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Doing Business with the Secretary of State

Presented by:
Lorna Wassdorf
Office of the Secretary of State

2006 PARTNERSHIPS, LIMITED PARTNERSHIPS AND LLCs
July 20-21, 2006
Austin, Texas



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What Does the Code Change?

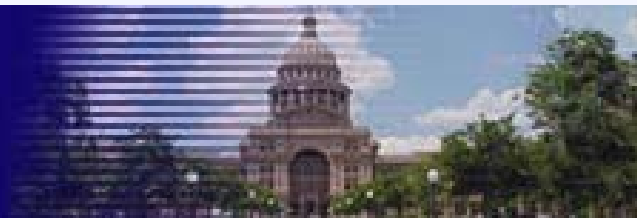
- ◆ Fees-filing fees generally standardized.
- ◆ Standardization of provisions among entity types.
- ◆ Vocabulary--new terminology required for application of common provisions to multiple entities.
- ◆ Simplification of filing provisions.



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Code Does **Not**

- ✓ Change the management structure
- ✓ Change the liability of the entity or its principals
- ✓ Change the operation of the entity
- ✓ Change the way external parties do business with the entity
- ✓ Change state agencies enforcement activities against those entities



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Navigating the BOC

- ◆ Look to Title 1 for the general provision.
- ◆ Then look to the specific title governing the entity--The “spoke” E.g., corporations--Title 2.

If the provision of Title 1 conflicts with a provision in the specific title governing the entity, the provision in the specific title supercedes the provision in Title 1.



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Title 1 Chapters

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



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Title 1 Chapters

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



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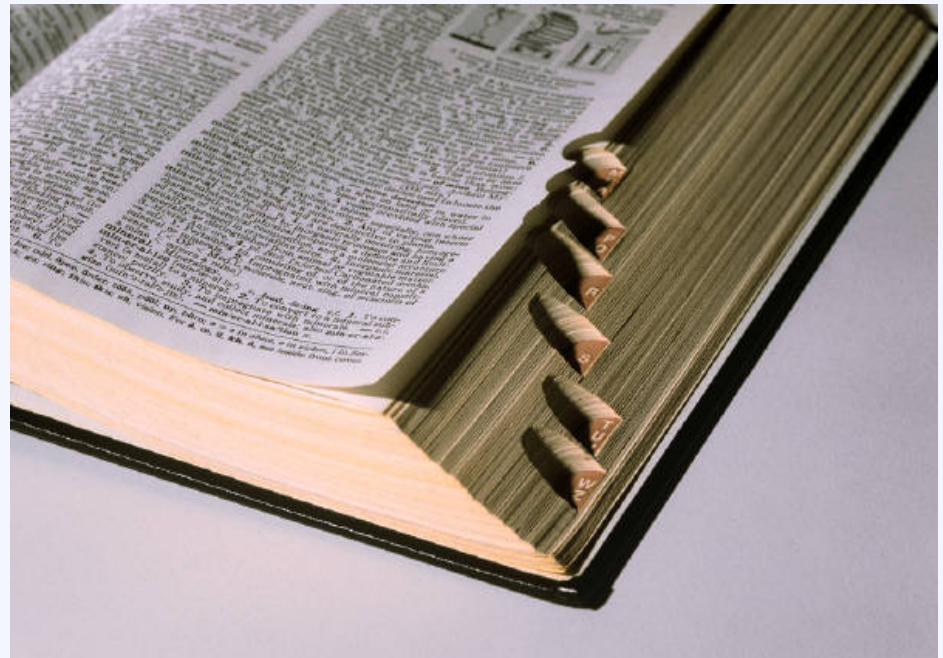


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Hub Chapters Title 1--Chapter 1

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



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Terminology is not a BIG Deal

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



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Hub Chapters Title 1--Chapter 2

Purposes & Powers

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

What's New?

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



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Chapter 2--Purposes

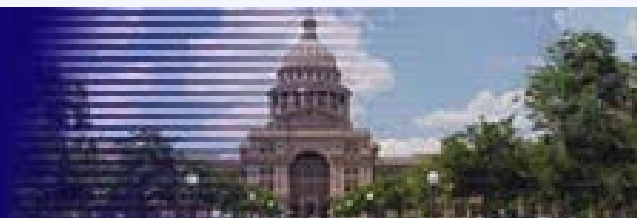
- The SOS will not distinguish between LLCs created for a for-profit purpose and LLCs created for a nonprofit purpose.
- Professional LLCs, LLCs with a for-profit purpose, and LLCs with a nonprofit purpose are classified under the same entity type description:
 - domestic limited liability company.



