



# **THE TEXAS BUSINESS ORGANIZATIONS CODE**

**Doing Business with the Secretary of State  
On and After January 1, 2010**

**A Guide for Texas Nonprofit Corporations**

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## **I. INTRODUCTION**

In 2003, the Texas Legislature enacted the Texas Business Organizations Code (BOC), which codified the provisions of the 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.<sup>1</sup> The BOC represented a major restructuring of the business organization statutes, and also made substantive changes to the law in existence at the time of its enactment.

Because the structure, organization, and language of the BOC differed from existing statutes, the Legislature delayed the effectiveness of the BOC until January 1, 2006. In addition, the Legislature provided for a four-year period of transition before the repeal of the statutes codified by the BOC and the mandatory application of the BOC to pre-existing entities. Consequently, on January 1, 2010, a Texas entity that was formed before January 1, 2006 and that has not elected to adopt the BOC will automatically be subject to the BOC.

## **II. NAVIGATING 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 is 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. Generally, in order to navigate the BOC, 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 will take precedence over the general provision in title 1.

## **III. TITLE 1. CHAPTER 1: GENERAL PROVISIONS**

### **A. The New Language of the BOC**

Chapter 1 of the BOC contains definitions for terms used in the BOC. It is important to refer to the definitional section when determining the meaning or application of a BOC provision. Also, remember to use the new terminology of the BOC when drafting filing instruments and bylaw provisions.

1. The provisions of the Texas Non-Profit Corporation Act are repealed on January 1, 2010. On and after January 1, 2010, a Texas nonprofit corporation will be subject to and governed by chapters 20 and 22 of title 2 and the provisions of title 1 to the extent applicable to nonprofit corporations. These provisions may be cited and referred to as the “Texas Nonprofit Corporation Law.”

2. The following chart provides the terms used by the Texas Non-Profit Corporation Act and the terms used to describe the same filing instrument under the BOC.

Texas Non-Profit Corporation Act		Texas Business Organizations Code
Articles of Incorporation	<i>now</i>	Certificate of Formation
Articles of Amendment	<i>now</i>	Certificate of Amendment
Restated Articles of Incorporation	<i>now</i>	Restated Certificate of Formation
Articles of Correction	<i>now</i>	Certificate of Correction
Articles of Dissolution	<i>now</i>	Certificate of Termination
Articles of Merger	<i>now</i>	Certificate of Merger
Articles of Consolidation	<i>now</i>	Certificate of Merger <sup>2</sup>
Application for Certificate of Authority	<i>now</i>	Application for Registration

**B. Other New Terms**

Chapter 1 of the BOC also introduces other new terms that are used in provisions that apply to all filing entities. The chart shown below reflects the definition of the term as it applies to a nonprofit corporation.

BOC Terminology		Definition
Filing instrument	<i>means</i>	A document or instrument filed under BOC
Governing authority	<i>means</i>	Board of directors of a corporation or other persons authorized to perform the functions of a board of directors
Governing documents	<i>means</i>	Certificate of formation, bylaws, and any other documents or agreements adopted by the corporation to govern the formation or internal affairs of the corporation.
Governing person	<i>means</i>	Director or person serving as part of the governing authority
Managerial official	<i>means</i>	An officer or governing person

**IV. 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. 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, 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 Nonprofit Corporations?**

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

1. Under the Texas Non-Profit Corporation Act, 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. Please note however that while the BOC allows a general purpose clause other laws, including the Internal Revenue Code, may require that the certificate of formation provide a limited or more specific purpose clause as a basis for granting a license or tax-exempt or tax-deductible status. If utilizing the Secretary of State form 202, please use the additional spaces provided in Article 5 of the form to set forth a more specific purpose or purposes. The "Supplemental Provisions/Information" section of the form may be used to include additional information or optional provisions.

## **V. TITLE 1. CHAPTER 3: FORMATION AND GOVERNANCE**

### **A. Certificate of Formation of a Domestic Nonprofit Corporation**

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

1. Every certificate of formation for a nonprofit corporation formed and governed by the BOC must contain the information required under sections 3.005 and 3.009, namely:

- a. The name of the filing entity to be formed.
- b. A statement that the entity to be formed is a nonprofit corporation.
  - (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 for a corporation remember to specifically identify the type of corporation being formed. 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, which may be stated as "any lawful purpose for which a nonprofit corporation may be formed under the BOC."
- d. If the corporation is to have no members, a statement to that effect.
- e. If management of the affairs of the corporation is to be vested in the nonprofit corporation's members, a statement to that effect.

