

1. A merger transaction controlled by another statute will continue to be governed by the other statute. For example, Chapter 162 of the Utilities Code will govern the consolidation or merger of telephone cooperatives.

2. An existing entity that continues to be governed by prior law needs to comply with the prior law when effecting the merger transaction. For example, article 5.04 of the Texas Business Corporation Act will continue to govern the merger of a Texas for-profit corporation formed before January 1, 2006 when merging with a foreign corporation, unless the Texas corporation has filed an early election to adopt the BOC.

3. A general partnership is not included within the definition of a domestic filing entity. Consequently, the merger of a foreign entity with a domestic general partnership governed by the BOC would not require

the filing of a certificate of merger with this office. Please note however that the merger of a foreign entity with a general partnership that continues to be governed by the Texas Revised Partnership Act would require the filing of a certificate of merger pursuant to section 9.02 (d) – (f) of the Act.

B. Transitional Transactions

Until January 1, 2010, fundamental business transactions between BOC entities and non-BOC entities will require drafters to look to multiple statutes.

1. A non-code organization, which includes a pre-2006 business corporation, may merge with a Texas corporation formed pursuant to the BOC as both the BOC and the Texas Business Corporation Act authorize this transaction.

a. Article 5.01A of Texas Business Corporation Act authorizes the merger of a domestic corporation with other entities. Article 1.02(20) defines "other entity" to mean "any entity, whether organized for profit or not, that is a corporation (other than a domestic corporation[59] or foreign corporation), limited or general partnership, limited liability company, real estate investment trust, joint venture, joint stock company, cooperative, association, bank, trust, insurance company or other legal entity organized pursuant to the laws of this state or any other state or country."
b. Section 10.001 of the BOC authorizes a merger of a domestic entity with a "non-code organization," which is defined under section 1.002(56) of the BOC as an organization other than a domestic entity.
c. In effecting the merger, the pre-2006 business corporation must not only comply with the provisions of chapter 10 of the BOC, but also the applicable law under which it is governed; namely, Part Five of the Business Corporation Act.
d. The filing instrument submitted in this type of transaction may be titled "Certificate of Merger" or "Articles of Merger." The secretary of state will not reject a filing instrument solely on the basis of the name used to identify the instrument.

2. A certificate of filing issued by the secretary of state for a merger transaction governed by prior law or by the BOC will bear the title of "Certificate of Merger."

3. Although the merger provisions of the BOC are modeled on the merger provisions of prior law, prior law contains some differences in filing requirements that must be kept in mind when drafting transitional or cross-statutory transactions.

a. If the approval of the shareholders of a corporation is required pursuant to Part Five of the Texas Business Corporation Act, the articles of merger must contain the number of shares outstanding, and the number of shares voted for and against the plan of merger.
b. If the shares of any class or series is entitled to vote as a class, the articles of merger must also include the designation and number of outstanding shares of each such class or series and the number of shares of each such class or series voted for and against the plan of merger.[60]

C. 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, 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/certificate of merger unless the articles/certificate of merger include a statement certifying:[61]

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 articles of organization, or certificate of formation or a statement that no amendments are to be effected by the merger;
d. that the certificate of formation of each new Texas corporation, limited partnership, or 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/certificate 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 governed by the Texas Business Corporation Act, 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 governed by the Texas Revised Limited Partnership Act, to each partner in each domestic limited partnership that is a party to the merger at least twenty days before the merger is effected, unless waived by the partner;[62]

(3) in the case of a limited liability company governed by the Texas Limited Liability Company Act, 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; or

(4) in the case of a domestic entity governed by the BOC, on written request furnished without cost by each surviving, acquiring, or new domestic entity or non-code organization to any owner or member of any domestic entity that is a party to the merger and, for a merger with multiple surviving domestic entities or non-code organizations, to any creditor or obligee of the parties to the merger if a liability or obligation is then outstanding.

3. The articles/certificate of merger also must contain a statement that the plan of merger was approved as required by the laws of the jurisdiction of formation of each organization that is a party to the merger and by the governing documents of those organizations.[63] Procedures for the approval of fundamental business transactions are found in the spoke applicable to the domestic entity type.[64]

4. As a result of the passage of House Bill 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.

D. Special Merger Provisions under Prior Law and the BOC

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.[65]

b. The parent or at least one of the subsidiaries in a short form merger filed pursuant to article 5.16 of the Texas Business Corporation Act 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.[66]

d. The voting requirements of article 5.03 of the Texas Business Corporation Act 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. Accordingly, as the merger is effected without approval of the shareholders, no amendments can be made to the articles of incorporation of a surviving entity.