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A Note About BOC “Nonprofits”

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



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A Note About BOC “Nonprofits”

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



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Hub Chapters Title 1--Chapter 3

- ◆ Chapter 3: Formation and Governance
 - ◆ Subchapter A-- Requirements for certificates of formation for all entities



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Certificates of Formation

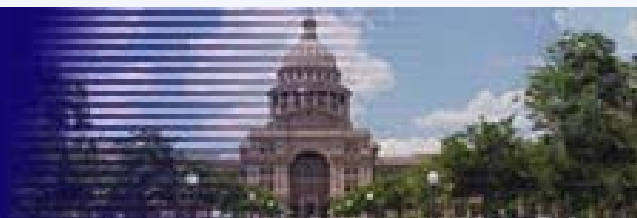
- ◆ Domestic filing entities are formed by filing a **certificate of formation** with the filing officer.
- ◆ Any certificate of formation filed with an effective date on or after January 1, 2006:
 - ✓ creates a BOC entity
 - ✓ must comply with BOC filing requirements.
- ◆ Conversion resulting in a domestic converted entity--converted entity formed as a BOC entity.



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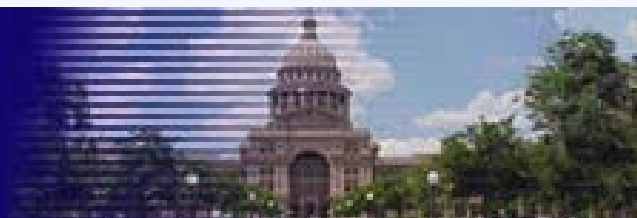
- ◆ Certificates of formation are governed by § 3.001 et seq.
- ◆ Every certificate of formation must contain:
 - ✓ The name of the filing entity to be formed;
 - ✓ The type of filing entity to be formed (e.g., limited liability company)
 - ✓ Purpose (except for LPs);
 - ✓ Duration, if not perpetual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



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





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CAUTION

“Gotchas”

CAUTION

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

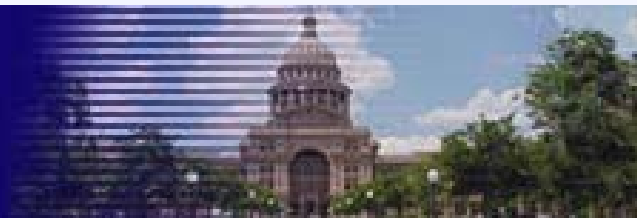
- ✓ Sec. 3.015(a)(1) requires that the certificate of formation of a professional association be signed by each original member of the PA.



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Chapter 3: Subchapter B Amendments & Restated Certificates

Uniform requirements for all domestic entities. SOS has promulgated a generic:

Certificate of Amendment (**Form 424**)

Restated Certificate of Formation (with further amendments) (**Form 414**), and

Restated Certificate of Formation (without amendments) (**Form 415**).



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Hub Chapters

Chapter 4: Filings

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



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Hub Chapters

Chapter 4: Filings

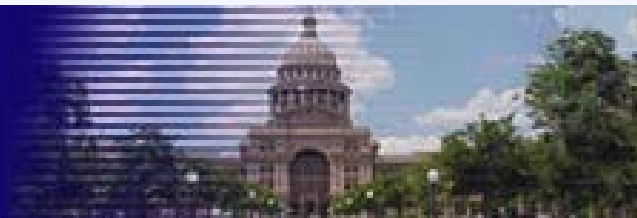
- ◆ Section 4.003--instrument must be signed by a person authorized by the BOC to act on behalf of the entity in regard to the filing instrument.
 - This is a general provision. Look to the spoke applicable to the entity or to the specific provision applicable to the transaction to determine who must sign an instrument.



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Chapter 4: Filings

Sec. 20.001: An officer must sign a filing instrument.

Sec. 153.553: Generally, a GP must sign a filing instrument. Section sets forth execution requirements for certain instruments.

- ✓ Initial certificate of formation signed by all general partners.
- ✓ Amendment signed by at least one general partner and by each new general partner added by the certificate of amendment.



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Chapter 4: Filings

Execution of LLC documents:

- ◆ No specific provision found in the spoke.
- ◆ If the LLC is managed by managers, a manager must sign the filing instrument.
- ◆ If the LLC is not managed by managers, but managed by its members, the filing instrument should be signed by an authorized member of the LLC.



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False or Fraudulent Filings

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

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

- Class A misdemeanor is punishable by a sentence of up to 180 days, a fine of up to \$4,000, or both.



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False or Fraudulent Filings

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

- State jail felonies are generally punishable by a sentence of 180 days to 2 years plus a fine of up to \$10,000.