- f. The names and addresses of the initial board of directors of the corporation, which must be at least three (3) individuals. Alternatively, if the management of the corporation is to be vested solely in its members, a statement to that effect.
- g. The period of duration of the entity, if not perpetual. Pursuant to section 3.003 of the BOC, a domestic filing entity exists perpetually unless otherwise provided in its certificate of formation. 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.
- h. The registered office street address and the name of the registered agent at such office address.
- i. If the nonprofit corporation is to be authorized on its winding up to distribute the corporation’s assets in a manner other than as provided by section 22.304, a statement describing the manner of distribution.
- j. The name and address of each organizer. Generally, only one organizer is required for a nonprofit corporation that is created and governed by the BOC.
  - (1) 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.
  - (2) 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.
- k. Any supplemental information required to be included in the certificate of formation for the entity type. (See item 2 below.)
- l. 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. The minimum requirements for a certificate of formation for a nonprofit corporation are included in SOS form 202. The form however does not include language that would be required by the Internal Revenue Service for purposes of obtaining a tax-exempt status. For further information on how to obtain a tax-exempt status for your organization, please refer to the IRS publication 557, which is available from the IRS web site at <http://www.irs.gov/pub/irs-pdf/p557.pdf>. It is recommended that this publication be consulted before drafting and submitting the certificate of formation.

3. Do not use SOS form 202 if forming a special purpose nonprofit corporation, such as a local government corporation, water supply corporation, or cemetery corporation. The statutes authorizing creation of a special purpose corporation generally impose additional or different requirements for formation than the requirements found in chapter 3 of the BOC; review the statute authorizing the formation of the special purpose corporation for specific requirements.

## **B. Amended and Restated Certificates of Formation**

While chapter 3 contains the general requirements, look to title 2, chapters 20 and 22, to obtain more specific information on the procedure governing the amendment or restatement of a certificate of formation.

1. The BOC eliminates the need to provide specific voting information in a certificate of amendment or restated certificate of formation; however, 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 and by the entity's governing documents.
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.

## **VI. 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. In general, in the case of a nonprofit corporation, an officer must sign a filing instrument. (Sec. 20.001 BOC)
3. In the case of a certificate of correction, the certificate must be signed by a person authorized to sign the instrument to be corrected. If the instrument to be corrected is the certificate of formation of the nonprofit corporation, an organizer is authorized to sign the certificate of correction. (Sec. 4.101(b) BOC)

### **B. Facsimile Submission of Filings**

Chapter 4 carries forward the authority to submit filing instruments by facsimile transmission available under the Texas Miscellaneous Corporation Laws Act, article 1302-7.07.

1. Section 4.003 authorizes the filing of a photocopy or facsimile copy of a signed instrument required or authorized to be filed with the Secretary of State under a provision of the BOC. In addition, Texas Business & Commerce Code, section 71.158, 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 plain 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 currently 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. (Sec. 405.031(e) Gov. Code)

### **C. BOC 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 article 1396-9.03A of the Texas Non-Profit Corporation Act, it was a Class A misdemeanor to knowingly sign a document that was materially false with the intent that it be filed with the Secretary of State.

2. Section 4.008 of the BOC applies to all filing instruments made on and after January 1, 2010. Similar to the provision under prior law, 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. However, the BOC enhances the penalty to a state jail felony if the person'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. In addition, 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. In general, the Secretary of State has no statutory authority to revoke or reverse the effect of a filing instrument that a person alleges was false, forged, or fraudulent.

### **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 before the mandatory application date. If submitting a document before January 1, 2010, a nonprofit corporation

should exercise care when selecting the appropriate form because a BOC form may not comply with the filing requirements under the Texas Non-Profit Corporation Act.

2. The Secretary of State's web site contains a forms selection page found at [http://www.sos.state.tx.us/corp/forms\\_option.shtml](http://www.sos.state.tx.us/corp/forms_option.shtml). Until January 1 2010, the forms selection page will contain three (3) different selections, as described below.

- a. A nonprofit corporation formed 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 would click on the "bar" entitled "Forms for Entities Formed Before January 1, 2006" to obtain an appropriate form for submission of a filing instrument.
- b. A nonprofit corporation formed on or after January 1, 2006, must click on the "bar" entitled "Texas Business Organizations Code Forms." 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. A domestic or foreign nonprofit corporation that needs to file a nonprofit periodic report would click on the "bar" entitled "Reports."
- d. Once the appropriate option has been selected, an index of forms suitable for filing will appear. All forms are provided in Word and PDF formats.

3. On and after January 1, 2010, the forms selection page will be revised to eliminate forms designed to comply with the prior law.

#### **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 delayed effectiveness provisions). 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 delayed effectiveness provisions).