2. Similar short form merger provisions are included in sections 10.006 and 10.152 of the BOC. The provisions are essentially the same as prior law. The BOC expands the provisions contained in the Texas Business Corporation Act and Texas Limited Liability Company Act and allows other entities to complete a merger with a subsidiary entity without the approval of the subsidiary's owners or members. Short form merger provisions do not apply however if a subsidiary entity is a partnership.

3. Merger of a General Partnership Governed by the BOC:

a. A Texas partnership may adopt a plan of merger and merge with one or more partnerships or other entities.[67]
b. A certificate of merger on behalf of a general partnership is filed with the secretary of state *only* when a party to the merger is a domestic filing entity or a domestic filing entity is to be created under the plan of merger.[68] Consequently, a partnership merger is filed with the secretary of state when the general partnership merges with or into a domestic corporation, limited partnership, limited liability company, professional association, or cooperative association or provides for the creation of one of these entities.[69]
c. A general partnership merger with or resulting in the creation of a real estate investment trust is not filed with the secretary of state. The merger should be filed with the county clerk in the county in which the domestic real estate investment trust's principal place of business in Texas is located.[70]

4. Merger of a General Partnership Formed Before January 1, 2006:

a. A Texas partnership that has not elected to adopt the BOC before its mandatory application date and that continues to be governed by the provisions of the Texas Revised General Partnership Act must file a certificate of merger with the secretary of state in order to effect a merger between the partnership and an "other entity." Consequently, until January 1, 2010, a partnership merger is filed with the secretary of state when the general partnership merges with or into a corporation, limited partnership, limited liability company, professional association or cooperative association, whether domestic or foreign, or provides for the creation of one of these entities.
b. The merger of a Texas partnership with or into a domestic or foreign partnership does not require the filing of a certificate of merger with the secretary of state.[71]

E. Common Errors To Avoid

Generally, the most frequent reason for rejection of a merger document is the failure to set forth all necessary recitations in the articles/certificate of merger or alternative statement.

1. The most frequent omission in a merger involving a domestic or foreign limited liability company or limited partnership is the authorization statement.[72] 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 has been approved by the laws of the jurisdiction of formation of each organization that is a party to the merger and by the governing documents of those organizations."

2. Persons using an SOS certificate of formation form for a domestic filing entity created pursuant to a plan of merger often fail to include the additional statement regarding the entity's formation pursuant to a plan of merger, which is required under section 3.005(a)(7) of the BOC. If using an SOS form the additional required statement may be set forth as additional text in the "Supplemental Provisions/Information" section of the promulgated form.

3. Pursuant to section 3.006, the formation and existence of a domestic filing entity created pursuant to a plan of merger takes effect and commences on the effectiveness of the merger. Consequently, the certificate of formation of a domestic filing entity created pursuant to the plan of merger cannot have an effective date that differs from the effective date of the articles/certificate of merger.

F. Conversions

1. Pre-BOC entities must comply with the conversion provisions in the Texas Business Corporation Act,[73] the Texas Limited Liability Company Act,[74] the Texas Revised Limited Partnership Act,[75] and the Texas Revised Partnership Act.[76]

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. *Note that the BOC will apply to the converted domestic entity and its certificate of formation for all conversions filed with this office on or after January 1, 2006.*

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/certificate 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.

c. The articles/certificate 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/governing documents.

d. 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.

e. 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 entity and the foreign entity will be transacting business in Texas, the *converted* entity will be required to file an application for registration under the statutes applicable to the converted entity.
c. Under the BOC, a foreign filing entity that converts to another foreign entity may file an amendment to its application for registration in order to succeed to the registration of the original foreign filing entity.[77]

3. Unlike the multiple provisions in prior law, the conversion provisions in chapter 10 of the BOC are applicable to all entities. Section 4.151 provides for one filing fee for the certificate of conversion, plus the fee for filing the certificate of formation for the converted domestic entity.

4. The conversion provisions 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/certificate 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.

G. Common Errors to Avoid

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 very 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.

H. How to Avoid Last Minute Problems with Tax Clearance

A common reason for rejection of a merger or conversion transaction is the failure to obtain tax clearance for the transaction.

1. Both the BOC and prior law require the secretary of state to determine that a merging or converting entity subject to franchise tax has paid all taxes due before the merger or conversion can be accepted and filed.[78]

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

   a. Submit the 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 provided in lieu of a plan of merger or conversion, a statement 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.[79]

I. What's New? Merger and Conversion Forms

The secretary of state has promulgated merger forms design to comply with BOC filing requirements.

1. There are several SOS forms that relate to merger transactions of BOC entities. SOS form 621 may be used to effect a divisional merger of a Texas BOC filing entity. SOS form 622 may be used to effect a merger of one or more Texas BOC filing entities with one or more organizations. SOS form 623 may be used to effect a merger of a subsidiary entity into a parent organization. SOS form 624 may be used to effect a merger when each party to the merger is a BOC nonprofit corporation. Please take care in selecting the correct form for submission.

