

Exploring the Flexibility Offered by TBOC Merger Provisions

- The Filing Office Perspective -

2014 LLCs, LPs and Partnerships
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Merger Defined

- Model Entity Transactions Act (2007)

“Merger” means a transaction in which two or more merging entities are combined into a surviving entity pursuant to a filing with the [Secretary of State]. Sec. 102 (23)



Merger Authorized

- Delaware, General Corporation Law

§ 251(a) Any 2 or more corporations existing under the laws of this State may merge into a single corporation, which may be any 1 of the constituent corporations or may consolidate into a new corporation formed by the consolidation, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section.

§§ 263 and 264 (authorize corporate mergers with partnerships and LLCs)

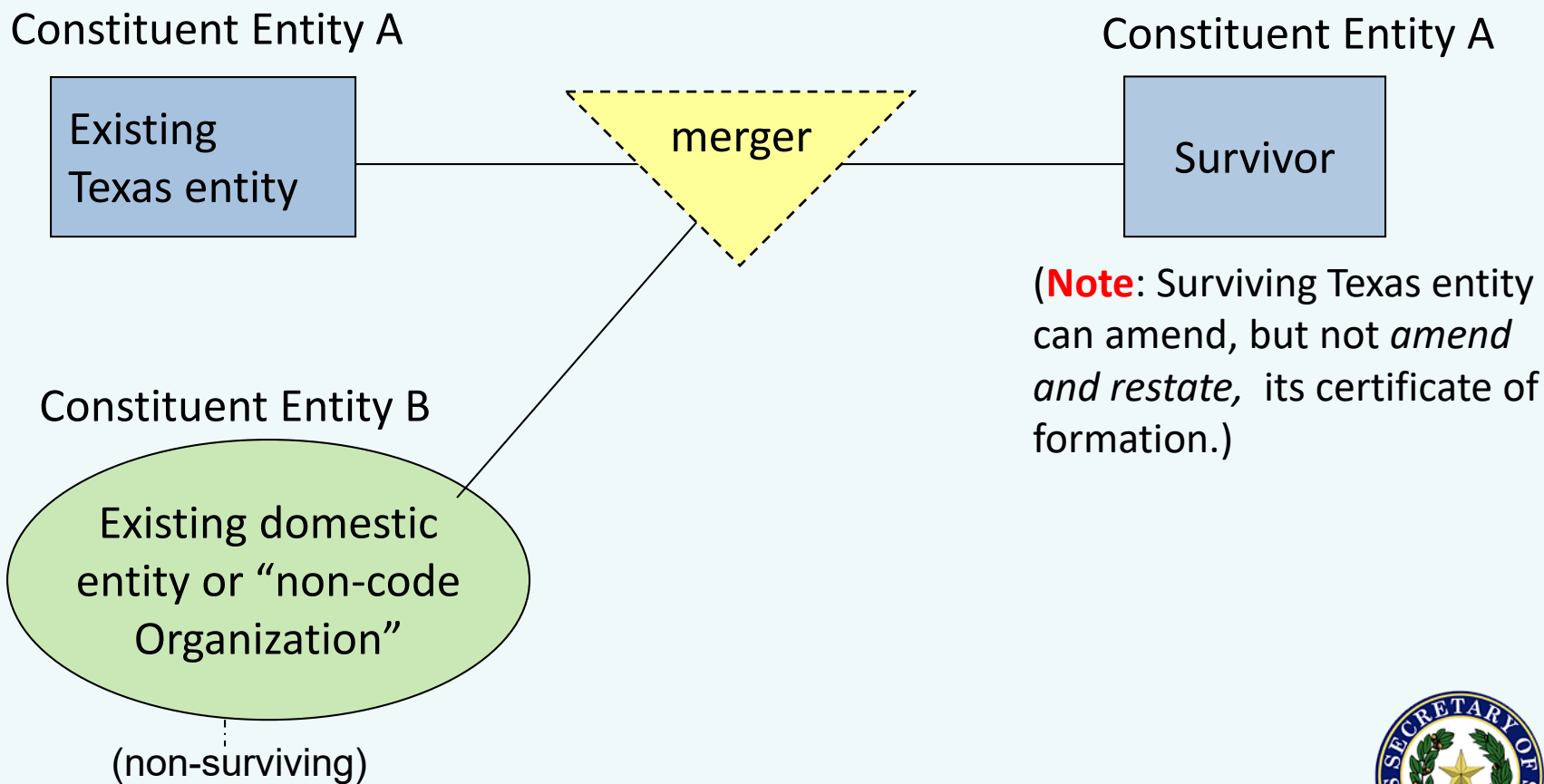


Merger Defined

- Section 1.002(55) BOC
