

Death and Resurrection of LLCs and LPs

Presented to:

The University of Texas School of Law
2012 LLCs, LPs and Partnerships
July 12-13, 2012
Austin, Texas

Presented by:
Professor Elizabeth S. Miller
Baylor Law School
Waco, Texas

Commentator:
Carmen I. Flores
Office of the Secretary of State
Austin, Texas

Voluntary Terminations—Winding Up

BOC §§ 11.051-11.059



Events that require the winding up of a domestic entity:

1. Expiration of duration;
2. Voluntary decision to wind up;
3. Occurrence of an event specified in the governing documents that requires the winding up or termination of the entity;
4. Event specified in other sections of the BOC; and
5. Court decree

Supplemental Provisions for LLCs

BOC § 11.056

Termination of the continued membership of the last remaining member of an LLC is an event requiring winding up under BOC § 11.051(4).

Winding up is required unless the legal representative or successor of the last remaining member agrees:

- To continue the company; and
 - To become a member or to designate another person to become a member effective as of the date of termination
- ★ Deadline for cancelling the event and for taking the action needed to continue the LLC—1 year. See BOC §§ 11.152(a) and 101.552(c).

Supplemental Provisions for LPs

BOC § 11.058

- Voluntary decision to wind up requires the written consent of all partners *unless* otherwise provided by partnership agreement.
- An event of withdrawal of a general partner requires winding up *unless* otherwise provided by partnership agreement.
- Winding up of the LP is required when there are no limited partners in the partnership.
- ★ The deadline for cancelling the event and for taking the action needed to continue the LP will depend on specified event.

Voluntary Terminations—Winding Up

BOC § 11.052

When an event that requires winding up occurs, the entity must:

1. Cease to carry on business *except to the extent necessary to wind up*
2. Send written notice to each known claimant (not applicable to partnerships)
3. Collect and sell property (may distribute in kind to owners or members)
4. Perform any other acts required to wind up
5. Apply property to discharge liabilities and obligations

The entity may still prosecute or defend a civil, criminal, or administrative action during the winding up process.

Tax Clearance for a Certificate of Termination

BOC §§ 11.051-11.059

06-359
05/11 (Rev. 6-1-12)

PRINT FORM CLEAR FIELDS

Request for Certificate of Account Status to Terminate a Taxable Entity's Existence in Texas or Registration

An entity that intends to terminate its legal existence or registration must satisfy filing requirements for all taxes administered by the Comptroller under Title 2 of the Texas Tax Code. In addition, all accounts for those taxes must be closed. To determine if the entity is current in tax requirements, or to close any open tax accounts, call us at 1-800-252-1381 or 512-463-4600. More information about this process is available online at www.franchisetax.tx.gov.

Section A - Entity Information

Entity's legal name: _____ Taxpayer number: _____ File number (from the Texas Secretary of State): _____

1. Is the entity a member of an affiliated group that will be required to file a combined report? YES NO
If YES, enter the following information for the entity that will report on your behalf. If NO, skip to Section B.
Legal name of reporting entity: _____ Texas taxpayer number / FEI number: _____

2. Is the entity's accounting year begin date on or after the combined group's accounting year begin date on its franchise tax report? YES NO
If YES, this entity's information must be included in the combined group report. If NO, enter the following information:
This entity's accounting year begin date: month ____ day ____ year ____ The day before the combined group's accounting year begin date: month ____ day ____ year ____

Section B - Texas Entity

If the entity was formed in Texas, indicate the filing for which the certificate is required.
 Termination Merger Entity conversion

Section C - Non-Texas Entity

If the entity was formed outside of Texas, please complete the following information.

1. Is the entity still conducting business in Texas? YES NO

2. If "NO," enter the entity's last day of business in Texas: month ____ day ____ year ____

3. Does the entity currently have an active charter in its home state? YES NO

4. If "NO," indicate the type and date of termination: month ____ day ____ year ____
 Termination effective date: _____
 Merger effective date: _____ Name of survivor: _____
 Entity conversion effective date: _____

Note: If the home state charter has been terminated, home state documentation must be included. The home state documentation must bear the seal of the appropriate filing agency and the effective date of the filing.

Section D - Receiving Your Certificate

Does this entity have a forfeited certificate or registration that needs to be reinstated before ending its existence or registration in Texas? YES NO

Please indicate how you would like to receive your certificate:

FAX: FAX number: _____ Telephone number: _____
(area code and number) (area code and number)

PDF: Email address: _____

Mail: Mailing address: _____ City: _____ State: _____ ZIP code: _____

You can file documents online with the Secretary of State using eSOSDirect at www.sos.state.tx.us/corp/sosda/index.shtml.