2. Although the merger provisions of the BOC are modeled on prior law, use of the merger forms promulgated by the secretary of state is not recommended for use by non-BOC entities or for cross-statutory transactions. For example, the combination and divisive merger forms do not include a field for provision of information required under article 5.04A(3) and (4) of the Texas Business Corporation Act.

3. SOS merger forms do not include a plan of merger form. The plan of merger may be attached to the certificate of merger form or the alternative statements contained within the form may be checked and completed.

4. SOS merger forms also do not include a form for the creation of any domestic filing entity to be created pursuant to a plan of merger. If the plan of merger results in the creation of a domestic filing entity, please remember that the certificate of formation of the domestic filing entity created pursuant to the plan of merger must contain a statement that the entity is being formed under a plan of merger.[80]

5. SOS conversion forms are compliant with the provisions of the BOC and are not designed for cross-statutory transactions. The forms are entity specific: SOS forms 631 to 634 are used when the converting entity is a for-profit or professional corporation; SOS forms 635 to 638 are used when the converting entity is a limited liability company, and SOS forms 641 to 644 are used when the converting entity is a limited partnership. *Please note that the secretary of state has not promulgated forms for the specific purpose of converting or "re-domesticating" a foreign entity to a Texas entity of the same entity type.*

6. SOS conversion forms do not include a plan of conversion or a certificate of formation for a converted entity that is to be a domestic filing entity. When drafting the certificate of formation of a converted entity that is a domestic filing entity, remember to include the additional statements required under section 3.005(a)(7) of the BOC.

J. What's New for Mergers, Interest Exchanges, and Conversions?

The enactment of the BOC effected changes to fees and created new filing transactions for certain entity types.

1. The computation of filing fees for merger and conversion transactions between multiple entity types under prior law was complicated by the need to impose the fee assessed under the various statutes governing the transaction. The BOC simplifies the filing fees for

merger and conversion transactions by imposing a standard common fee.

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 for-profit 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 for-profit 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 when the converted entity is a domestic filing entity. For example, the total fee for filing the conversion of a foreign LLC to a Texas for-profit corporation is $600 ($300 for the conversion and $300 for the formation fee).

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.[81]

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.
e. The fee for filing a merger transaction where the only parties to the merger are nonprofit corporations or cooperative associations is $50. The fee for filing a merger transaction of a nonprofit corporation and a for-profit entity is $300.

3. The Texas Non-Profit Corporation Act was not amended to permit conversion of a non-profit corporation; consequently prior to the BOC a domestic non-profit corporation could not convert to a foreign non-profit corporation or other entity. A domestic for-profit corporation, limited liability company or limited partnership could 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.[82] The BOC specifically provides for the creation of a Texas nonprofit corporation by conversion. However, please note that 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*.

4. Under the Texas Limited Liability Company Act and the Texas Revised Limited Partnership Act, 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.

IX. TITLE 1. CHAPTER 11: WINDING UP AND TERMINATION

A. Winding Up

The process of winding up of the business of a domestic entity is triggered as a result of the occurrence of certain events. Chapter 11 of the BOC and the applicable spokes govern the winding up of a domestic entity.

1. Section 11.051 of the BOC sets forth five events that require the winding up of a domestic entity. These five events are: 1) the expiration of an entity's duration; 2) a voluntary decision to wind up the business of the entity by a vote of the persons authorized under the BOC to approve the winding up of the entity; 3) the occurrence of an event provided for in the governing documents of the entity that requires the winding up of the entity; 4) the occurrence of an event specified in the BOC as requiring the winding up of the domestic entity; and 5) a judicial decree that requires the winding up or dissolution of the entity.

2. There are also supplemental provisions that require the winding up of a limited liability company (sec. 11.056), a general partnership (sec. 11.057) and a limited partnership (sec. 11.058).

3. Unless the event requiring the winding up of the domestic entity is revoked (sec. 11.151) or canceled (sec. 11.152), the governing persons, or other persons authorized by the BOC, are required to wind up the business of the domestic entity as soon as reasonably practicable. Look to chapter 11 and the specific title governing the domestic entity for requirements and procedures relating to a revocation or cancellation of an event requiring the winding up of a domestic entity.

B. Certificate of Termination

A domestic filing entity must file a certificate of termination after the process of winding up is completed.

1. A certificate of termination must include the following:

a. the name and address of the filing entity;
b. the name and address of each governing person
c. the nature of the event that requires the filing entity's winding up;
d. a statement that the entity has complied with the provisions of the BOC governing its winding up;
e. any other information that may be required of the entity under the BOC; and
f. a certificate of account status, if applicable.