 - (B) The combination of one or more domestic entities with one or more domestic entities or non-code organizations resulting in:
 - (i) One or more surviving domestic entities or non-code organizations;
 - (ii) The creation of one or more new domestic entities or non-code organizations; or
 - (iii) One or more surviving domestic entities or non-code organizations and one or more new domestic or foreign entities or non-code organizations.

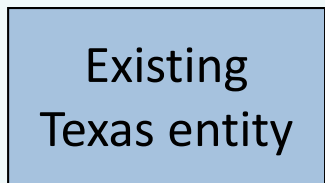


SOS Merger Form 622



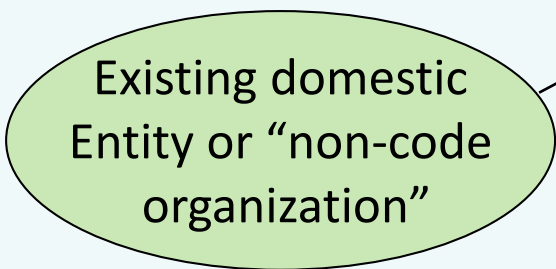
SOS Merger Form 622

Constituent Entity A

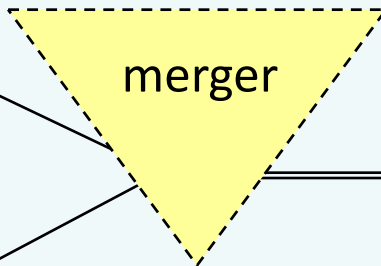


(non-surviving)

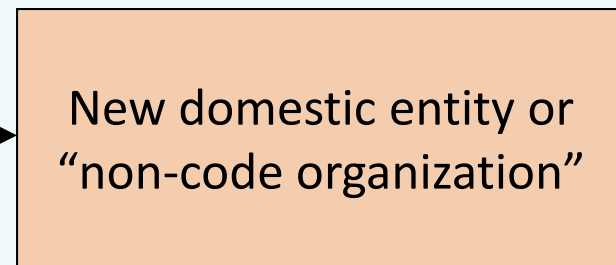
Constituent Entity B



(non-surviving)



New Entity C



SOS Merger Form 622

Constituent Entity A

Existing
Texas entity

(non-surviving)

New Entity C

New domestic entity or
“non-code organization”

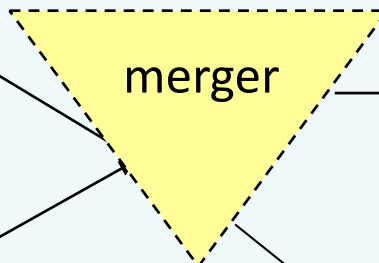
Constituent Entity B

Existing domestic
Entity or “non-code
organization”