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 90<sup>th</sup> 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. Please note that 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. Further, the former name of the entity will be given an inactive name status of “prior name.”

4. The delayed effectiveness provisions of the Texas Non-Profit Corporation Act 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—New for Nonprofit Corporations**

Although the Texas Non-Profit Corporation Act had provisions that permitted the delayed effectiveness of certain filings, the Act did not authorize the abandonment of an instrument with a delayed effective date or condition after the instrument had been filed with the Secretary of State.

1. 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.

2. 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 of State must determine whether the former name of any entity is available or whether the organizational documents need to be amended to change the name. If the likelihood exists that the parties might abandon a transaction, consider filing a name reservation for the prior or former name of an entity that may need to be reactivated.

3. 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. (Sec. 4.052 to Sec. 4.056 BOC)

4. 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**

Filing fees for instruments filed under the BOC are contained in a single chapter.

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. Section 4.153 contains the filing fees for instruments filed by nonprofit corporations. In general, the filing fees for nonprofit corporations remained the same.
3. An instrument submitted by a nonprofit corporation formed under a special statute will be assessed the fee established for a nonprofit corporation filing under chapter 4, unless another fee is established for the filing under the statute governing the special purpose nonprofit corporation.
4. Expedite fees are authorized under section 405.032 of the Texas Government Code. Consequently, the BOC does not change 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. Certificate of Correction**

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

1. A filing entity 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.<sup>3</sup> A certificate of correction would be executed by a person who was authorized to sign the filing instrument to be corrected.
2. Documents may be corrected to contain only those statements that lawfully could have been included in the original instrument. The 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 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 BOC provisions for correction, sections 4.101 through 4.105, 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.

### **VII. TITLE 1. CHAPTER 5: NAMES OF ENTITIES**

#### **A. Entity Name Issues: Name Availability**

1. The leading cause of rejection on any formation filing, regardless of the type of entity, is the failure of the entity name to meet the name standards established by law and by the administrative rules adopted by the Secretary of State.

2. Name provisions for a filing entity 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 4 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](http://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 sections 79.30 and 79.50 to 79.52.<sup>4</sup>

4. There are three categories of name similarity:<sup>5</sup>

- a. Names that are the same; that is, a comparison of the names reveals no differences. (1 TAC section 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 section 79.37) In accordance with 1 TAC section 79.39, if any of the following conditions exist a proposed name is considered 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 section 79.40) In accordance with 1 TAC section 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.<sup>6</sup>

6. No particular form of consent is required; however, the consent must be in writing and signed by a managerial official of the consenting entity. Consents given orally cannot be accepted. The consent provided for purposes of filing should not state conditions.

## **B. Name Clearance—Limitations**

1. Formation under a given name does not give a 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 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 71 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 make financial expenditures or execute documents utilizing a proposed entity name based on a preliminary name clearance.

## **C. Words of Organization**

1. 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.

2. A nonprofit corporation may, but is not required to use an organizational designation such as “Incorporated” or “Corporation.” (Sec. 5.054(b) BOC)

#### **D. Name Reservations**

1. The BOC provisions relating to name reservations apply to all filing entity types; consequently, a name reservation may be used in connection with a document filed by any foreign or domestic filing entity. 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 may terminate a name reservation before the expiration of its 120-day term by submitting 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.

#### **E. Assumed Names**

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 filing under chapter 71, Business & Commerce Code.

1. In the case of a corporation, such as a nonprofit corporation, section 71.002(2) of the Business & Commerce Code, defines an assumed name as “a name other than the name stated in its certificate of formation or a comparable document.”

2. 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 71, 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.

3. 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 nonprofit corporation maintains its principal office.<sup>7</sup> If the nonprofit corporation does not maintain its principal office in Texas, the assumed name certificate would be filed with the county clerk in the county where the corporation maintains its registered office address.

4. 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.

## **VIII. TITLE 1. CHAPTER 5: REGISTERED AGENT AND REGISTERED OFFICE**

### **A. Registered Agent Requirements**

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.

a. 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. *Effective January 1, 2010*, an organizer or an officer or director of a nonprofit corporation who executes an instrument that appoints or designates a person as the registered agent of the corporation is affirming that the person designated has consented (in a written or electronic form) to serve as registered agent. The consent of the registered agent should be maintained with the books and records of the corporation.

3. The consent of the person designated as the registered agent is not required to be filed with the certificate of formation, periodic report, or other instrument that appoints the person as the entity's registered agent. However, a filing that includes the written consent of a person designated as the registered agent will be retained in the records of the Secretary of State as part of the document.