Your account will be reviewed to determine eligibility. If eligible, a certificate will be sent using the format selected. If not eligible, we will notify you in writing what is required to be eligible. All requests are processed in the order they are received regardless of the format you select. Assistance is also available at your local field office. Field office locations are available online at www.winnow.state.tx.us/ta/info/fieldoff.html.

Your name (Please type or print): _____ Phone number and extension: _____

Authorized agent
sign here

Visit us online at www.franchisetax.tx.gov or call 1-800-252-1381 or 512-463-4600.

Mail to: Comptroller of Public Accounts
P.O. Box 149348
Austin, TX 78714-9348

Under Ch. 559, Government Code, you are entitled to review, request and correct information we have on file about you, with limited exceptions in accordance with Ch. 552, Government Code. To request information for review or to request error correction, contact us at the address or phone number listed on this form.

Must file final tax reports, including final Public Information Report. Must satisfy *all* filing requirements and obligations under Title 2 of the Tax Code. Taxes include:

- Franchise tax
- Sales and use tax
- Hotel occupancy tax
- Motor fuels tax
- Insurance taxes

Certificate of Termination

Most Common Rejection Reasons

- Failure to provide an appropriate certificate of account status.
- Providing a stale certificate of account status.
- Omitting the names and addresses of the governing persons.
- Failure to identify the event that required winding up.

Certificate of Account Status

Incorrect Certificate


TEXAS COMPTROLLER OF PUBLIC ACCOUNTS
SUSAN COMBS • COMPTROLLER • AUSTIN, TEXAS 78774

July 2, 2012

CERTIFICATE OF ACCOUNT STATUS

THE STATE OF TEXAS
COUNTY OF TRAVIS

I, Susan Combs, Comptroller of Public Accounts of the State of Texas, DO
HEREBY CERTIFY that according to the records of this office

CRAZY 8'S FAMILY LIMITED PARTNERSHIP

is, as of this date, in good standing with this office having no franchise
tax reports or payments due at this time. This certificate is valid through
the date that the next franchise tax report will be due May 15, 2013.

This certificate does not make a representation as to the status of the
entity's registration, if any, with the Texas Secretary of State.

This certificate is valid for the purpose of conversion when the converted
entity is subject to franchise tax as required by law. This certificate is
not valid for any other filing with the Texas Secretary of State.

GIVEN UNDER MY HAND AND
SEAL OF OFFICE in the City of
Austin, this 2nd day of
July 2012 A.D.

Correct Certificate

TEXAS COMPTROLLER *of* PUBLIC ACCOUNTS
P.O. Box 13526 • AUSTIN, TX 78711-3526

May 31, 2012

CHISHOLM TRAIL PROPERTIES, L.L.C.
8 CHISHOLM TRL
ROUND ROCK, TX 78681-5043

CERTIFICATE OF ACCOUNT STATUS

THE STATE OF TEXAS
COUNTY OF TRAVIS

I, Susan Combs, Comptroller of Public Accounts of the State of Texas, DO HEREBY
CERTIFY that according to the records of this office

CHISHOLM TRAIL PROPERTIES, L.L.C.

has filed all required reports for taxes administered by the Comptroller
under Title 2, Tax Code, and taxes reported due on those reports have been
paid. This certificate must be filed with the Texas Secretary of State to
legally end the entity's existence in Texas. This certificate is valid
through December 31, 2012.

Certificate on left is from the Comptroller's website. This is not sufficient for termination.

Conditions for Reinstatement of a Voluntarily Terminated Entity

BOC § 11.201

- Termination was by mistake or inadvertent
- Termination occurred without requisite approval of governing persons
- Winding up process had not been completed before termination
- Entity's legal existence is required to:
 - Convey or assign property;
 - Settle or release a claim or liability;
 - Take an action; or
 - Sign an instrument/agreement



Procedure for Reinstatement of a Voluntarily Terminated Entity

BOC § 11.206

- Must complete requirements for reinstatement before **3rd** anniversary of effectiveness of termination.
- Reinstatement must be approved by owners, members, governing persons, or other persons in the manner set forth in the title governing the entity.
- File certificate of reinstatement (SOS Form 811) with Secretary of State (SOS) together with tax clearance letter from Comptroller.
- Entity name must be available; if entity name is not available, include consent or amendment.