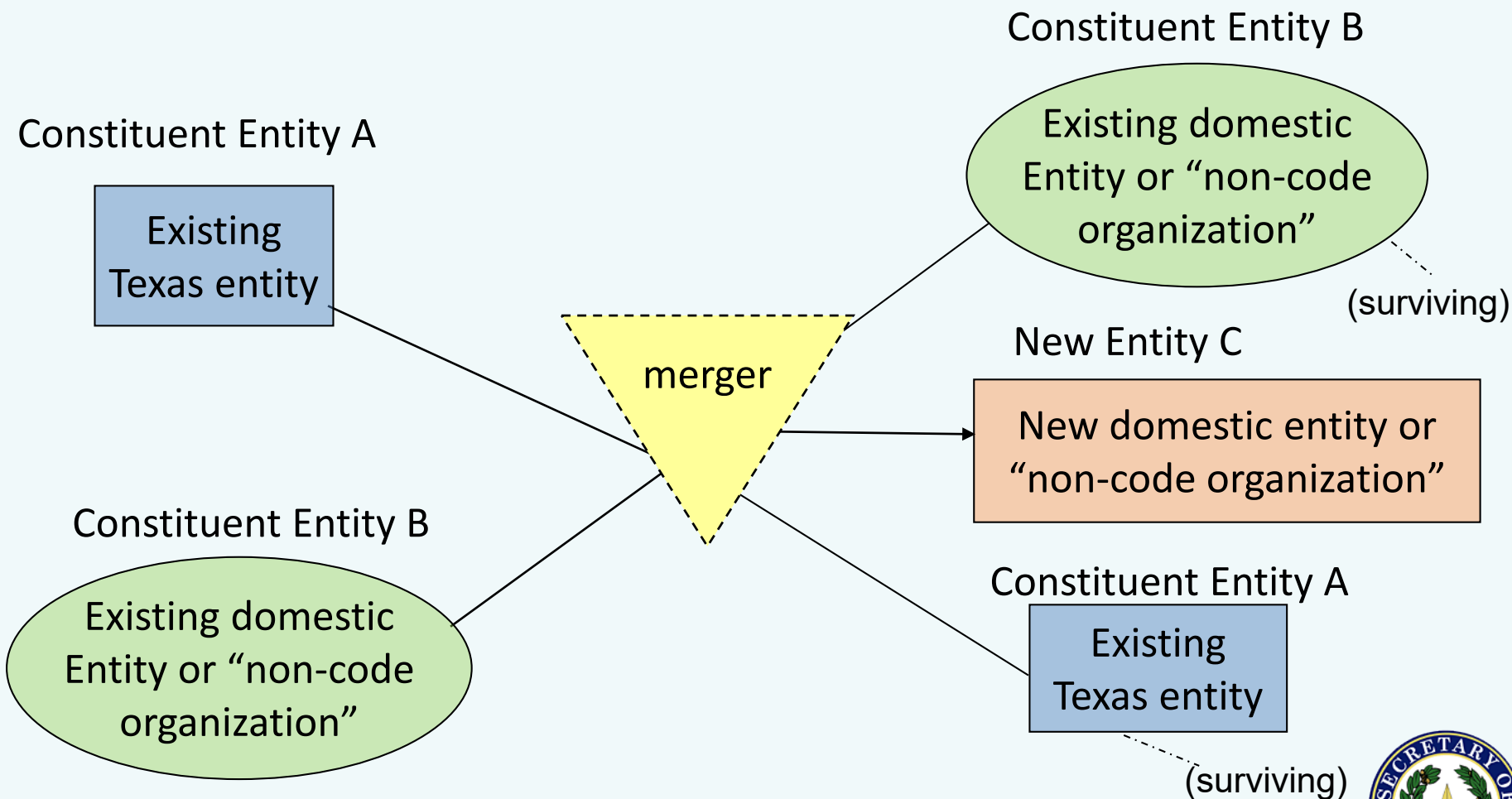
Constituent Entity B

Existing domestic
Entity or “non-code
organization”

(surviving)