4. A person who has been named as the registered agent of an entity without the person's consent is not required to perform the duties of a registered agent. (Sec. 5.206 BOC) In addition, a person who has been designated as a registered agent without the person's consent may file a rejection of the appointment with the Secretary of State. On filing, the rejection of appointment will terminate the appointment of the registered agent and registered office. Failure to appoint or maintain a registered agent and registered office may result in the involuntary termination of a domestic filing entity or the revocation of a foreign filing entity's registration to transact business in Texas.

5. A person may resign as the registered agent of an entity by providing notice to the entity and by filing a statement of resignation with the Secretary of State. The statement of resignation to the Secretary of State must be given before the 11<sup>th</sup> day after the date notice is given to the entity. On compliance with the notice and filing requirements, the appointment of the registered agent and registered office terminate. However, this termination is not effective until the 31<sup>st</sup> day after the date the Secretary of State receives the resignation statement. (Sec. 5.204(d) BOC)

6. 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).

## **B. Registered Office Requirements**

1. Although the registered office address does not need to 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.
2. 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. For this reason, a post office box address is not sufficient as the registered office address.
3. The Secretary of State sends official notices and requests to the registered agent of the corporation at the registered address of record. Consequently, it is very important for the corporation to maintain current registered agent and registered office information in order to ensure the active status of the entity. Failure to maintain a registered agent or registered office may result in the involuntary termination of the Texas nonprofit corporation. If the person named as the corporation’s registered agent will no longer function in that capacity, or if the corporation’s registered office address changes, the corporation *must* file a statement of change of registered agent or registered office with the Secretary of State. (SOS form 401)

## **IX. TITLE 1. CHAPTER 10: MERGERS AND CONVERSIONS**

### **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. The BOC provides more flexible merger provisions than those that were found in the Texas Non-Profit Corporation Act. Under prior law, a nonprofit corporation could merge only with and into other nonprofit corporations. Additionally, prior law permitted only one of the parties to the merger to survive the transaction. Section 1.002(55) of the BOC defines a merger as:
  - a. the division of a domestic entity into two or more new domestic entities or other organizations or into a surviving domestic entity and one or more new domestic or foreign entities or non-code organizations; or
  - b. the combination of one or more domestic entities with one or more domestic entities or non-code organizations resulting in:
    - (1) one or more surviving domestic entities or non-code organizations;
    - (2) the creation of one or more new domestic entities or non-code organizations; or
    - (3) one or more surviving domestic entities or non-code organizations and the creation of one or more new domestic entities or non-code organizations.
2. Although the BOC has more flexible and permissive merger provisions for nonprofit corporations, certain restrictions and limitations still apply. These restrictions are found in section 10.010 and are set forth below:

- 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.
3. 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.
  4. The provisions of chapter 10 of the BOC do not apply to an unincorporated nonprofit association. Consequently, an unincorporated nonprofit association has no authority to engage in a merger with a nonprofit corporation.

**B. Alternative Certified Statement in Lieu of a Plan of Merger**

1. The requirements for a plan of merger are set forth in sections 10.002 to 10.004 of the BOC.
2. The plan of merger must be set forth as part of the certificate of merger unless the certificate of merger includes a statement certifying:<sup>8</sup>
  - 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 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 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 on written request and without cost by each surviving, acquiring, or new domestic entity or non-code organization to:
    - (1) any owner or member of any domestic entity that is a party to the merger, and
    - (2) in the case of 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 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.<sup>9</sup> Procedures for the approval of

fundamental business transactions for nonprofit corporations are found in sections 22.251-22.257 of the BOC.

### **C. Common Errors To Avoid**

1. Failure to ensure tax clearance for each non-surviving party to the merger by either including the appropriate tax certificate or by including a statement relating to the payment of such taxes by one or more of the surviving entities or new entities created by the merger.
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 certificate of merger.

### **D. Limited Conversion Transaction for Nonprofit Corporations**

1. 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.*
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 registration to transact business that converts to a domestic filing entity will be deemed to have automatically withdrawn its registration when it files the certificate of conversion with the Secretary of State.
  - 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.<sup>10</sup>
3. Although a Texas nonprofit corporation cannot convert into a for-profit entity, it may convert to a foreign nonprofit corporation.
4. The provisions of chapter 10 of the BOC do not apply to an unincorporated nonprofit association. Consequently, an unincorporated nonprofit association has no authority to file a conversion or to convert to a nonprofit corporation.