Effect of Reinstatement of a Voluntarily Terminated Entity

BOC § 11.206

When the reinstatement of a terminated entity takes effect:

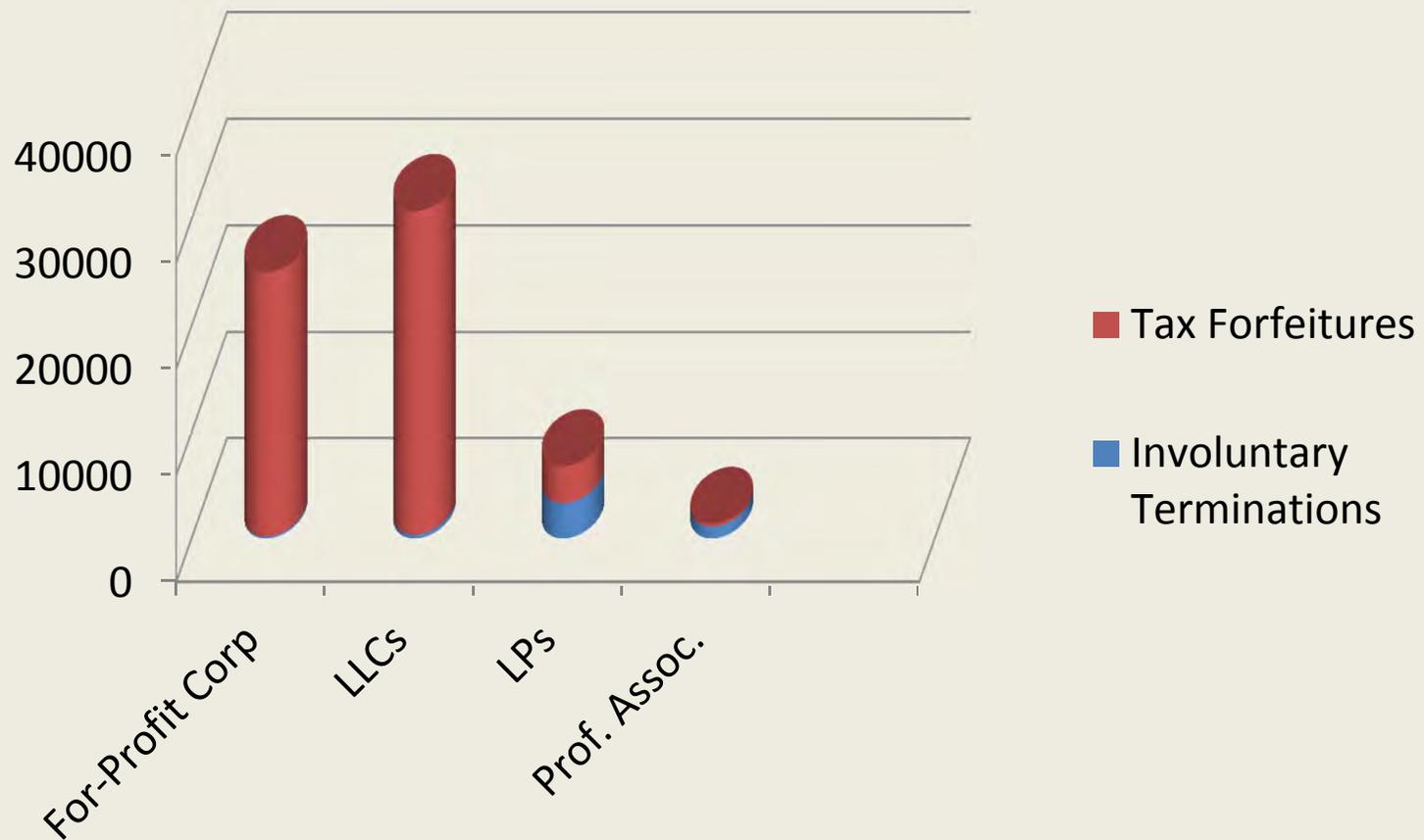
1. the existence of the terminated entity is considered to have continued without interruption from the date of termination; and
2. the terminated entity may carry on its business as if the termination of its existence had not occurred.



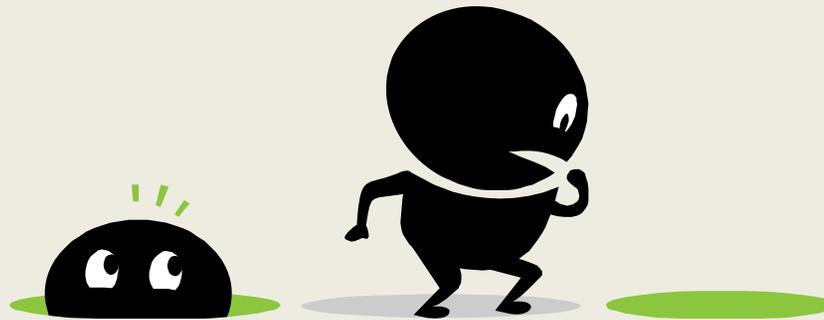
Involuntary Terminations & Forfeitures by SOS

- *Chapter 11 Business Organizations Code*
 - ***Failure to maintain registered agent or office***
 - Failure to timely file a report (e.g., annual statement for a professional association is due by June 30)
 - Failure to pay or dishonored payment of formation filing fee
- Chapter 22 Business Organizations Code
 - Failure to file nonprofit periodic report when due
- *Chapter 153 Business Organizations Code*
 - ***Failure to file limited partnership periodic report when due***
- *Chapter 171 Tax Code*