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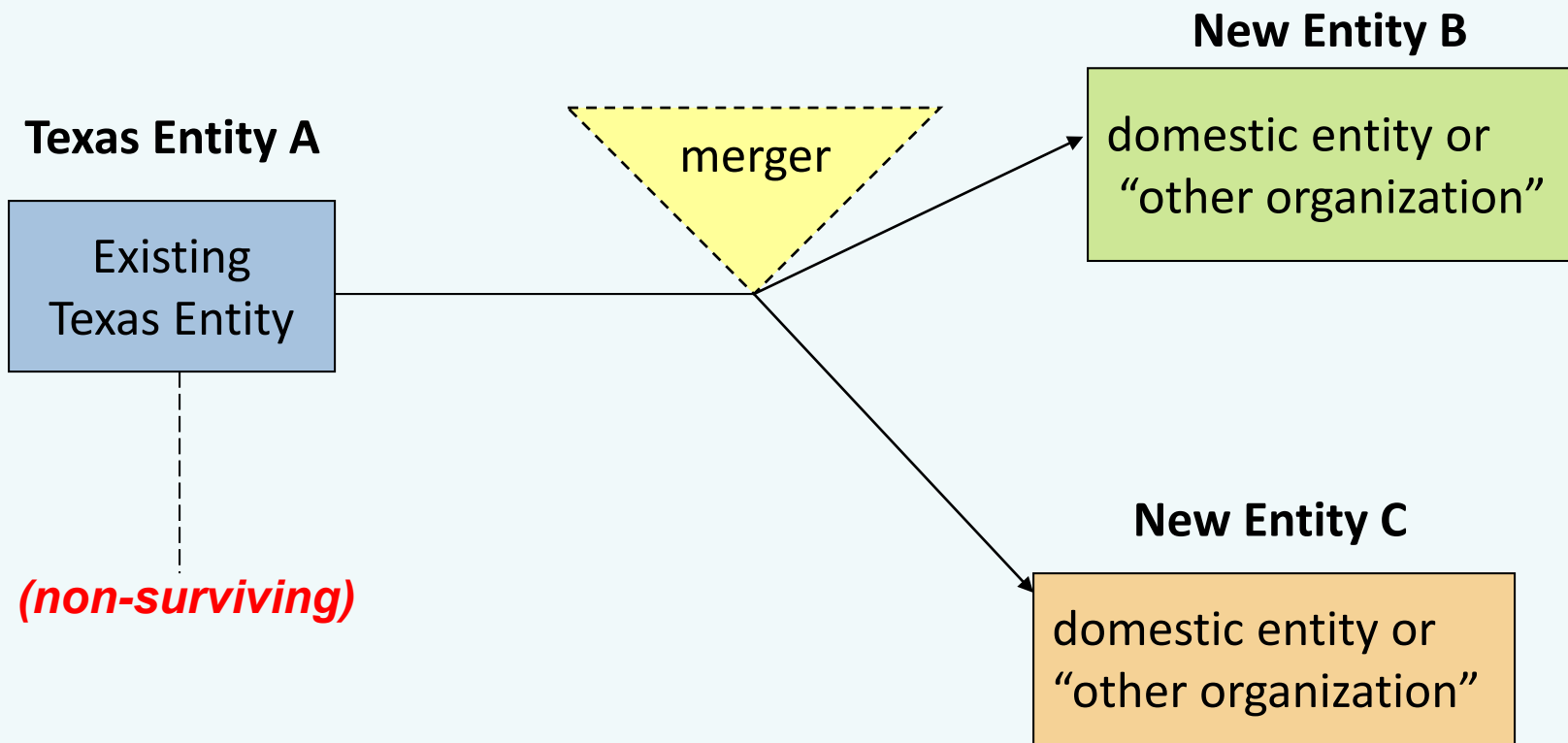


Merger Defined

- Section 1.002(55) BOC
 - (A) The division of a domestic entity into:
 - (i) Two or more new domestic entities or other organizations; or



SOS Form 621



Divisive Merger—definition A (i)