### **E. 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.

### **F. 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. The BOC requires 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.
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 entity. The certificate of account status must specifically indicate that it is for the purpose of merger or conversion and, in the case of a merger, will require the filing of a final tax return for any non-surviving party to the merger; 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. (Sec. 10.156(2) BOC)

### **G. Merger and Conversion Forms**

The Secretary of State has promulgated merger forms designed 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. 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.
3. 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.<sup>11</sup>
4. Given the statutory restriction on the conversion of a domestic nonprofit corporation, the SOS conversion forms do not include a form for converting a Texas nonprofit corporation to a foreign nonprofit corporation, and vice versa.

## **X. 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:
  - a. the expiration of an entity's duration;
  - b. a voluntary decision to wind up the business/affairs of the entity by a vote of the persons authorized under the BOC to approve the winding up of the entity;
  - c. the occurrence of an event provided for in the governing documents of the entity that requires the winding up of the entity;
  - d. the occurrence of an event specified in the BOC as requiring the winding up of the domestic entity; and
  - e. a judicial decree that requires the winding up or dissolution of the entity.
2. 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. Pursuant to sections 11.101 and 11.105, a certificate of termination for a Texas nonprofit corporation 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. a statement that any property of the nonprofit corporation has been transferred, conveyed, applied, or distributed in accordance with chapters 11 and 22 of the BOC;
- f. a statement that there is no suit pending against the nonprofit corporation or that adequate provision has been made for the satisfaction of any judgment that may be entered against the nonprofit corporation in a pending suit; and
- g. if the nonprofit corporation received and held property permitted to be used only for charitable, religious, eleemosynary, benevolent, educational, or similar purposes, but the nonprofit corporation did not hold the property on a condition requiring return, transfer, or conveyance because of the winding up and termination, a statement that distribution of that property has been effected in accordance with a plan of distribution adopted in compliance with the BOC for the distribution of that property.

2. A nonprofit corporation may use SOS form 652 for the purpose of submitting a certificate of termination.

## **XI. TITLE 1. CHAPTER 11: REINSTATEMENT**

### **A. New—BOC Permits a Reinstatement After a Voluntary Termination**

One of the substantive changes made by the enactment of the BOC.

1. Under the Texas Non-Profit Corporation Act, a nonprofit corporation could not revoke a voluntary dissolution and reactivate the corporation once the articles of dissolution had been filed with the Secretary of State. However, sections 11.201 and 11.202 of the BOC permit a voluntarily terminated (i.e., dissolved) 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. In the case of a nonprofit corporation, these procedures are set forth in sections 22.301-22.303 of the BOC.

3. Before 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.<sup>12</sup>

4. SOS form 811 would be used when applying to reinstate the existence of the entity. The certificate of reinstatement *must* include the name of the entity's registered agent and its registered office address. The person designated as the entity's registered agent also must have consented, in a written or electronic form, to act as the entity's registered agent. The consent of the agent does not need to accompany the filing.

5. An entity that has been involuntarily terminated by the Secretary of State, or that has had its existence forfeited under the Tax Code, or that has been terminated by court order may not be reinstated under section 11.201 of the BOC.

#### **B. Reinstatement After an Involuntary Termination—Change to Timeframe**

1. The Texas Non-Profit Corporation Act established a certain timeframe, 36 months, within which a nonprofit corporation must submit an application for reinstatement following an involuntary dissolution by the Secretary of State.

2. Section 11.253 of the BOC does not establish a timeframe for filing a reinstatement following an involuntary termination. However, if the entity is reinstated before 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. In the case of a nonprofit corporation, these procedures are set forth in sections 22.301-22.303 of the BOC.

4. Before 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.<sup>13</sup>

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. The person designated as the entity's registered agent also must have consented, in a written or electronic form, to act as the entity's registered agent. The consent of the agent does not need to accompany the filing.

6. 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 an Involuntary Termination for Failure to File a Periodic Report**

1. Requirements under the BOC are similar to prior law. A nonprofit corporation that has been involuntarily terminated for its failure to file a periodic report when required to do so by the Secretary of State does not reactivate the entity by filing a reinstatement under chapter 11 of the

BOC. Instead, a nonprofit corporation may reactivate its existence by filing the delinquent periodic report pursuant to section 22.365 of the BOC.

2. Before filing the reinstatement, the Secretary of State must determine whether the name of the involuntarily terminated corporation 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.

#### **D. Reinstatement After a Tax Forfeiture**

1. Reinstatement following a forfeiture of existence under the Texas Tax Code is governed by the Tax Code and not by the BOC.<sup>14</sup> An application for reinstatement filed under the Tax Code should be made on SOS form 801 and must be accompanied by a tax clearance letter issued by the Comptroller of Public Accounts. There is no fee imposed on a nonprofit corporation filing a reinstatement after a tax forfeiture.

2. Before filing the reinstatement, the Secretary of State must determine whether the name of the involuntarily terminated corporation 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.