2. Supplemental information is required of nonprofit corporations and limited partnerships.[83] SOS form 651 may be used for the termination of a domestic entity, other than a nonprofit corporation or cooperative association (these entities use SOS form 652).

C. Involuntary Termination or Revocation by the Secretary of State

The authority of the secretary of state to involuntarily terminate or revoke certain entities was expanded by the BOC.

1. The following circumstances give rise to an involuntary termination of a domestic filing entity by the secretary of state:

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

2. Prior law did not authorize the involuntary termination of a domestic or foreign limited partnership or foreign limited liability partnership for its failure to maintain a registered agent or registered office address. Under the BOC, a domestic or foreign limited partnership or foreign limited liability partnership may face involuntary termination or revocation for its failure to maintain a registered agent or registered office.

3. The grounds giving rise to the revocation of a foreign filing entity's registration may be found in section 9.101 of the BOC. In addition to the circumstances described above, the secretary of state may revoke the registration of a foreign filing entity if the entity fails to amend its registration when required to do so by law.[84]

X. TITLE 1. CHAPTER 11: REINSTATEMENT

A. BOC-Entities May Reinstate After a Voluntary Termination

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 domestic or foreign entity or a name registration or reservation on file with the secretary of state. 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.[85]

4. A letter of eligibility from the 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, professional corporation, or limited liability company.[86]

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.

B. Reinstatement After an Involuntary Termination

1. Existing law establishes a certain timeframe, 36 months, within which a non-BOC nonprofit corporation, for-profit corporation, professional corporation, professional association, and limited liability company must submit an application for reinstatement following an involuntary dissolution by the secretary of state.[87] Failure to file an application for reinstatement within this timeframe requires the creation of a new entity.

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 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.

4. Prior to filing the reinstatement, the secretary of state must determine whether the name of the involuntarily terminated entity being reinstated is the same as, or deceptively similar to that of an existing domestic or foreign entity or a name registration or reservation on file with the secretary of state. 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.[88]

5. A certificate of reinstatement must include any documents needed to correct the circumstances giving rise to the involuntary termination, including the payment of any fees or penalties. In addition, the certificate of reinstatement *must* include the name of the entity's registered agent and its registered office address.

6. A letter of eligibility from the 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, professional corporation, or limited liability company.[89]

7. 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.

C. Reinstatement After Revocation of Registration

1. Pursuant to section 9.104, a foreign filing entity, other than a foreign limited liability partnership, that has had its certificate of registration revoked by the secretary of state must file a certificate of reinstatement *no later than the third anniversary of the date of the revocation of the entity's registration.* The 36-month timeframe is similar to existing law.

2. A foreign limited liability partnership that has had its certificate of registration revoked by the secretary of state must reinstate no later than the date the registration would have expired had the registration not been revoked.[90]

3. Failure to file a certificate of reinstatement within the timeframes specified above requires the foreign filing entity to submit a new application for registration.

D. Reinstatement 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.[91]

E. SOS Forms for Reinstatement

The secretary of state has promulgated a single form (SOS form 811) that may be used for the reinstatement of a BOC entity, domestic or foreign. The form may be used to effect a reinstatement

following a voluntary termination, an involuntary termination, a revocation of registration, or a tax forfeiture. Due to the differences in statutory requirements and timeframes, this form should not be used by non-BOC entities. Until January 1, 2010, a non-BOC entity should continue to use the application for reinstatement form (SOS form 801) promulgated for entities formed before the enactment of the BOC.

F. Judicial Revocation of Fraudulent Terminations

House Bill 1165, which was passed by the 78th Legislature in 2003, amended the Texas Business Corporation Act and the Texas Non-Profit Corporation Act 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 of a domestic filing entity.

XI. BOC TRANSITION ISSUES

A. Effective Date and Mandatory Application Date

House Bill 1156, the legislative act that enacted the BOC, became effective on January 1, 2006.

1. The BOC applies to all domestic entities created on or after January 1, 2006 and to all foreign entities registering with the secretary of state on and after January 1, 2006, the effective date of the BOC. Please note that the term *"domestic entity"* does not include such entities as a bank, an insurance company, a telephone cooperative, a water supply corporation, or other corporate entity formed under special statute.

2. The phrase *"mandatory application date,"* as it relates to application of the BOC, means:

- for a domestic entity formed on or after the effective date of the BOC, January 1, 2006;
- for a foreign filing entity or other foreign entity that has not registered with the secretary of state before the effective date of the BOC, January 1, 2006;
- for a domestic entity in existence prior to the effective date of the BOC or for a foreign filing entity registered with the secretary of state prior to the effective date of the BOC, the date of completion of the action required to voluntarily elect to adopt the BOC, but no earlier than January 1, 2006;
- for any other entity, January 1, 2010.