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Civil Liabilities

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

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



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Civil Liabilities

An injured person may recover from:

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



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Enforcement

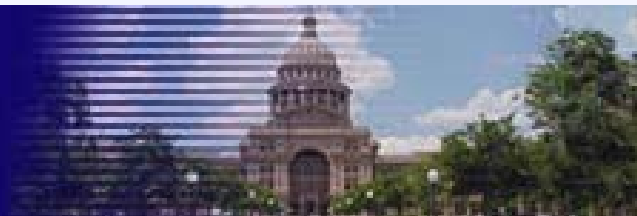
The SOS does *not* have authority to initiate criminal action or bring civil suit on behalf of parties harmed by a fraudulent filing.



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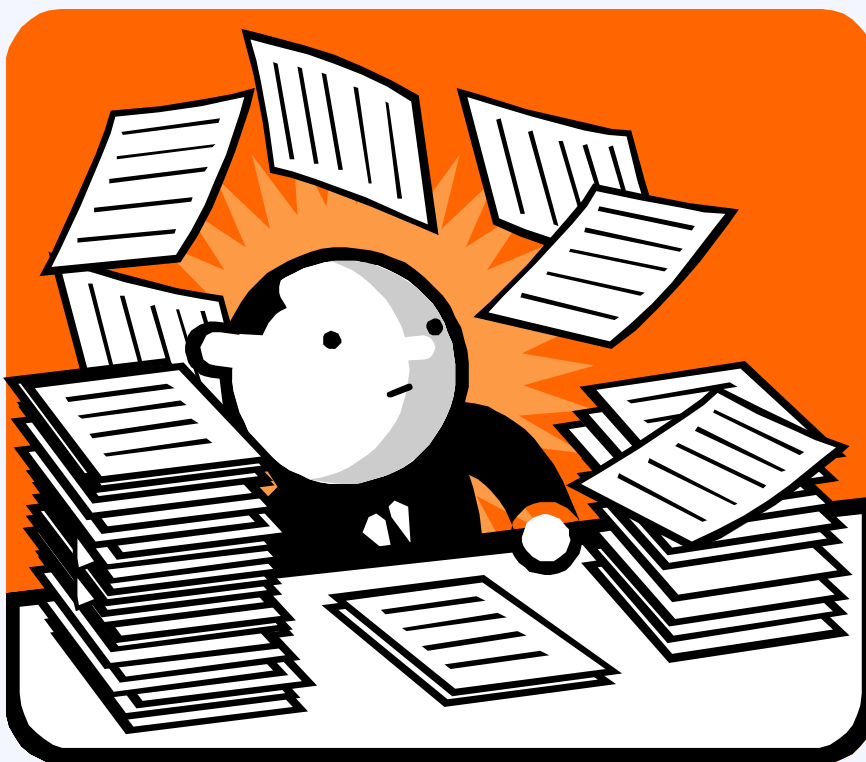


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Forms

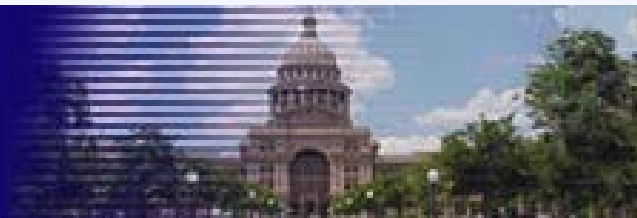
Section 4.006 of the BOC authorizes the SOS to promulgate forms for any filing instrument or report required or permitted to be filed with the SOS.



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Forms

- ★ Available on the SOS web site at:
http://www.sos.state.tx.us/corp/forms_option.shtml
- ★ Split into BOC Forms and Pre-BOC Forms
- ★ When possible, SOS promulgated forms that complied with BOC as well as prior law
- ★ **Use of SOS forms permissive not mandatory.**



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Chapter 4: Filings

- ◆ Subchapter B--When Filings Take Effect
 - General rule: On Filing
 - Delayed effective dates and conditions
 - Abandonment before effectiveness

- ◆ Subchapter C--Certificates of Correction



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Chapter 4 Continued

◆ Subchapter D: **FILING FEES!** All filing fees contained in one chapter.

All Entities	§ 4.151
For-Profit	§ 4.152
Nonprofit	§ 4.153
Limited Liability Company	§ 4.154
Limited Partnership	§ 4.155



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Filing Fees

- ✓ Generally, filing fees for nonprofit corporation filings remain the same.
- ✓ Filing fees for LLC documents and LP documents were standardized with filing fees established under the TBCA.
- ✓ Filing fees for LLC documents increased.
- ✓ Many filing fees for LP documents decreased.