#### **E. Judicial Revocation of Fraudulent Terminations**

Section 11.153 of the BOC is similar to article 1396-6.07 of the Texas Non-Profit Corporation Act. Section 11.153 authorizes a court-ordered revocation of a fraudulent certificate of termination when the corporation was terminated 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. There is no fee for filing a court-ordered revocation of a fraudulent termination.

## **XII. ANSWERS TO SOME FREQUENTLY ASKED QUESTIONS**

### **A. Formation and Governance Issues**

1. *What is a nonprofit corporation?* A “nonprofit corporation” is a corporation no part of the income of which is distributable to members, directors, or officers. A nonprofit corporation may be created for any lawful purpose, which purpose must be stated in its certificate of formation, the document filed with the Secretary of State to create a nonprofit corporation.

2. *Is a nonprofit corporation a tax-exempt entity? If not, how do I become tax-exempt?* A Texas nonprofit corporation is not automatically exempt from federal or state taxes. To become exempt, the corporation must meet certain requirements and apply with both the IRS and the Texas Comptroller of Public Accounts. To learn more about the rules and procedures for obtaining a federal tax-exempt status, read IRS publication 557 “*How to Apply for Recognition of Exemption for an Organization.*” You may also direct your questions regarding federal tax exemption by writing to the IRS, Exempt Organizations, 1100 Commerce, Dallas, Texas 75242 or by calling (214) 767-6023 or 767-0040. To learn more about the rules and procedures for obtaining a state tax exempt status, contact the Texas Comptroller of Public Accounts, Tax Exempt Organizations Section, by calling (800) 531-5441 or (512) 463-4600 or by sending an e-mail to [tax.help@cpa.state.tx.us](mailto:tax.help@cpa.state.tx.us).

3. *How do I form a “501(c)(3)” corporation?* The designation “501(c)(3)” refers to a specific federal tax provision only. If you need information regarding a federal tax provision or how a tax provision impacts your certificate of formation, you should contact your own tax counsel, attorney, or the IRS. The Secretary of State’s form 202 meets minimum state law requirements but does *not* include any additional statements that the IRS might require for tax-exempt status.
4. *Do you have to be a U.S. citizen or a U.S. resident to incorporate a nonprofit corporation in Texas? Do you have to be 18 or older to be an officer or director?* The BOC does not impose residency requirements on who can form a corporation, or who may be an officer or director of a corporation. An entity can impose age, residency, or citizenship requirements in its certificate of formation or other governing documents, if desired. Other laws might impose restrictions, and there may be issues related to a minor’s capacity to contract or to be an owner of an entity with a liquor license.
5. *Where can I get a corporate seal or a minute book?* The BOC provides a corporation with the authority to have a corporate seal, but does not require a corporation to have a corporate seal. Because a seal is not required to be placed on an instrument filed with the Secretary of State, this Office does not have information or regulations on how to design a seal or where to obtain one. Seals, stock certificates, and corporate minute books can be purchased from book stores, office supply stores, or corporate service companies.
6. *Can I file my corporation’s bylaws with the Secretary of State?* No. The bylaws of a corporation are internal documents kept by the corporation at its principal or registered office. There is no statute that authorizes the filing of a corporate entity’s bylaws with the Secretary of State.
7. *Can one person be the sole director and officer of a nonprofit corporation?* The BOC requires a nonprofit corporation to have at least three directors, one president and one secretary. The same person cannot be both the president and secretary. Officers and directors must be natural persons, but may be known by other titles.
8. *Can a nonprofit corporation pay a salary to its officers, directors and/or employees?* Yes. Any corporation may pay reasonable compensation for services rendered to the corporation.
9. *Can a nonprofit corporation give political contributions?* Under title 15 of the Election Code, a corporation, including a nonprofit corporation, may not generally make political contributions or expenditures. However, title 15 of the Election Code also provides an exception from this restriction for a political action committee that incorporates for liability purposes. Please note that a nonprofit corporation formed for the purpose of operating as a political action committee must have a specific purpose clause in its certificate of formation to fall within this exception. The Secretary of State does not have a specific certificate of formation form for this purpose. To find out more information regarding the laws, rules, and regulations governing political action committees, or how certain political activities may impact a nonprofit corporation’s tax-exempt status, contact the [Texas Ethics Commission](#), (512) 463-5800, the Federal Elections Commission, or the IRS.
10. *Who has authority to investigate the activities of a nonprofit corporation?* The Texas Attorney General has statutory authority to (1) investigate charities that operate as nonprofit

corporations, and (2) inspect the books and records of all corporations, including nonprofit corporations. The Secretary of State has no such authority. The [IRS](#) can revoke a nonprofit corporation's tax-exempt status for violations of federal tax laws.