Involuntarily Terminated Domestic Entities 2011



Forfeiture of Rights and Involuntary Terminations Under the BOC



Involuntary Termination for Failure to Maintain Registered Agent or Office

Events triggering “90-day” notice under § 11.251(b)(1)(B)

- Receipt of Resignation of Registered Agent
- Receipt of Rejection of Appointment
- Receipt of an allegation of failure to maintain either registered agent or registered office:
 - Receipt of return mail directed to registered agent at registered office address
 - Receipt of a written complaint that:
 - Agent not found at registered office address
 - Registered office is address for a mailbox service

Involuntary Termination for Failure to Maintain Registered Agent or Office

- On acceptance of a resignation of agent or rejection of appointment, SOS sends “90-day” letter; entity’s status changed to “RA notice sent,” which is an active status.
- SOS will issue a certificate of involuntary termination if the entity fails to designate a new registered agent and/or registered office before the 91st day after the date the notice was mailed.
- SOS changes status of entity to “involuntarily terminated.”

Limited Partnership Periodic Reports Forfeiture and Termination

Section 153.301 of the BOC requires a limited partnership (domestic and foreign) to file a periodic report (Form 804) when notified by the SOS.

The report requires the partnership to list:

- its principal office address in the United States;
- the name and address of its current registered agent/office in Texas, and
- the name and address of each general partner of record.

Note: Report may update the principal office address, registered agent/office , and the address of a named general partner. Report cannot update the name of a general partner, delete a named general partner, or add a new general partner.

Limited Partnership Periodic Report

BOC §§ 153.304-153.307

- There is no “anniversary date” for filing a periodic report; however, the SOS is authorized to require the filing of a report not more than once every four years.
- SOS sends notice to file a periodic report to the partnership’s registered agent/office of record.
- Report must be filed within 30 days of the date the SOS sends notice. Failure to timely file report results in the forfeiture of the partnership’s right to transact business.
- SOS sends notice of forfeiture to registered agent, and changes entity status to “forfeited rights.”

Effect of Forfeited Rights for Failure to File Report

BOC § 153.309

- The limited partnership may not maintain an action, suit, or proceeding in a court of this state; and
- A successor or assignee of the limited partnership may not maintain an action, suit, or proceeding in a court of this state on a right, claim, or demand arising from the transaction of business by the limited partnership in this state.
- The forfeiture of the right to transact business does not:
 - (1) impair the validity of a contract or act of the limited partnership; or
 - (2) prevent the limited partnership from defending an action, suit, or proceeding in a court of this state.

Forfeiture of right to transact business does not affect the liability of a limited partner.

Revival of Right to Transact Business

BOC § 153.310

- The partnership may revive its right to transact business by filing the required report (Form 804), and paying the report fee and late fee.
- The delinquent report must be received by the SOS no later than the 120th day after the date of mailing of the notice of forfeiture.
- If the delinquent report is timely filed, the SOS will revive the right of the limited partnership, and change the status of the limited partnership to “in existence.”