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Pre-Clearance Fee

Before effective date of the BOC, only fee imposed for pre-clearance was for LP documents.

Under the BOC, the fee for preclearing any filing instrument is \$50.



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Chapter 5: Names of Entities

Registered Agents and Registered Offices

- ◆ Subchapter A: General Provisions
- ◆ Subchapter B: General Provisions Relating to Names of Entities
- ◆ Subchapter C: Reservation of Names
- ◆ Subchapter D: Registration of Names
- ◆ Subchapter E: Registered Agents and Registered Offices
- ◆ Subchapter F: Service of Process



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Chapter 5--Names

- ✓ Authorizes use of assumed names
- ✓ Contains organizational identifiers for entities
- ✓ Professional entity names must not be contrary to regulatory statute
- ✓ Prohibits unauthorized purpose in name
- ✓ Cannot use “Lotto” or “Lottery”
- ✓ Unauthorized use of certain words in veterans organizations



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Names

Name availability standards and rules remain the same.
§ 5.001 et seq.

- LP name can include name of limited partner.
- “Limited” and “Ltd.” are acceptable organizational indicators for limited partnerships, for-profit, nonprofit, and professional corporations. §§ 5.054(1) and 5.055(a)



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Name Reservations

- ★ Any person may reserve the use of a name under chapter 5 of the BOC.
- ★ The filing fee is \$40.
- ★ The name is reserved for a period of 120 days.



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Renewal of Name Reservations

- ★ Under the BOC, all name reservations can be renewed for additional 120-day periods.
- ★ File a new application within 30 days prior to expiration (**\$40**). If not using SOS form, please identify the reservation as a renewal.
- ★ Renewal must be made by applicant of record. If not, transfer of name reservation required (**\$15**).



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Registered Agent Requirements

- Registered Agent may be:
 - ✓ an individual resident of Texas, or
 - ✓ a domestic or foreign entity that is registered to do business in Texas.
- Registered agent's business office address must be the same address as the registered office.
- BOC & Non-BOC entities may use Form 401.



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Registered Office Requirements

➤ Registered Office:

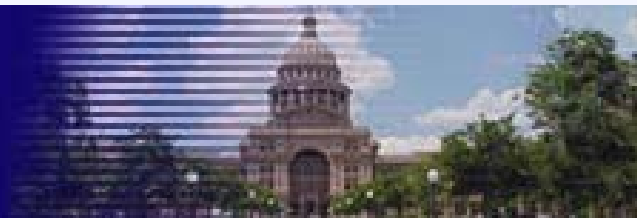
- ✓ Must be located at a street address where process may be personally served on the registered agent;
- ✓ Is not required to be the business office address of the represented entity; and
- ✓ May not be solely a mailbox service or telephone answering service.



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Change of Name of Registered Agent

- BOC provides that a registered agent that changes his/her/its name may file statement with the SOS to show the name change.

- Form 408 may be used for this purpose.



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Chapter 9--Foreign Entities



Transacting Business in Texas
After January 1, 2006



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Foreign Entities Required to Register

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

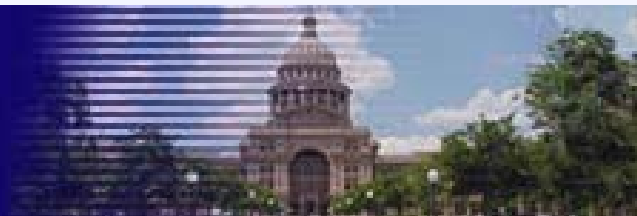
- ✓ The entity affords limited liability under the laws of its jurisdiction of formation for any member or owner, unless the foreign entity is authorized to transact business under other state law.



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Foreign Entities

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

Real estate investment trusts

Business trusts

Professional corporations

Professional associations

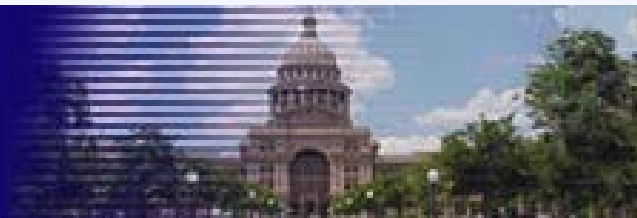
★ **Before January 1, 2006, these entities could only file as a foreign LLC.**



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What is “Transacting Business” ?

- Transacting business is not defined by BOC.
- List of “not-transacting business” activities same as those provided under prior law.
- We do not have authority to issue formal binding legal opinions.
- Look to judicial opinions for guidance.



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Is Entity Transacting Business in Texas?