11. *Are the books and records of a nonprofit corporation available for inspection?* Section 22.351 of the BOC gives a member of a nonprofit corporation, on written demand, the right to examine and copy the books and records of the nonprofit corporation. The member, or the member's agent, accountant, or attorney, may examine and copy these records at any reasonable time and for a proper purpose. Section 22.352 also requires a nonprofit corporation to maintain financial records in accordance with generally accepted accounting principles; the board of directors is required to prepare or approve an annual financial report for the preceding year.

Additionally, section 22.353 requires certain nonprofit corporations to make all records, books, and annual reports of financial activity available to the general public for inspection and copying. However, section 22.353 does not apply to (1) corporations that solicit funds only from their members; (2) corporations that do not intend to solicit and do not actually receive contributions in excess of \$10,000 during a fiscal year from sources other than their members; (3) proprietary schools; (4) religious institutions; (5) trade associations or professional associations whose principal income is from dues and member sales and services; (6) insurers; or (7) alumni associations of public or private institutions of higher education.

Under certain circumstances, a nonprofit corporation's books and records are available to the public under the Texas Public Information Act (chapter 552 of the Government Code). Section 552.003(1)(A) of the Public Information Act defines "governmental body" to include the "part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds." For more information on the Public Information Act, please contact the [Attorney General](#); the Secretary of State cannot provide advice regarding the application of the Public Information Act to a particular nonprofit corporation.

12. *Does a nonprofit corporation file a copy of its IRS Form 990 with the Secretary of State?* No; however, under certain circumstances, a nonprofit corporation files Form 990 or 990-PF with the Charitable Trust Section of the Texas [Attorney General](#).

## **B. Nonprofit Periodic Reports**

1. *I received a notice from the Secretary of State about filing a "periodic report." What is this report? Is this required annually?* The Secretary of State is authorized to require a nonprofit corporation to file a report that provides information regarding the corporation's registered agent and registered office, and the names and addresses of its current officers and directors. This is an informational report and is required regardless of the corporation's tax status. The report is not requested on an annual basis; the report may be requested by the Secretary of State not more than once every four (4) years. (Sec. 22.357 BOC)

2. *Why am I receiving notices about filing a periodic report, I am no longer an officer of this corporation?* The Secretary of State sends official notices to the current registered agent and registered office address of a corporation on file with this Office. If a periodic report notice was addressed to you, it is because your name and address appear as the corporation's registered agent and registered office and the corporation has not designated or appointed a new registered agent.

3. *The report contains pre-printed information that is wrong (outdated), how can I change it?* Although you cannot change the entity's name, file number or jurisdiction of formation, you can change or update the following pre-printed information on the report by simply crossing it out and filling in the correct information:

- a. The registered agent name;
- b. The registered office address; and
- c. The names, addresses, and titles of persons named as officers and directors of the corporation.

If the corporation needs to effect a change to its legal name, it must file a certificate of amendment with the Secretary of State. (SOS form 424)

4. *Can I file a periodic report even if the Secretary of State has not requested one?* Yes. Although a nonprofit corporation is not required to notify the Secretary of State of changes to officer/director information each time a change occurs, a nonprofit corporation can file a periodic report even if the Secretary has not asked for one; however, filing a voluntary report does *not* affect your duty to timely-file a report when one is requested by the Secretary of State.

5. *What happens if I don't file the periodic report?* A nonprofit corporation that fails to file the periodic report within 30 days from the date that the report is sent by the Secretary of State forfeits its right to transact business in Texas. A nonprofit corporation that has forfeited its right to transact business cannot maintain any action, suit, or proceeding in any Texas court; however, the corporation may still defend any action or suit. The forfeiture does not impair the validity of any contract.

The corporation may relieve itself of the forfeiture by simply filing the periodic report within 120 days of the date of mailing of the notice of forfeiture. If the corporation fails to file the report within this 120-day period, the Secretary of State will involuntarily terminate the existence of the Texas nonprofit corporation or revoke the foreign nonprofit corporation's registration to transact business in Texas, as applicable.

6. *If a nonprofit corporation has been involuntarily terminated or has had its registration revoked for failure to file its periodic report can it be reinstated?* Yes. So long as the entity would otherwise continue to exist, the entity can reinstate *at any time* by filing the required report (SOS form 802) together with the maximum filing fee of \$25. However, please note that the Secretary of State must determine whether the corporation's name is still available before the required periodic report can be filed and the entity reinstated. Consequently, additional filings and fees may need to be submitted together with the periodic report when the name of the corporation is the same as, deceptively similar to, or similar to the name of any existing domestic or foreign filing entity, or any name reservation or registration on file with the Secretary of State.