3. The provisions of the BOC will not apply to non-code organizations such as banks or insurance companies until January 1, 2010, unless the laws governing such entities or the BOC provide otherwise.[92]

B. Early Adoption of the BOC

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. (SOS forms 808 and 809)

1. Section 402.003 of the BOC 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".

2. Generally, the secretary of state does require amendments to governing documents as a precondition for filing an early adoption statement. However, certain circumstances may require that a certificate of amendment be submitted to cause the entity's formation or registration document to comply with the BOC. For example, a limited partnership formed under the Texas Uniform Limited Partnership Act may need to provide an amendment to its certificate of limited partnership to include a term of organization in its limited partnership name.

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, for-profit corporation, professional corporation, or professional association would be $15.

4. House Bill 1319, which was passed by the 79th Legislature, amended Section 402.005 of the BOC to permit certain corporations created under a special statute before January 1, 2006 to file an early adoption statement to elect to adopt the BOC prior to the mandatory application date. The provision applies only to a corporation that is formed by filing its articles of incorporation with the secretary of state, such as a telephone cooperative or water supply corporation.

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. The following transition provisions in the BOC are applicable to LLPs to clarify the applicability of the BOC to the registration of domestic and foreign LLPs after the effective date of the BOC.

1. Partnerships formed and registered before January 1, 2006: 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. Any renewal is governed by the 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 the BOC is earlier adopted.

2. Partnerships 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 the BOC. The provisions of the Texas Revised Partnership Act or Texas Revised Limited Partnership, as applicable, continue to govern other matters until 2010, unless the BOC is 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.

D. Entities in a Forfeited or Involuntarily Terminated Status

1. Pursuant to section 402.013, 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 to transact business pursuant to 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.

E. Opt In and Comply?

Whether an entity formed before the effective date of the BOC should opt in and comply with the BOC is generally a fact driven decision.

1. Due to the strictures of prior law, an involuntarily terminated domestic entity may only be able to reactivate its existence by opting into the more flexible provisions of the BOC, which do not limit the timeframe within which a reinstatement must be filed.

2. Registered foreign entities may seek to opt-in and comply with the BOC in order to effect certain amendments.

   a. An amendment to reflect a change effected by a merger or conversion resulting in a transfer of the registration to a successor entity may only be accomplished under the provisions of the BOC.
   b. A foreign entity previously qualified as a foreign limited liability company that is not characterized as a limited liability company in its home jurisdiction may wish to opt-in and comply in order to effect an amendment to its registration to accurately reflect its entity type.

3. A professional corporation governed by the Texas Professional Corporation Act that desires a multi-tiered ownership structure may wish to opt-in and comply. Only a professional corporation governed by the BOC may have professional organizations that provide the same professional service as owners of the professional corporation.

4. Entities that are parties to a cross-entity merger involving BOC and non-BOC organizations may wish to opt-in and comply in order to facilitate the merger transaction and the drafting of the merger filing instrument.

XII. DOING BUSINESS WITH THE SECRETARY OF STATE

A. Ministerial Duties

1. The filing duties of the secretary of state are ministerial and mandatory. This means that the secretary of state cannot be enjoined from filing a document that on its face conforms to law.[93]

2. The secretary of state does not determine whether the person signing a document has the capacity claimed or that the signature affixed to the document is, in fact, the signature of the named person.[94]

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.[95]

B. Accessing Information

The secretary of state has upgraded its computer technology and the agency's use of technology in order to facilitate public access to information.

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 at http://www.sos.state.tx.us/corp/generalfaqs.shtml, which is accessible from the side navigation bar on the Corporations Section home page.

2. Secretary of state records, including corporation, limited partnership, limited liability company, assumed name, trademark, and UCC filings, are available from the web through SOSDirect. 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. 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 SOSDirect can be obtained from http://www.sos.state.tx.us/corp/sosda/index.shtml.

4. 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. The naming convention for any employee is first initial followed by the last name. For example, the e-mail address for Lorna Wassdorf is lwassdorf@sos.state.tx.us.

5. If you are not comfortable using the SOSDirect electronic resource, requests for information or for preliminary name availability determinations may be made by telephone at (512) 463-5555 or by e-mail at corpinfo@sos.state.tx.us. Copies or certificate requests may be placed with a person on staff by telephone at (512) 463-5578, by e-mail at corpcert@sos.state.tx.us or by faxing your written request to (512) 463-5709.

6. Many of the forms promulgated by the secretary of state also can be faxed on demand by calling (900) 263-0060. There is a fee of $1.00 per minute for using this service; however, the fax transmission itself is free. Use of the "900 fax on demand" is facilitated if you have handy the SOS form number of the desired form and the fax number to which the form is to be transmitted.