- ◆ Entity has employee residing in Texas.
- ◆ Entity is pursuing its purpose in Texas.
- ◆ Entity owns & receives income from property in Texas.
- ◆ Entity maintains principal office or business office in Texas.

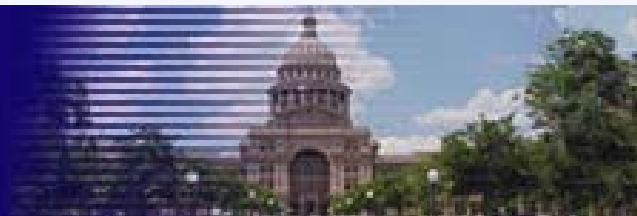
☒ Not interstate commerce. Business conducted solely by fax, mail, web, email and/or telephone.



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What's New?

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



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Foreign Entities--Failure to Register

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



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Foreign Entities--Failure to Register

**Late filing penalty equal to registration fee
for each year of delinquency.**

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

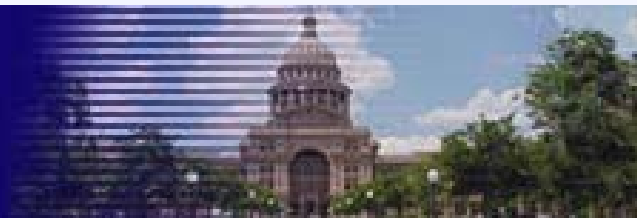
SOS will precondition filing of application on payment of the late filing fee.



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Avoidance of Late Filing Fee

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



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Duplicate Registration of LLLP

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



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Foreign Entities Involved in Merger or Conversion

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

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



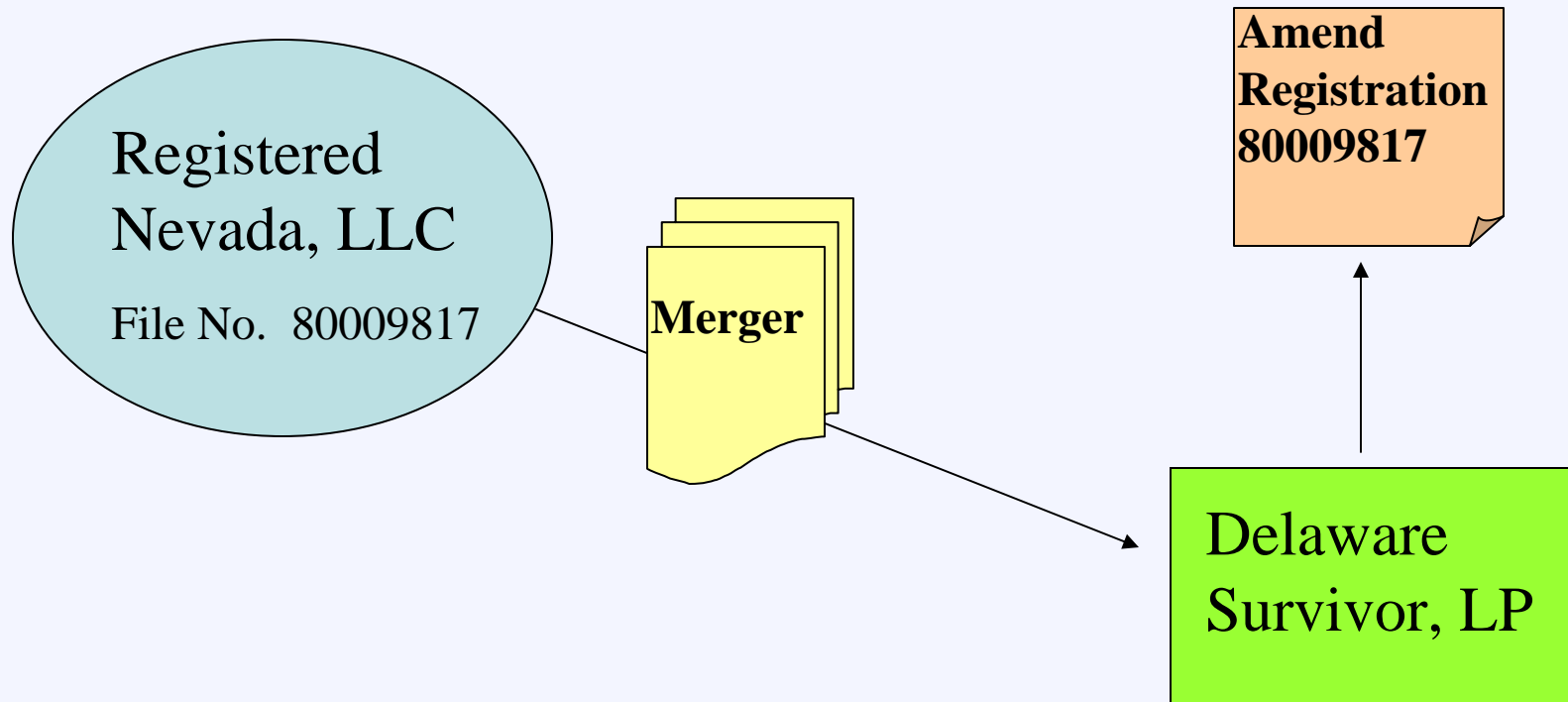
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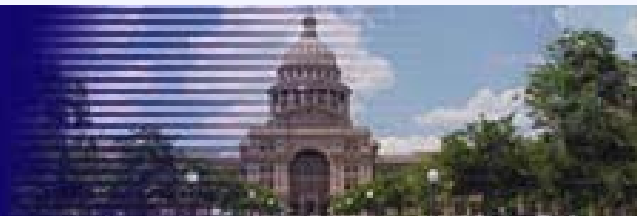
BOC--Foreign Entities