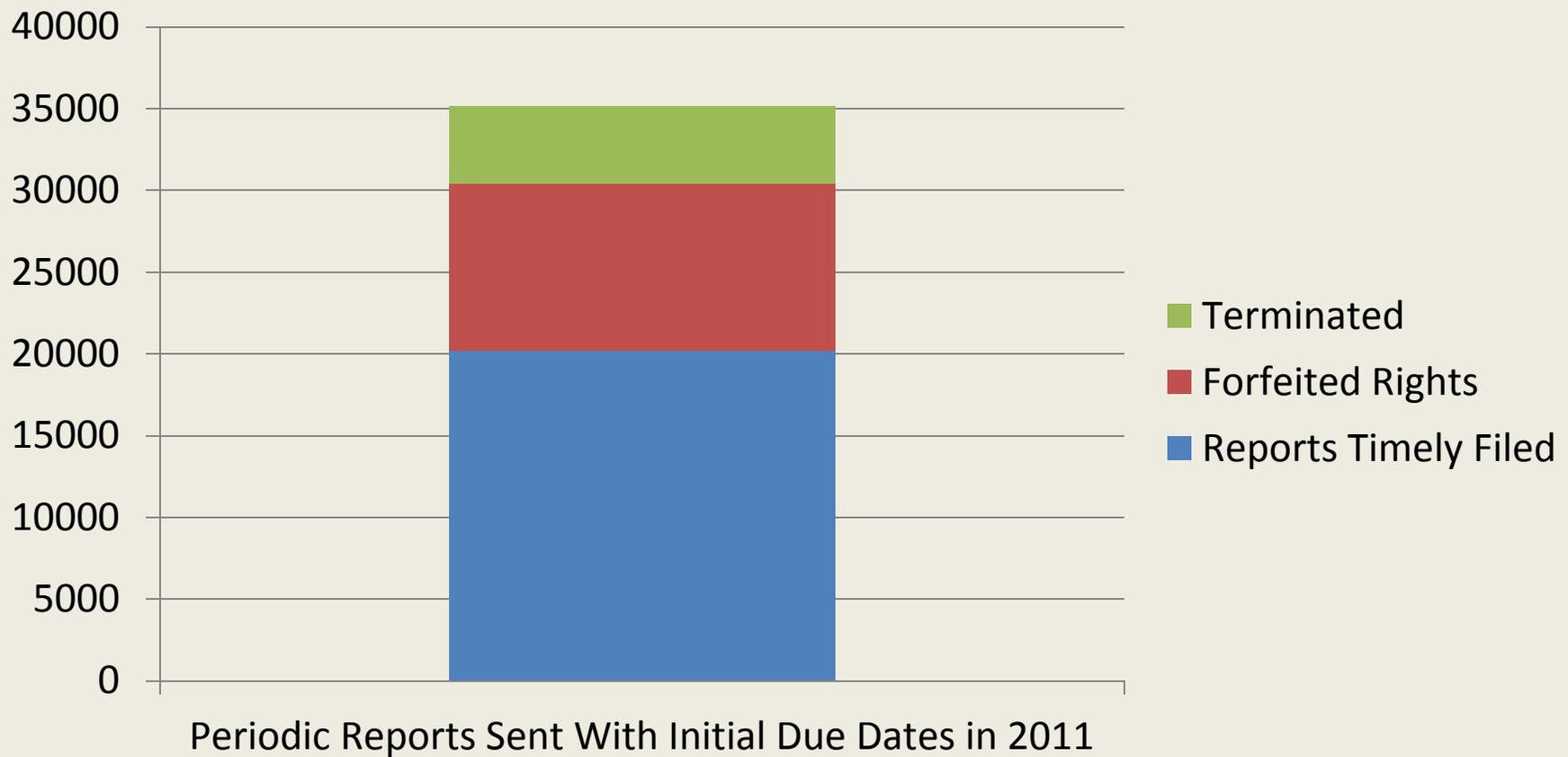
Termination of Certificate of Formation

BOC § 153.311

- The SOS will terminate the certificate of formation of a limited partnership that forfeits its right to transact business and fails to revive that right within the timeframe specified.
- The SOS sends notice of the involuntary termination to the limited partnership and notes the termination and date of termination in its records.
- The SOS changes the status of the limited partnership from “forfeited rights” to “involuntarily terminated.”

The change to inactive status does not affect the liability of a limited partner.

Limited Partnerships Notified to File Reports



Administrative Tax Forfeitures

Tax Code §§ 171.251-171.2515

- Franchise tax reports are due annually on May 15th.
- If the franchise tax report is not timely filed or an extension is not requested, the Comptroller will notify the entity of its delinquency.
- The Comptroller will forfeit the entity's privileges (right to transact business in the state) if the entity does not file the required reports or pay tax within 45 days after the date of the delinquency notice.



Effects of Forfeiture of Privileges

Tax Code §§ 171.252, 171.255-171.2515

- Taxable entity denied the right to sue or defend in a court in this state. See *Mello v. A.M.F., Inc.*, 7 SW3rd 339, 331 (Tex. App.—Beaumont 1999, pet. denied)
- Managerial officials liable for debts of entity. Liable as if entity were a partnership and managerial officials were partners.
- Although statute speaks of “officer/director” liability, provision also applies to non-corporate entities. See *Bruce v. Freeman Decorating Servs., Inc.*, No. 14-10-00611-CV, 2011 WL 3585619 (Tex. App.—Houston [14th Dis.] Aug. 15, 2011, no pet. h.) (mem. op.)