7. If you wish to pose a question to the legal staff regarding a filing issue, you may telephone (512) 463-5586 or send an e-mail to corphelp@sos.state.tx.us.

C. Official Certifications

Recent changes to the business organization statutes have changed the language used in official certifications of entity status.

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/terminated 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 or certificate of 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 increased from $10 to $15.[96]

ENDNOTES

[1] House Bill 1156 codified the provisions of the following statutes: the Texas Business Corporation Act [TBCA]; the Texas Miscellaneous Corporation Laws Act [TMCLA] (article 1302-1.01 et. seq. Vernon's Ann. Civ. St. (V.A.C.S.)); the Texas Non-Profit Corporation Act [TNPCA] (article 1396 V.A.C.S.); the Cooperative Association Act (article 1396-50.01, V.A.C.S.); the Texas Professional Corporation Act [TPCA] (article 1528f, V.A.C.S.); the Texas Professional Association Act [TPAA] (article 1528f, V.A.C.S.); the Texas Limited Liability Company Act [TLLCA] (article 1528n, V.A.C.S.); the Texas Revised Limited Partnership Act [TRLPA] (article 6132a-1, V.A.C.S.); the Texas Revised Partnership Act [TRPA] (article 6132b-1.01 et. seq., V.A.C.S.); and the Texas Real Estate Investment Trust Act [TREITA] (article 6138A, V.A.C.S.)

[2] Sec. 1.106 BOC

[3] *See* Sec. 1.002(60) and Sec. 2.002 BOC

[4] Sec. 2A(2) TPAA, Art. 11/01A(3) TLLCA, and Sec. 301.012 BOC

[5] Sec. 2A(3) TPAA, Sec. 4(b) TPCA, Art. 11.01A(3) TLLCA, and Sec. 301.012 BOC

[6] 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. Although not permitted under the TLLCA, section 301.012 of the BOC permits a professional limited liability company formed under or governed by the provisions of the BOC to engage in this joint practice.

[7] Sec. 301.003(7) of the BOC defines a "professional organization" as a person, other than an individual, whether nonprofit, for-profit, domestic, or foreign and including a nonprofit corporation or nonprofit association, that renders the same professional service as the professional corporation only through owners, members, managerial officials, employees, or agents, each of whom is a professional individual or professional organization.

[8] Sec. 302.001 BOC

[9] The list of professionals authorized to form professional associations is exclusive. *See e.g.*, Forrest N. Welmaker, Jr. v. The Honorable Henry Cuellar, Secretary of State, 37 SW 3d 550, (Tex. Civ. App.—Austin 2001, pet. denied), which upheld the secretary of state's refusal of articles of association with a purpose to practice law.

[10] Sec. 405.031(e) Texas Government Code

[11] Art. 10.02 of the TBCA, art. 1396-9.03A of the TNPCA, art. 9.02 of the TLLCA, and sec. 13.08(b)(13) of the TRPA provide that if a person signs a document which the person knows if false in any material respect with the intent that the document be delivered to the secretary of state to be filed on behalf of a corporation, limited liability company, or limited liability partnership, the person has committed an offense. The offense is a Class A misdemeanor. The TBCA provision further provides that the offense is a state jail felony if the intent of the person is to harm or defraud another. In addition, section 2.04(c) of the TRLPA provides that the execution of a certificate or written statement constitutes an oath or affirmation, under penalties of perjury, that, to the best of the executing party's knowledge and belief, the facts stated in the certificate or statement are true. Further, a person may be liable for damages under section 2.08 of the TRLPA if a certificate of limited partnership, or a certificate of amendment, merger, or cancellation contains a false statement or material omission, or is forged or is signed by a person not authorized by the partnership to execute the document.

[12] *See* 1 TAC §79.73

[13] In order to effect the abandonment of the filed instrument, article 9.03 TLLCA and section 2.12F TRLPA require that a certificate of abandonment be filed with the secretary of state. The filing fee is $15.

[14] Art. 5.03L TBCA requires the filing of a statement of abandonment with the secretary of state.

[15] Art. 5.17L TBCA requires the filing of a statement of abandonment with the secretary of state.

[16] 1 TAC Sec. 79.82

[17] Art. 10.03A(3) TBCA; Art. 1396-10.07A(3) TNPCA; Sec. 2.12A(3) TRLPA; Art. 9.03A(4) TLLCA, Sections 4.052 to 4.056 BOC

[18] Art. 1302-7.01 through 7.05 TMCLA, which are applicable to corporations and LLCs; Sec. 2.13 TRLPA; Sections 4.101 to 4.105 BOC

[19] Art. 1302-7.04C TMCLA; Sec. 2.13(c)(3) TRLPA

[20] Art. 2.05 and 8.03 TBCA; Sec. 1.03 TRLPA; Art. 2.03 and 7.03 TLLCA; and sections 5.052, 5.053, and 9.004(b)(1) of the BOC.