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Chapter 10: Mergers, Conversions & Exchanges

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



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Chapter 10 of the BOC

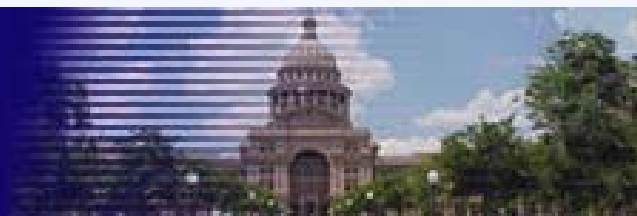
- ✓ The filing of a certificate of merger is required if:
 - any domestic entity that is a party to the merger is a filing entity; or
 - any domestic entity to be created under the plan of merger is a filing entity.



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Chapter 10

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

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



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Transitional Filings

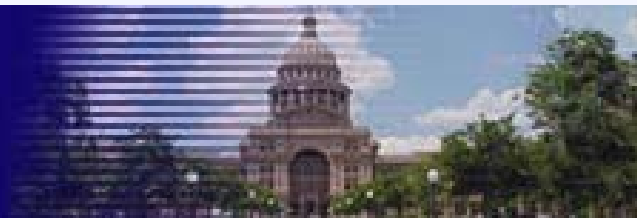
- ✓ An existing entity that continues to be governed by “prior law” needs to comply with the prior law governing the entity in order to effect a merger, consolidation, exchange, or conversion.



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Other Issues

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



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What's New?

Merger and Conversion Fees

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

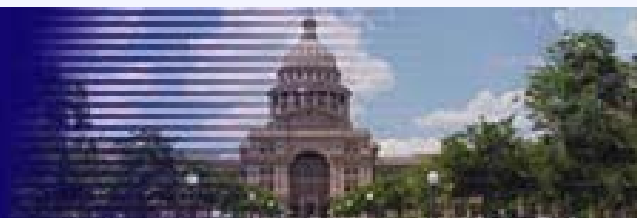
In addition, fee imposed for filing the certificate of formation for a converted domestic filing entity or for each new domestic filing entity created by a merger.



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What's New?

SOS Promulgates Merger and Conversion Forms

Designed for BOC entity transactions; not cross-statutory transactions.

Do not include a plan of merger or conversion. A copy of the plan of merger or conversion may be attached to the form, or the alternative statements may be completed.

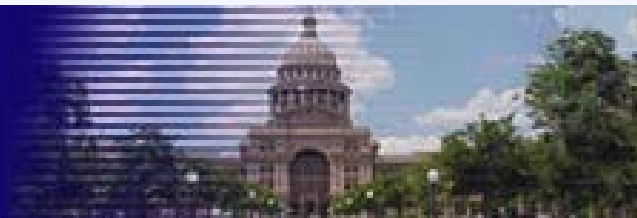
Not designed to be used when the jurisdiction of formation of the converted or converting entity is outside Texas.



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SOS Merger and Conversion Forms

CAUTION

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

☐ A statement that the entity is formed under a plan of merger or conversion.

☐ If conversion, the name, address, date of formation, prior form of organization, and jurisdiction of formation of the converting entity.



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What's New?