Liability of Managerial Officials

Tax Code § 171.255

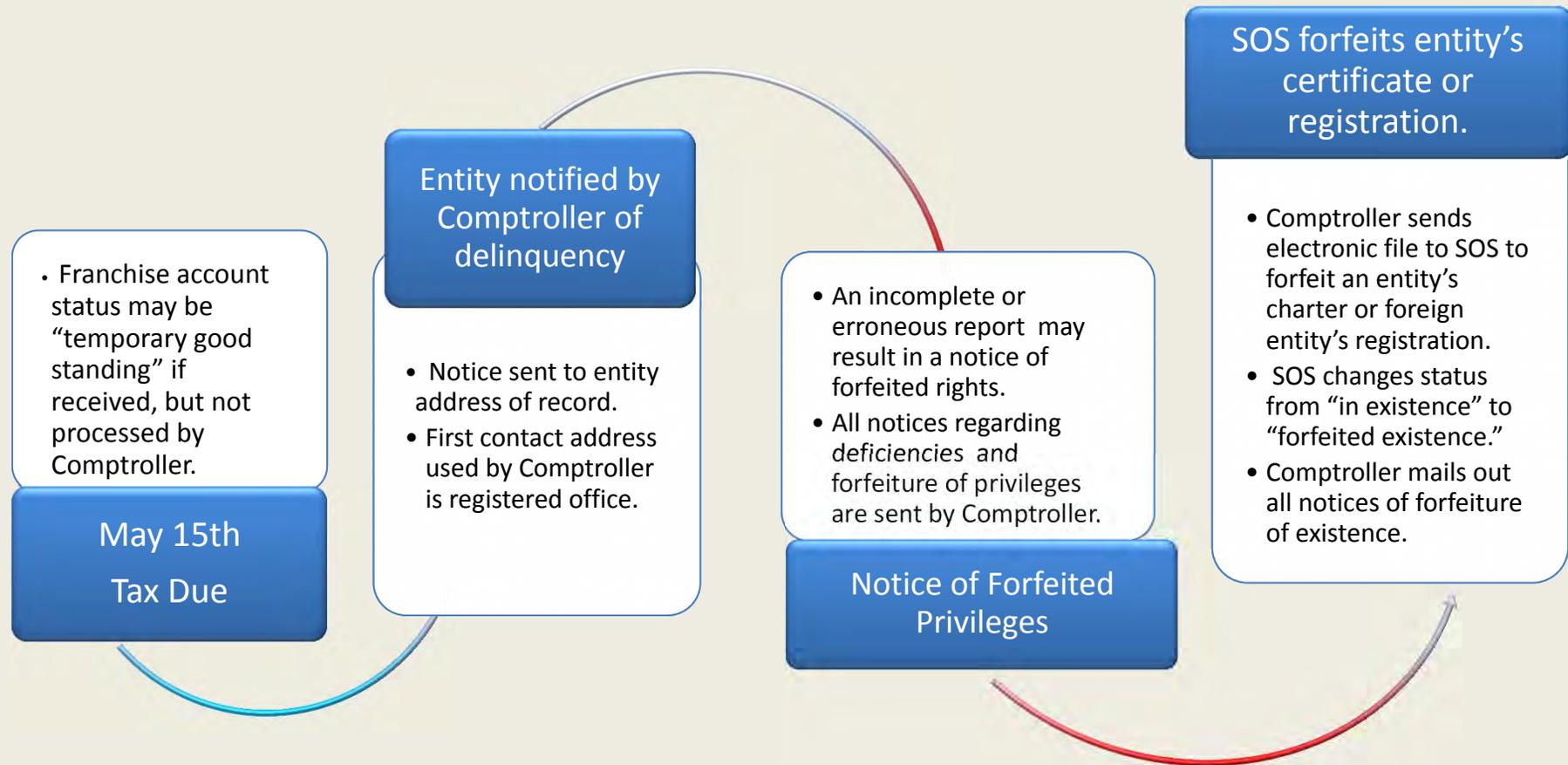
- Liability of “officers and directors” extends back to debts created or incurred after the report, tax, or penalty was due and continues until the privileges are revived.



Officer or director is not liable if it can be shown that debt was created or incurred:

- Over the director’s objection;
or
- Without the director’s knowledge and that the exercise of reasonable diligence to become acquainted with the affairs of the entity would not have revealed the intention to create the debt.

Path to Forfeiture of Existence under Tax Code



IMPORTANT: July 27, 2012—Anticipated “charter” forfeiture date.