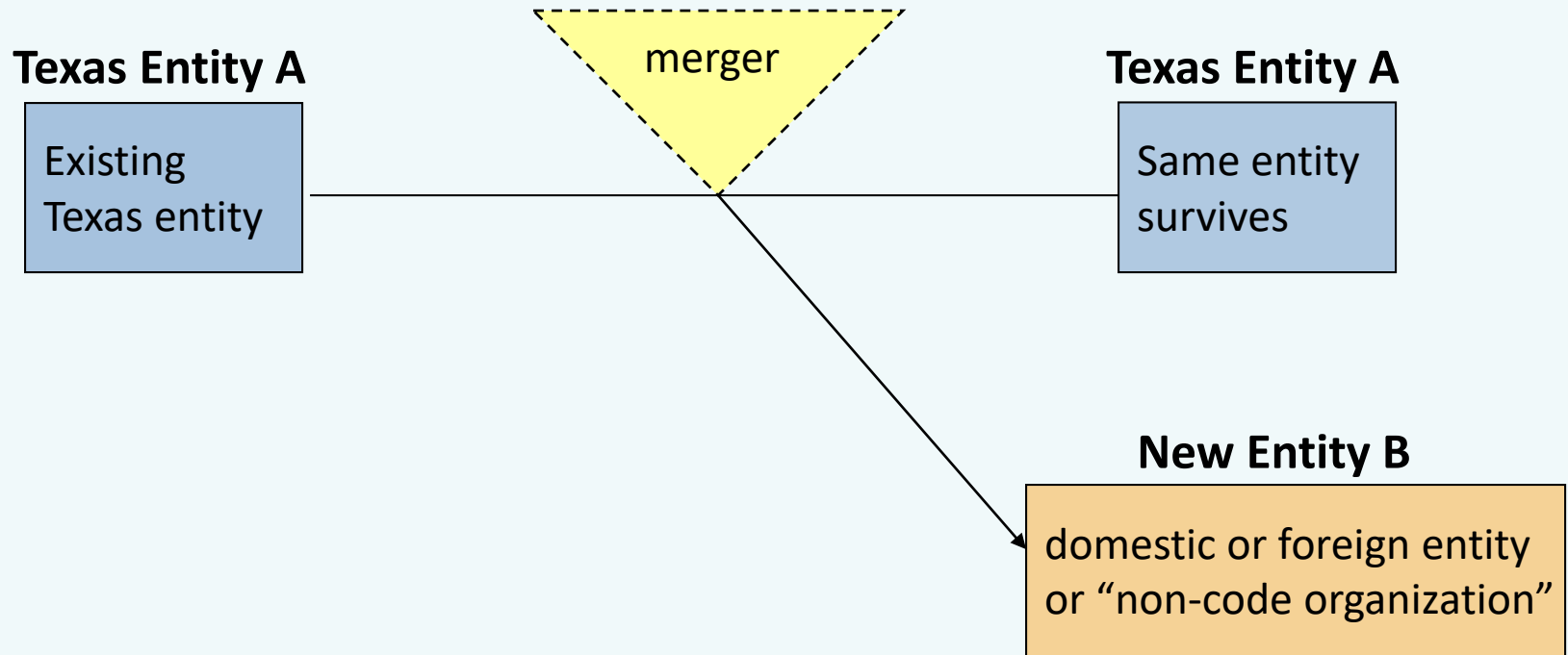


Merger Defined

- Section 1.002(55) BOC
 - (A) The division of a domestic entity into:
 - (i) Two or more new domestic entities or other organizations; or
 - (ii) A surviving domestic entity and one or more new domestic or foreign entities or non-code organizations.



SOS Form 621



Divisive Merger—definition A (ii)



A Comparison

Authorized Transactions	TBOC	Delaware	META
More than 1 surviving entity	✓	×	×
All parties may survive merger	✓	×	×
Creation of new resulting entity, plus surviving entity	✓	×	×
Division of 1 pre-existing entity, into 2 or more entities	✓	×	×



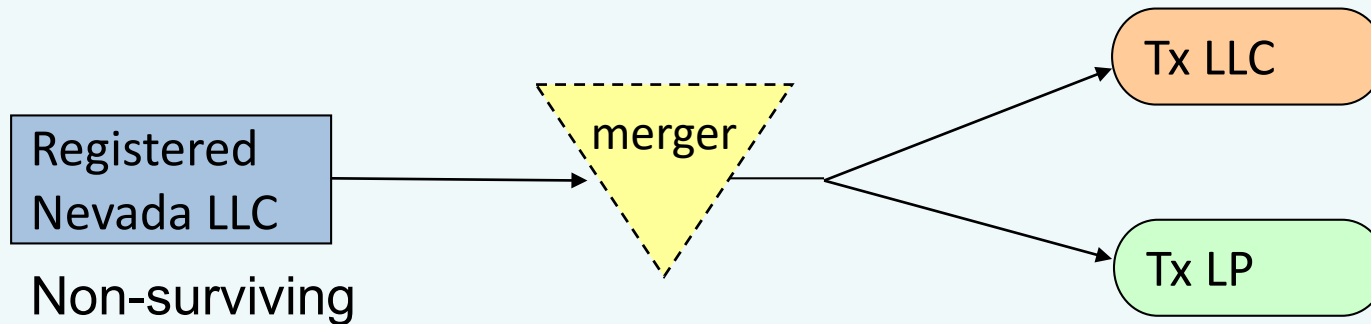
Frequently Asked Questions



Divisive Merger

Questions & Issues

Q: Can a foreign entity use the divisive merger provisions to create a Texas entity into which it will merge?



