

TEXAS SECRETARY of STATE

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View from the Secretary of State's Office: *Issues, Traps, Developments*

2011 Essentials of Business Law

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New Texas Business Filings

	<u>2010</u>	<u>2009</u>
For-Profit Corporations	24,806	25,131
LLCs	76,138	68,805
LPs	5,440	5,552
LLPs (new & renewal)	4,013	4,091

Active Entities as of April 1, 2011

For-Profit Corporations	367,364
Limited Liability Companies	396,776
Limited Partnerships	128,888
Limited Liability Partnerships	3,961

Mandatory Application Date for the Business Organizations Code

What does a pre-BOC entity need to do after January 1,
2010?

Should a pre-BOC entity amend?

- Section 402.005 of the BOC indicates that a domestic or foreign filing entity should **conform** its certificate of formation or application for registration when it next files an amendment to its certificate or application.
- “Conform” means “to be similar or identical; *also* : to be in agreement or harmony.” [Merriam-Webster Online]

References to Prior Law

Must an entity amend to update references to prior law to BOC terminology?

SOS thinks not.

References to Prior Law

SOS believes references to prior law conform to BOC

- Reference is historically accurate.
- BOC applies despite contrary references.
- Repeal does not affect prior operation of the statute or any action under that statute. Gov't Code § 311.031.
- BOC lists synonymous terms in § 1.006:
 - *articles of incorporation = certificate of formation*
 - *regulations = company agreement*
 - *certificate of authority = registration to transact business*

Designation of Entity Type

Does absence of statement of entity type mean that a pre-BOC certificate of formation does not conform to the BOC?

SOS thinks not.

→ Entity type is apparent in SOS records.

Appointment of SOS as Agent for Foreign Entity

Does absence of statement appointing SOS as agent for service of process mean that a pre-BOC application for registration does not conform to the BOC?

SOS thinks not.

→ Section 5.251 makes SOS agent under certain circumstances regardless of whether the statement is included in the application for registration.

To Amend or Not to Amend

- Consider amending if documents do not conform in some substantive manner, i.e., name or registered agent, rather than to change references or terminology.
- If amending, consider a restated certificate of formation changing substance, references, and terminology.
 - Easier to make wholesale changes.
 - Supersedes original certificate of formation and prior amendments and is *effective certificate of formation*.

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Look for Clarification

Senate Bill 748/House Bill 1873



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Series LLCs

Establishing a Series LLC

- ❖ A company agreement may establish or provide for the establishment of one or more designed series of members, managers, membership interests or assets.
- ❖ Statement that a series LLC is being created not required in certificate of formation.
- ❖ Sec. 101.602(b)(3) BOC requires certificate of formation to include notice of limitations on liabilities of the series.

Notice of Limitations

Sec. 101.602(a) BOC requires notice to state:

- The debts, liabilities and obligations shall be enforceable against the assets of that series only and shall not be enforceable against the assets of the LLC or any other series.
- None of the debts, liabilities and obligations with respect to the LLC shall be enforceable against the assets of any series.

Notice of Limitations

Section 101.602(a) does not require the notice to reference a specific series.

How Popular Is the Texas Series LLC?

- ❖ There is no filing with the SOS when a series is actually established so SOS records do not reflect when and how many series have been created.
- ❖ SOS reviewed a representative sample of newly formed LLCs to identify certificates of formation that included the notice of limitations.



SOS Sampling

Sample Size 1,023 Confidence Interval ± 4 Confidence Rate 99%

- ❖ Only one certificate of formation (0.097% of the sample) included the series notice language.
 - In the first eight months after the effective date of the legislation, fewer than 5% of newly formed LLCs included the notice of limitations.
 - Fewer than 2,574 out of the 62,826 LLCs formed between September 1, 2009 and May 15, 2010.

Registration of a Series

Generally, a series LLC formed under the laws of another jurisdiction is treated as a single legal entity for qualification purposes. The LLC itself rather than the individual series should register as the legal entity that is transacting business in Texas.

Supplemental Information Required in the Application for Registration

Sec. 9.005 of the BOC requires a foreign LLC governed by a company agreement that establishes or provides for the establishment of series to include a notice of limitation of liabilities in its application for registration.

SOS created Form 313 foreign series LLC registrations.

Supplemental Information Required in the Application for Registration

The application must state whether:

- the series has separate rights, powers or duties with respect to specified property or obligations or separate profits and losses associated with the specified property or obligations;
- any debts, liabilities, obligations of a particular series shall be enforceable against the assets of that series only and not against the assets of the LLC or other series;
- any debts, liabilities, obligations with respect to the LLC generally or any other series shall be enforceable against the assets of that series.

Conducting Business in the Name of a Series

- ❖ A series has the power, in the series' own name, to:
 - sue and be sued;
 - contract;
 - hold title to assets; and
 - grant liens and security interests in those assets.
- ❖ A series conducting business under its own name rather than the legal name of the LLC should file an assumed name certificate. Tex. Bus. & Comm. Code ch. 71

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LLP Issues

LLP Renewals

Be vigilant about timely renewals of LLP registrations!