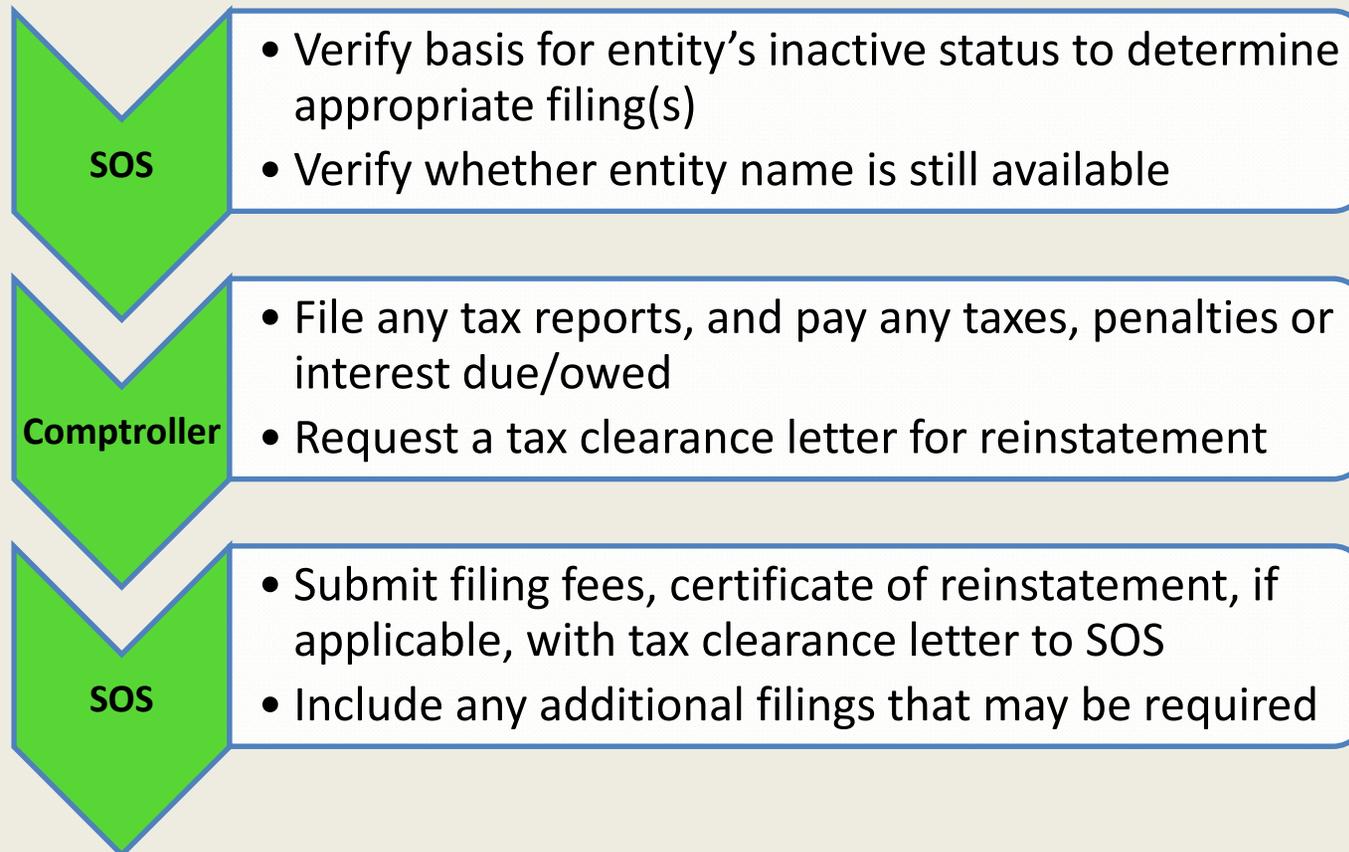
Reinstatement of Involuntarily Terminated Filing Entities



What do you mean
my company's
forfeited?? I pay my
taxes every year!

A terminated entity may not continue its existence for the purpose of continuing the business for which it was formed unless the entity is reinstated under Subchapter E of Chapter 11 of the BOC. §11.356(b)

Reinstatement After Involuntary Termination



Reinstatement After Involuntary Termination Under BOC

If entity was involuntarily terminated by SOS under section 11.251 of the BOC, entity reinstates under section 11.253:

- Submit certificate of reinstatement (Form 811) to SOS, together with applicable filing fee and tax clearance letter
- Correct the circumstances that led to the involuntary termination

Note: *Certificate of reinstatement must be accompanied by a certificate of amendment if the entity's name is not available.*

Reinstatement After Involuntary Termination

BOC § 11.253(d)

- No time limit or deadline for filing a certificate of reinstatement after an involuntary termination.
- If reinstatement filed before the 3rd anniversary of the date of entity's involuntary termination, the entity is considered to have continued in existence without interruption from the date of termination (i.e., relation back effect).
- Reinstatement has no effect on any issue of personal liability of the governing persons, officers or agents of the entity during the period between termination and reinstatement.

Reinstatement After Involuntary Termination

BOC § 153.312

If limited partnership was involuntarily terminated by SOS under section 153.311 of the BOC for failing to file a periodic report, entity reinstates under section 153.312 .

- Submit periodic report (Form 804) to SOS, together with applicable filing fees (\$225) and tax clearance letter

Note: *Periodic report must be accompanied by a certificate of amendment when the entity's name is not available or when the name of the current general partner is not the same as the general partner on record with the SOS.*

Reinstatement After Involuntary Termination

BOC § 153.312

- No time limit or deadline for reinstatement under section 153.312.
- The statute does not address the effect of a reinstatement of a limited partnership after an involuntary termination for failure to file a periodic report other than the change in status from an inactive status to an active status.