[21] *See* 1 TAC § 79.35 and Steakley v. Braden, 322 S.W. 2d 363 (Tex. Civ. App.—Austin 1959, no writ).

[22] 1 TAC § 79.38. *See also* 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."

[23] *See* Art. 2.05C TBCA

[24] Sec. 5.052 BOC

[25] Sec. 31.005 Texas Finance Code

[26] Persons may obtain further information by calling (512) 475-1300 or by visiting the Department of Banking's web site at http://www.banking.state.tx.us/corp/noobject.htm.

[27] Sec. 5.057 BOC and Sec. 251.452 BOC

[28] Art. 711.021(h) Tex. Health & Safety Code

[29] Sec. 61.313 Texas Education Code
[30] Sec. 5.062 BOC
[31] Sec. 5.061 BOC
[32] Sec. 16.30 Texas Business & Commerce Code (hereinafter " TB&CC"); Amateur Sports Act, 36 U.S.C. §380 (1978)
[33] Sec. 9.004 BOC. The name that the corporation elects for use in Texas with the appropriate word of incorporation or abbreviation denoting incorporation should be set forth in the application for registration. Because the name of the corporation as stated in its articles of incorporation from its jurisdiction of incorporation will differ from the name on its registration, the corporation should consider whether an assumed name certificate should be filed under Chapter 36 of the TB&CC.
[34] Sec. 5.055 of the BOC may be read to require a limited partnership that is registering as a limited liability partnership to comply with both section 5.055(a) and (b) and to thus duplicate the words or abbreviations of organization in its name. The secretary of state will however accept for filing a name that complies with either subsection (a) or (b).
[35] The comments in Part VII, section E, apply to professional limited liability companies, professional corporations, and professional associations.
[36] 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, PC or PA. If a name is determined to be in violation of the statutes or ethics of the profession, articles/certificate of amendment must be filed to change the name.
[37] John Smith, Certified Public Accountant, PLLC is a correct usage of the credential; John Smith and Associates, PLLC, CPA is incorrect.
[38] Professional Ethics Opinion No. 393 (1978)
[39] The Attorney General of Texas has opined that engineers form for-profit 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 TPCA. Since the definition in the TLLCA does not contain this restriction, the secretary of state has filed articles of organization providing for the creation of a PLLC to engage in the practice of engineering. This same reasoning applies to filings submitted under the BOC.
[40] Texas Engineering Practice Act, Sec. 1001.004 Texas Occupations Code. At the request of the Texas Board of Professional Engineers, after filing a certificate of formation that contains the word "engineer" or "engineering" in the name, the secretary of state sends a copy of the instrument in order that the Board may investigate and determine compliance with Section 1001.004 of the Occupations Code.
[41] Based on the definition of "professional service" contained in the Texas Professional Corporation Act, the Attorney General of Texas has opined that architects form for-profit corporations rather than professional corporations. *See* Op. Tex. Att'y Gen. No. 539 (1970). The definition of "professional service" contained in the Texas Professional Corporation Act differs from the definition of a "professional service" 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 before the passage of the Act. Since the definition of "professional service" contained in the TLLCA does not contain a similar restriction, the secretary of state has filed articles of organization for the creation of a PLLC to engage in the practice of architecture. This same reasoning applies to filings under the BOC.
[42] After filing, the secretary of state sends a copy to the Texas Board of Architectural Examiners of all certificates of formation that contain certain words in the name in order that the Board may investigate and determine compliance with their rules and regulations.
[43] 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.
[44] Sec. 1.03 TRLPA
[45] Sec. 1.03(4) TRLPA
[46] Sec. 36.11(a) TB&CC
[47] See Art. 2.09A(2) TBCA
[48] If the registered office address is in a city with a population of less than 5,000, the secretary of state will accept an address other than a street address for the registered office. See 1 TAC §79.28
[49] Only professional legal corporations were authorized to obtain a certificate of authority under Section 19A of the TPCA. Before the enactment of the TLLCA, a foreign professional corporation formed for the rendition of a professional service other than the practice of law had to form a domestic professional corporation in order to provide the professional service as a corporation in Texas. *See* Tex. Att'y Gen. Op. JM-7 (1983). The TPAA does not provide for the qualification of a foreign professional association.
[50] *See* Art. 2.01B(4) TBCA
[51] 115 S.W.2d 468 (Tex. Civ. App. 1938)
[52] Sec. 9.051 to Sec. 9.052 BOC
[53] Sec. 10.02 TRPA and Sec. 152.905 BOC. As of May 1, 2006, approximately 906 statements of foreign registration have been filed since the enactment of the qualification requirements in 1997. As of May 1, 2006, approximately 446 foreign limited liability partnerships are currently registered.
[54] 1 TAC §80.2(f)