### **C. Mandatory Application of BOC**

1. *My entity is still governed by the Texas Non-Profit Corporation Act (Texas Business Corporation Act, etc.) and is not currently governed by the BOC. Should the entity file a statement of early adoption of the BOC before December 31, 2009? Does my entity need to do anything to get ready for January 1, 2010?* An entity may still take the adoption and approval actions described by section 402.003 of the BOC and file a statement of early adoption of the BOC before December 31, 2009. However, an entity is not required to do so. On January 1,

2010, the BOC will automatically apply to the entity. An entity does not have to file anything at this time in order to comply with the BOC. (Sec. 402.005 BOC) However, if an entity's formation document (i.e., articles of incorporation) does not comply with the BOC, then the next time the entity files an amendment, it must amend its formation document to comply with the BOC.

2. *My entity's governing documents still use terms like "articles of incorporation," and other vocabulary used under prior law. Does this mean that my entity's governing documents do not comply with the BOC?* In general, the BOC includes a list of synonymous terms so that a reference in your entity's governing documents to "articles of incorporation" or "charter" is legally synonymous to the term "certificate of formation." (For a complete list of synonymous terms, see section 1.006 of the BOC.) Consequently, given these synonymous terms it is likely that there is no need to make any changes to an entity's governing documents.

However, there may be some instances where an entity's governing documents contain specially drafted or specific provisions that may have been altered or changed by the BOC. Under these circumstances, the entity should consult with a private attorney to determine which provisions in the governing documents, if any, should be amended or re-drafted in light of these changes. The Secretary of State cannot make this determination for the entity.

### **XIII. 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.<sup>15</sup>

2. The Secretary of State does not regulate the manner in which a corporation does business. The Secretary of State does not determine whether a person signing a document has the capacity claimed or whether the signature affixed to the document is, in fact, the signature of the named person.<sup>16</sup> 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.<sup>17</sup>

#### **B. Accessing Information**

1. The Secretary of State's 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 our web site. 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 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. 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 can be obtained from <http://www.sos.state.tx.us/corp/sosda/index.shtml>.

3. 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](mailto: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](mailto:corpcert@sos.state.tx.us) or by faxing your written request to (512) 463-5709.

4. The legal staff of the Corporations Section cannot provide you with legal advice. However, if you have questions relating to filing requirements, send an e-mail to [corphelp@sos.state.tx.us](mailto:corphelp@sos.state.tx.us). Alternatively, the legal staff may be reached by calling (512) 463-5586.

### **C. Official Certifications**

1. If you are asked to provide a “certificate of existence” for your nonprofit corporation, order a certificate of status from the Secretary of State. Section 4.005(d) of the BOC provides that a certificate of status issued by the Secretary of State stating that the Texas entity is *in existence* is conclusive evidence of the entity’s 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 termination or notice of tax forfeiture 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 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.

## ENDNOTES

<sup>1</sup> 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 [TNPCHA] (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.)

<sup>2</sup> A consolidation transaction under the Texas Non-Profit Corporation Act is now included within the definition of a "merger" under the BOC.

<sup>3</sup> Sections 4.101 to 4.105 BOC

<sup>4</sup> Sections 5.052, 5.053, and 9.004(b)(1) of the BOC.

<sup>5</sup> See 1 TAC Sec. 79.35 and Steakley v. Braden, 322 S.W. 2d 363 (Tex. Civ. App.—Austin 1959, no writ).

<sup>6</sup> 1 TAC Sec. 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."

<sup>7</sup> Sec. 71.103 TB&CC

<sup>8</sup> Sec. 10.151(b)(1) BOC

<sup>9</sup> Sec. 10.151(b)(3) BOC

<sup>10</sup> Sec. 9.009(a-1)(2) BOC

<sup>11</sup> Sec. 3.005(a)(7) BOC

<sup>12</sup> Sec. 11.203 BOC

<sup>13</sup> Sec. 11.203 BOC

<sup>14</sup> Sec. 11.254 BOC

<sup>15</sup> Beall v. Strake, 609 W.W. 2d 885 (Tex. Civ. App—Austin 1981, writ ref'd n.r.e.)

<sup>16</sup> 1 TAC Sections 79.21, 80.3, and 83.3.

<sup>17</sup> The BOC provides for the court ordered revocation of a certificate of termination when the domestic filing entity was dissolved as a result of actual or constructive fraud. This provision also authorizes the Secretary of State to take any action necessary to carry out the court's order to reactivate the filing entity.