Manning v. Enbridge Pipelines (East Texas) L.P., 345 S.W.3rd 718, 723 (Tex.App.—Beaumont 2011, pet. denied) relates to revival of right to transact business after forfeiture of right, but before termination.

Reinstatement After Tax Forfeiture

Tax Code §§ 171.312-171.315

If the SOS forfeited the existence of the taxable entity under chapter 171 of the Tax Code, entity reinstates under the Tax Code and not the BOC. (BOC §11.254)

Entity must:

- File each report and pay taxes, penalties, and interest due.
- Request and obtain a tax clearance letter from Comptroller.
- An officer, director or shareholder at time of forfeiture requests in the name of the entity that SOS set aside the forfeiture (Form 801). Form 801 submitted with tax clearance letter and applicable filing fee.

Entity name must be available; if not, also submit a certificate of amendment.

Reinstatement After Tax Forfeiture

Tax Code §§ 171.312-171.315

- No time limit or deadline set in the Tax Code for filing a reinstatement and request to set aside tax forfeiture.
- On filing request, SOS sets aside forfeiture by changing status of the entity from “forfeited existence” to “in existence.”
- Pursuant to section 171.314, if forfeiture is set aside, Comptroller shall revive the taxable entity’s corporate privileges and right to do business.

Limited Survival and Other Special Chapter 11 Provisions

Significant Provisions of Chapter 11 of the BOC

Section 11.001 defines a “terminated entity” as a domestic entity the existence of which has been:

- Terminated in a manner authorized or required by the BOC, unless the entity has been reinstated in the manner provided by the BOC; or
- Forfeited pursuant to the Tax Code, unless the forfeiture has been set aside.

A “terminated filing entity” is a terminated entity that is a filing entity.

Significant Provisions of Chapter 11 of the BOC

BOC § 11.356

A terminated domestic filing entity continues in existence until the 3rd anniversary of the effective date of its termination only for the purposes set forth in section 11.356, which include:

- Prosecuting or defending in the entity's name an action or proceeding brought by or against the terminated filing entity; and
- Permitting the survival of an existing claim by or against the terminated filing entity.

Significant Provisions of Chapter 11 of the BOC

Section 11.001 defines a “claim” as a right to payment, damages, or property, whether liquidated or unliquidated, accrued or contingent, matured or unmatured.

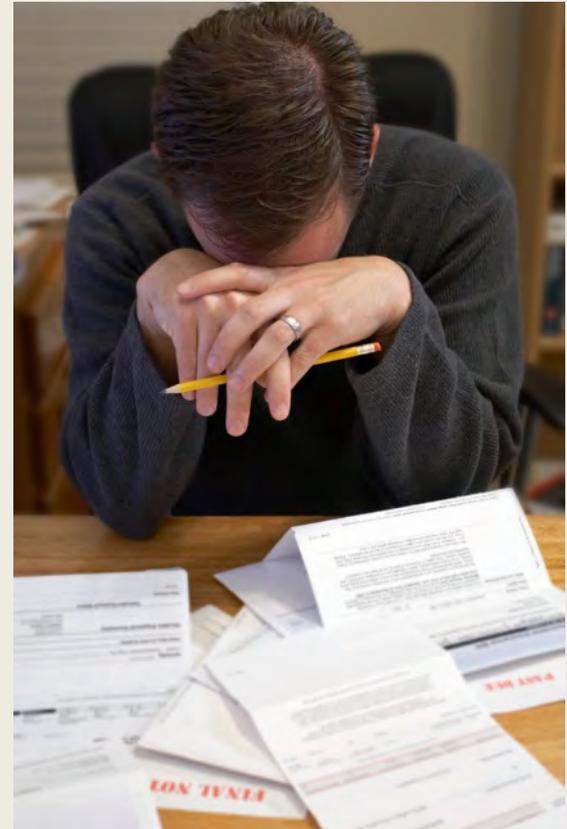
An “existing claim” means:

- a claim against an entity that existed before the entity’s termination and that is not barred by limitations; or
- a contractual obligation incurred after termination.

Significant Provisions of Chapter 11 of the BOC

Section 11.351—A terminated filing entity is liable only for an existing claim.

Section 11.359—An existing claim by or against a terminated filing entity is extinguished unless an action or proceeding is brought on the claim no later than the 3rd anniversary of the date of termination of the entity.



Significant Provisions of Chapter 11 of the BOC

BOC § 11.357

During the three-year period of limited survival, a governing person serving at the time of termination continues to manage the affairs of the terminated filing entity for the limited purposes specified in section 11.356 and has the powers necessary to accomplish those purposes.

In exercising these powers, a governing person (or the person's successor):

- has the same duties to the terminated filing entity the person had immediately before the termination; and
- is liable to the terminated filing entity for actions taken after the termination to the same extent that the person would have been liable to the entity had the person taken those actions before the termination.