- *Evanston Ins. Co. v. Dillard Dep't Stores, Inc.*, 602 F.3d 610 (5th Cir. 2010).
 - debt “incurred” by judgment against partnership.
 - despite active LLP registration when cause of action arose, because no active LLP registration when judgment rendered, individual partners personally liable.

Help is on the way with the passage of SB 748/HB 1873.



LLP Renewals and Franchise Tax

LLPs are taxable entities. If LLP is general partnership comprised solely of natural persons, registration lapse triggers final franchise tax report.

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New Registered Agent Provisions

Consent of Registered Agent

- A person appointed or named as a registered agent must have consented, in written or electronic form, to serve in that capacity.
- Designation or appointment of a registered agent by an organizer or managerial official in a registered agent filing is affirmation of consent.
- SOS developed Form 401-A for the consent.
 - Use of form is optional.
 - See 1 TAC § 79.29 if not using form.

Registered Agent Filings to which the consent requirement applies

- Filings under the BOC:
certificates of formation, applications for registration,
statements of change of registered agent/office, amendments,
restated certificates, mergers, conversions, reinstatements.
- Similar documents for filings by entities organized under special
statutes and governed in whole or part by the BOC or to which general
corporate laws apply.
- Appointment of agents by:
unincorporated nonprofit associations
Texas financial institutions
defense base development authorities

Filing Consent of Registered Agent

- Filing with the SOS is *not* required.
- SOS recommends that the represented entity retain a copy of the consent in its own records.
- A statement of consent of registered agent will be maintained in the records of the SOS when:
 - submitted simultaneously with or as part of a registered agent filing; or
 - submitted separately with the appropriate filing fee.

Failure to Obtain Consent

- Sections 4.007 and 4.008 apply to false statement in registered agent filing naming a person without consent.
 - Section 4.007 provides for damages, court costs, and attorney's fees for a loss caused by a false statement of material fact in a filing instrument.
 - Section 4.008 provides criminal penalties if a person signs or directs the filing of an instrument that the person knows is materially false.



Rejection of Appointment

- A person named as registered agent without consent is *not* required to perform the duties of a registered agent and may refuse service of process.
- A person designated without consent may terminate the designation by filing a statement of rejection with SOS.
 - SOS developed Form 428 for rejection.
- SOS will notify entity of the necessity of filing a new registered agent and office.
- Failure to timely designate a new agent may result in involuntary termination of a domestic entity or revocation of registration of a foreign entity

Transfer of Ownership or Membership Interests

Sec. 5.2011 BOC requires that before the sale, acquisition, or transfer of a majority of interest of an entity, the governing authority should verify that the person named as a registered agent has consented to continue to serve in that capacity. Continuation of that registered agent is affirmation that the requisite verification has occurred and the person consents to serve as registered agent.

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Conversions

Conversion Traps

- ◆ Don't use SOS certificates of formation for the formation document in a conversion unless the language required by §3.005(7) is added:
 - A statement that entity is formed under a plan of conversion; and
 - The name, address, date of formation, prior form of organization, and jurisdiction of formation of the converting entity.
- ◆ A domestic nonprofit corporation may not convert into a for-profit entity. §10.108

Conversion Effective Dates

The certificate of conversion and the certificate of formation filed as part of the conversion cannot have different effective dates.

Ex: Do not show an effective date of 12/31/2011 on the certificate of conversion and an effective date of 1/1/2012 on the formation.

§ 3.006 provides that the formation and existence of a domestic filing entity that is a converted entity in a conversion takes effect and commences on the effectiveness of the conversion.

Amendments to Foreign Registrations following a conversion or merger

- Sec. 9.009(a-1) permits a foreign filing entity to amend its application for registration to disclose a change resulting from:
 1. a conversion from one type of foreign entity to another type of foreign entity; or
 2. a merger into another foreign filing entity.
- Entity making the amendment succeeds to the registration of the original foreign filing entity.
- *See SOS Form 422.*

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Name Availability

Entity Name Rules

The standards that the SOS applies when determining the availability of an entity name are included in Title 1, Part 4, Chapter 79, Subchapter C of the Texas Administrative Code.

There is a link to the rules on the *About the Corporations Section* tier page on SOS web site under *Points of Interest*.

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Unincorporated Nonprofit Associations

Unincorporated Associations are Taxable Entities

Under § 252.006 of the BOC, a nonprofit association is a legal entity separate from its members for the purposes of determining and enforcing rights, duties and liabilities in contract and tort.

Comptroller of Public Accounts is expecting that unincorporated associations will file franchise tax reports.

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Pending Legislation

Bills Amending the BOC

- ✓ **SB 748/HB 1873** (BOC committee bill)
- ✓ **SB 323/HB 521** (applies corporation liability principles to LLCs)
- ✓ **HB 2047** (service of process on registered agent)
- ✓ **SB 342/HB 2921** (OAG authority)
- ✓ **SB 1568/HB 3244** (shareholder standing after merger)
- ✓ **HB 2393** (uncertificated shares)
- ✓ **SB 582/HB 1438** (service on entities/delinquent taxes)
- ✓ **SB 961/HB 2098** (joint practice of physicians, physician assistants)

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Doing Business with the SOS

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Forms

http://www.sos.state.tx.us/corp/forms_option.shtml

Online Filing and Orders



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

Need Help?

Call (512) 463-5586



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