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

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



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Chapter 11: Winding Up & Termination

◆ The new term for the dissolution of a domestic entity. A domestic filing entity must file a “*certificate of termination*” after the process of winding up the business of an entity. Filing fee: \$40

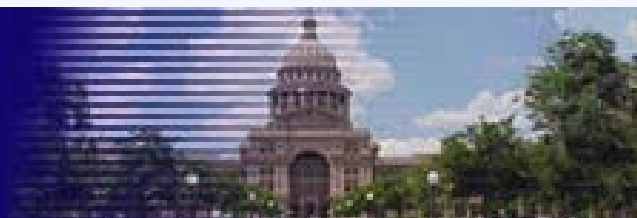
SOS Form 651 may be used for the termination of a domestic entity, other than a nonprofit corporation or cooperative association (Form 652).



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Chapter 11: Winding Up & Termination

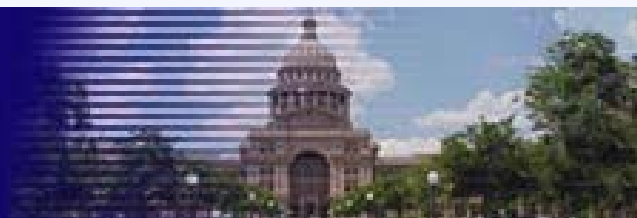
- ◆ In general, winding up is required when:
 - ✓ the entity's duration expires, if not perpetual;
 - ✓ a voluntary determination to wind up the domestic entity has been made by the domestic entity or the owners, members, or governing authority in the manner specified in the BOC for such entity; or
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



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Involuntary Termination

Circumstances giving rise to an involuntary termination by the SOS.

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

[New for LPs and foreign LLPs](#)



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Reinstatements

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



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Reinstatements under the BOC

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



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Reinstatement

Following a Voluntary Termination

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



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Reinstatements after Involuntary Terminations

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



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Reinstatements after Tax Forfeiture

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

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

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



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BOC Reinstatement Requirements

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



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Filings Outside the HUB Provisions

⇒ Close Corporations:

Statement of Operation **21.718**

Termination **21.709**

⇒ For-Profit Corporations:

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

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

⇒ Nonprofit Corporations:

Reports of domestic and foreign nonprofit corporations

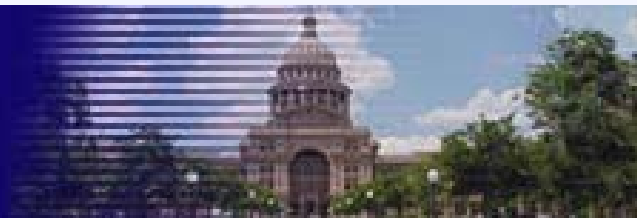
22.357



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Filings Outside the HUB Provisions

⇒ Limited Partnerships:

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

⇒ Limited Liability Partnerships:

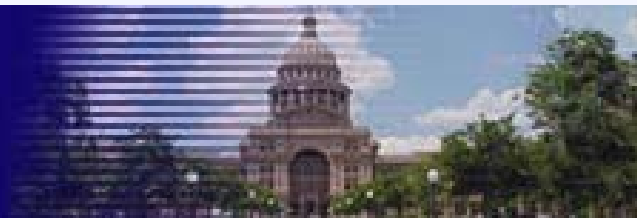
Registration, amendment, renewal and withdrawal of a domestic LLP	152.802
Registration of a foreign LLP	152.905
Withdrawal of a foreign LLP	152.906
Renewal of a foreign LLP	152.908



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Filings Outside the HUB Provisions

⇒ Cooperative Associations:

Annual Report of Financial Condition **251.353**

⇒ Unincorporated Nonprofit Associations:

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

Appointment of agent to receive service of process
252.011



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Effective Dates and Transition Issues

- ◆ BOC applies to all new Texas entities created on or after January 1, 2006.
- ◆ Applies to all foreign filing entities registering with the SOS after January 1, 2006.



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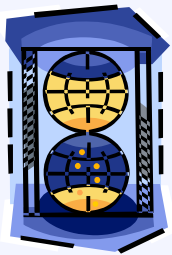


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Effective Date for Existing Entities

On January 1, 2010, the “mandatory” application date, BOC applies to all domestic entities and foreign filing entities that were formed or registered with SOS before January 1, 2006.



Existing entities may opt in earlier by filing a statement of early adoption with the SOS.



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Transition Issues

Early Adoption of the Code

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

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



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Transition Issues

Early Adoption of the Code

What is the filing fee for an early adoption statement?

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



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Opt-in and Comply?