[55] The LLP is a foreign nonfiling entity, which is defined in the BOC to mean a foreign entity that is not a foreign filing entity. Foreign entity is "an organization formed under, and the internal affairs of which are governed by, the laws of a jurisdiction other than this state." Sec. 1.002(28) BOC
[56] *See e.g*., article 8.14C TBCA
[57] Sec. 9.009(a-1) BOC
[58] House Bill 1637, 78th Legislature, which became effective on September 1, 2003.
[59] A domestic corporation is defined under article 1.02A(11) of the TBCA as a for-profit corporation created under the TBCA.
[60] Art. 5.04A(3) & (4) TBCA
[61] Art. 5.04A(1) TBCA; Sec. 2.11(d)(1) TRLPA; Art. 10.03A(1) TLLCA; Sec. 10.151(b)(1) BOC
[62] 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.
[63] Sec. 10.151(b)(3) BOC
[64] For example, provisions for for-profit and professional corporations are found in Sections 21.451 to 21.462 of the BOC. LLCs should look to Sec. 101.365.
[65] 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.
[66] In the case were 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.
[67] Art. 6132b-9.02 TRPA.; Sec. 10.001 and Sec. 10.151 BOC
[68] Until January 1, 2010, a partnership that was formed before January 1, 2006 and that continues to be governed by the provisions of the TRPA may need to file a certificate of merger with the secretary of state pursuant to article 6132b-9.02(d) and (e). The filing fee for the merger would be the fee assessed under the BOC ($300).
[69] Sec. 10.151(a)(1) BOC. Corporations, limited partnerships, limited liability companies, professional associations, cooperatives, and real estate investment trusts are filing entities. General partnerships and joint ventures are not filing entities under the BOC.
[70] Sec. 10.153(b) and (c) BOC
[71] Sec. 9.02(d) TRPA
[72] Art. 10.02A(2) TLLCA; Sec. 2.11(d)(2) TRLPA; and Sec. 10.151(b)(3) BOC
[73] Art. 5.17 - Art. 5.20 TBCA
[74] Art. 10.08 - Art. 10.11 TLLCA
[75] Sec. 2.15 TRLPA
[76] Art. 6132b-9.05 TRPA
[77] Sec. 9.009(a-1)(2) BOC
[78] 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 for-profit 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. House Bill 3, which expanded the franchise tax base to include such entities as taxable entities, was enacted by the 79th Legislature in its 3rd Called Session and does not become effective until January 1, 2008.
[79] Art. 5.04C TBCA; Art. 5.18C TBCA; Art. 10.03B TLLCA; Art. 10.09C TLLCA; and Sec. 10.156(2) BOC
[80] Sec. 3.005(a)(7) BOC
[81] Sec. 10.010 BOC
[82] *See* Op. Tex. Att'y Gen. No. JC-0015 (1999). Sec. 162.253 of the Texas Utilities Code specifically allows a domestic corporation authorized to furnish communication services to consolidate and convert to a telephone cooperative.
[83] Sec. 11.105 and Sec. 153.452 BOC
[84] Sec. 9.101(b)(3) BOC
[85] Sec. 11.203 BOC
[86] Sec. 11.202(e) BOC. It is likely that this requirement may be expanded to include other taxable entities after January 1, 2008, given the passage of House Bill 3 by the 79th Legislature.
[87] Art. 7.01E and Art. 8.16 TBCA; Art. 7.01E and Art. 8.15 TNPCA; Art. 7.11E TLLCA
[88] Sec. 11.203 BOC
[89] Sec. 11.202(e) BOC. It is likely that this requirement may be expanded in a future legislative session to include other taxable entities given the passage of House Bill 3 by the 79th Legislature in its 3rd Called Session.
[90] Sec. 152.914 BOC
[91] Sec. 11.254 BOC
[92] Sec. 402.005(b) BOC. *See e.g*., Sec. 92.001 of the Finance Code, which addresses the applicability of the BOC to a savings bank.
[93] Beall v. Strake, 609 W.W. 2d 885 (Tex. Civ. App—Austin 1981, writ ref'd n.r.e.)
[94] 1 TAC §§79.21, 80.3, and 83.3.
[95] 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* article 6.08 of the TBCA and article 1396-6.07 of the TNPCA.

[96] Senate Bill 1377 also creates a separate fee of $10 for the 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.