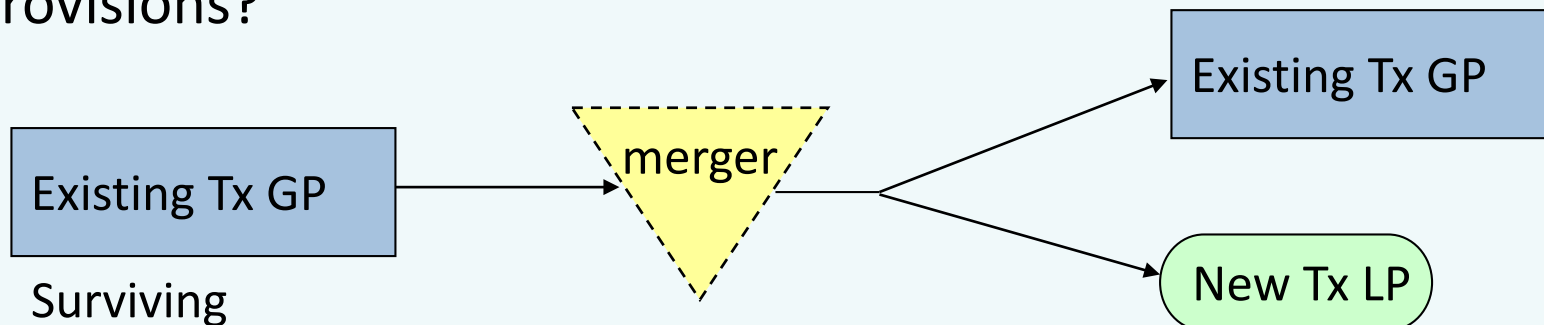
A: **No**. By definition, a divisive merger cannot be used by a foreign entity to create a Texas entity into which to merge.



Divisive Merger

Questions & Issues

Q: Can a Texas general partnership use the divisive merger provisions?



A: Yes. Although a general partnership is not a filing entity, it is a domestic entity that may engage in a divisive merger. In the scenario shown, a certificate of merger would be filed with SOS.



Merger

Questions & Issues

Q: The plan of merger creates a new Texas filing entity and I need to attach a Certificate of Formation to my Certificate of Merger. Can I use an SOS form?

A: Yes. However, the certificate of formation must include the statement that the entity is formed under a plan of merger. This statement is not contained in a secretary of state form, but should be included in the “Supplemental Provisions” section of the form.



Common Errors and Other Issues

- Amendments to surviving entity
- Execution
- Delayed Effectiveness Issues
- Post-merger filings



Mergers

Errors to Avoid

- §10.004—A plan of merger may include amendments to the governing documents of any surviving entity.
- ***Do not*** include a statement that the survivor is amending and restating its formation instrument or attach an “Amended and Restated” certificate of formation for a surviving filing entity.



Signature Issues

- Divisive Mergers (Form 621)
 - By an authorized managerial official of the pre-existing Texas entity
- Combination Mergers (Form 622)
 - By an authorized managerial official or representative of **each** organization that is a party to the merger.
- Short-Form Parent/Sub Mergers (Form 623)
 - By a managerial official of Parent organization



Delayed Effectiveness Issues

- Delayed effective date may not be later than 90 days from the date of signing.
- Delayed effective times may not be stated as 12:00 am, 12:00 pm, midnight or noon.
- Be specific when providing a delayed effective time. Don't state: "Immediately after" or "immediately before" a stated time.



Delayed Effectiveness

- All delayed effective dates and times are recorded as the date and time in the time zone used by filing office—***Central Time***.
- For example, a document with a delayed effectiveness stated as “September 1, 2014, 12:01 am Eastern Time” will be shown as “August 31, 2014, 11:01 pm.”



Delayed Effectiveness

- 1 TAC §79.73 SOS updates its computer records and takes action to make the changes effected by the filing instrument as of the day of filing.
- If you need a Certificate of Existence for a closing, please note that a Certificate of Fact—Status will reflect what is evidenced in the SOS's database at the time of generation of the certificate.



Other Reasons for Rejection

- Omission of language of §10.151(b) (3) approval statement
- Tax clearance issues
- Identifying merging domestic entity as LLP without including organizational form of underlying partnership



Foreign Merging Entity Tax Issues

- If the foreign entity is registered with this office to transact business in Texas, a tax certificate or the alternative language in § 10.153(2) is required.
- If the foreign entity is not registered with this office, a tax certificate is not required.



Post-Merger Filings May Be Required

- ✓ Amendment to Registration
- ✓ Termination of Registration
- ✓ Transfer of Registration
- ✓ Assumed Name Certificate Filing