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



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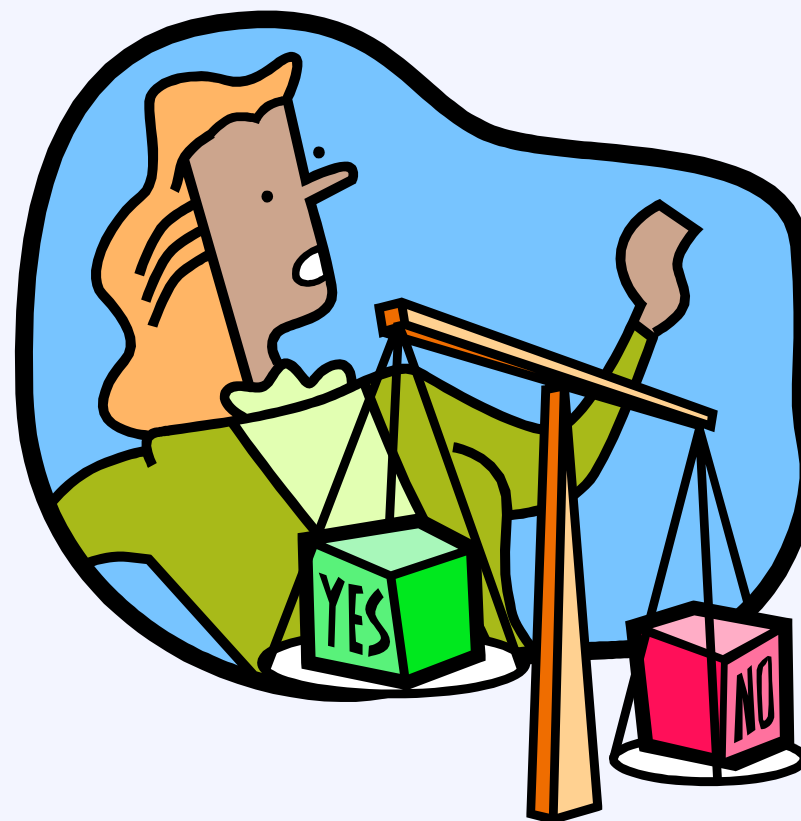


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1. Fact driven decision
2. Reinstatement Issues
3. Amend registration to identify true entity type of foreign entity qualified as foreign LLC
4. Cross-entity mergers
5. Amend registration to reflect change relating to merger or conversion
6. Nonprofit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

Why Opt In?



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Transition Issues

Expiration of Prior Law

All prior law continues in effect (except fees).

Provisions have been added to all of the Acts being codified to indicate that they will expire on January 1, 2010.



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Transition Issues

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

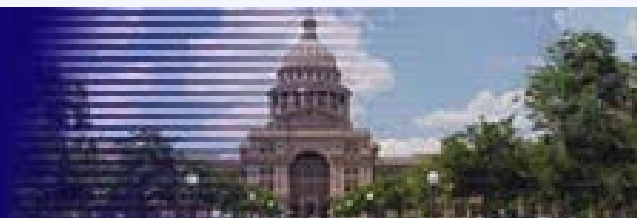
No action is necessary. The BOC is automatically applicable to the domestic entity on January 1, 2010. If necessary, the entity shall conform its governing documents to the BOC when it next files an amendment to its certificate of formation.



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Need Help?

Contact SOS by Email

Name availability & general entity information:

corpinfo@sos.state.tx.us

Request copies or certificates of fact:

corpcert@sos.state.tx.us

Legal questions relating to filing issues:

corphelp@sos.state.tx.us

SOSDirect assistance & issues:

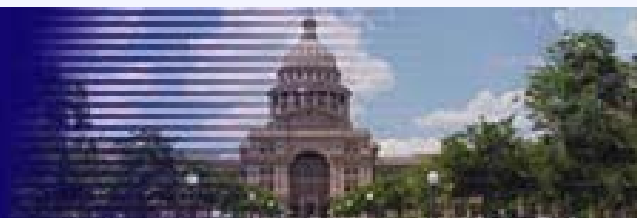
sosdirect@sos.state.tx.us



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Need Help?

Contact SOS by Email

Contact individual at SOS:

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

lwassdorf@sos.state.tx.us

cflores@sos.state.tx.us



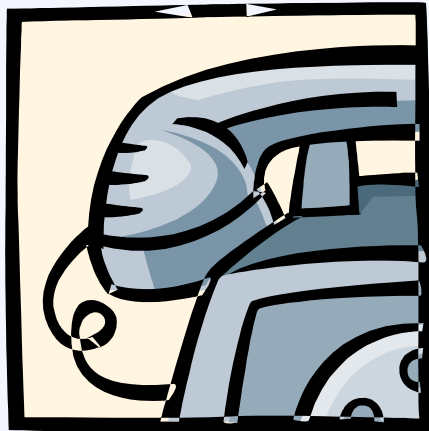
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Need Help? Call



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