The View From the Secretary of State's Office

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Presented to:
2009 Partnerships and Limited Liability Companies
University of Texas School of Law
Continuing Legal Education
July 23-24, 2009
Austin, Texas

Statistics

New Texas Business Entities

	2008	2007
For-Profit Corporations	28,136	32,064
LLCs	68,036	69,055
LPs	7,912	10,718
LLPs (new & renewal)	4,499	4,667

Active Entities as of June 1, 2009

For-Profit Corporations	406,358
Limited Liability Companies	350,316
Limited Partnerships	150,697
Limited Liability Partnerships	4,252

Filings When an Entity is in Bankruptcy

Subchapter G of Chapter 10 includes special filing provisions applicable to a domestic entity that is being reorganized under a federal statute.

Bankruptcy
Who may file and sign a document to be filed with the SOS?

- A bankruptcy trustee
- Designated officers
- Any other individual designated by a court having jurisdiction of a domestic entity being reorganized under federal statute.

See §§10.301 and 10.302

What Actions May be Taken?

Persons named in §10.301 may:

- ✓ amend or restate a certificate of formation;
- ✓ merge or engage in an interest exchange;
- ✓ change the registered agent or office;
- ✓ alter, amend or repeal the entity's governing documents other than filing instruments;
- ✓ change and restructure the governing authority and managerial officials;
- ✓ sell, lease, exchange or dispose of all, or substantially all, of the property and assets;
- ✓ change the terms and conditions of the issuance of bonds, debentures and other obligations;
- ✓ convert; or
- ✓ wind up and terminate the entity's existence.

Requisite Approval

No action required by or notice given to the domestic entity's governing authority, owners or members when filing documents with the SOS in order to carry out a plan of reorganization ordered by a court under federal law.

Document Requirements

Documents filed pursuant to a plan of reorganization should be drafted and filed to comply with chapter 10 and generally must include the following information:

☑ the date of the court order or decree approving the action;

☑ the name of the court having jurisdiction, file name, and case number; and

☑ a statement that the court had jurisdiction under a federal statute.

Coming Soon!

Mandatory Application Date for the Business Organizations Code

January 1, 2010

BOC Mandatory Application Date

Do you need to file an election to adopt?

No.

On January 1, 2010, the Texas Business Organizations Code is applicable to all entities irrespective of the entity's date of formation or whether the entity has filed an election to adopt.

Repeal of Source Law

On January 1, 2010, the following statutes are repealed:

- ☑ Texas Business Corporation Act
- ☑ Texas Non-Profit Corporation Act
- ☑ Texas Professional Association Act
- ☑ Texas Professional Corporation Act
- ☑ Texas Limited Liability Company Act
- ☑ Texas Revised Partnership Act
- ☑ Texas Revised Limited Partnership Act
- ☑ Texas Real Estate Investment Trust Act
- ☑ Texas Miscellaneous Corporation Laws Act
- ☑ Texas Cooperative Association Act
- ☑ Texas Uniform Unincorporated Nonprofit Association Act

Should a filing entity file an amendment with the SOS as a result of the mandatory application date?

Section 402.005 of the BOC indicates that a domestic or foreign filing entity should file an amendment to conform its certificate of formation or application for registration when it next files an amendment to its certificate or application.

SOS is not expecting or requiring that amendments be filed by filing entities that were formed or registered before January 1, 2006. SOS does not believe that the difference in terminology used in governing documents necessitate the filing of an amendment since the BOC references synonymous terms in §1.006.

Registration as a LLP or LLLP

When registering as a LLP or LLLP, the SOS seeks to identify the underlying partnership. Is partnership organized as a general partnership or as a limited partnership?

- ❑ If it is a Texas limited partnership, the limited partnership must have filed a certificate of formation with the Texas SOS.
- ❑ Prior to filing the registration or renewal, the SOS verifies the existence of the Texas LP:
  - ✓ Filing fee will be based on the number of general partners rather than total partners.
  - ✓ SOS passes the file number of the underlying LP to the Comptroller of Public Accounts.

Partnerships

§1.002(34) defines a **general partnership** to mean a partnership governed as a general partnership under chapter 152. *The term includes a general partnership registered as a limited liability partnership*.

§1.002(50) defines a limited partnership to mean a **partnership** that has one or more general partners and one or more limited partners. *The term includes a limited partnership registered as a limited liability limited partnership.*

LLP Renewals

Be vigilant about timely renewals of LLP registrations!

LLPs are taxable entities.

If the LLP is a general partnership comprised solely of natural persons, a lapse in registration will trigger the need to file a final franchise tax report on the lapsed registration.

If the general partnership subsequently re-registers, an initial franchise tax report will be due on the new LLP registration.

Legislative Changes
relating to SOS filing responsibilities
SB 1442

1. **Newly taxable entities**
2. Railroads
3. **Certificates of correction**
4. **Certificates of fact-status or existence**
5. **Changes in GP by a foreign LP**
6. **Withdrawal of registration after conversion**
7. SOS acknowledgment of filing
8. **Assumed name changes**
9. **Series LLCs**
10. **Conversions**

Newly Taxable Entities

- Tax certificates will be required for LPs, LLPs and PAs in order to file:

  Voluntary terminations under the BOC;
  Withdrawals of foreign registrations;
  Withdrawal of LLP registrations;
  Voluntary cancellations of LPs under TRLPA; and
  Voluntary dissolutions of PAs under TPAA.

Newly Taxable Entities

- Tax clearance letters will be required to file a *reinstatements* following voluntary terminations, involuntary terminations, or revocations of foreign registration for LPs, LLPs and PAs.

Newly Taxable Entities

- ✓ LPs and PAs will need to submit a certificate of account status (tax certificate) for each merging or converting domestic entity and registered foreign entity; *or*

- ✓ Include a statement that one or more of the surviving or new entities in the merger, or the converted entity in a conversion, will be responsible for the payment of all fees and franchise taxes and will be obligated to pay any fees and franchise taxes if not timely paid.

Certificates of Correction

SB 1442 amends the provisions regarding certificate of correction to allow a certificate of formation to be corrected by the organizer who file the certificate.

Other certificate of correction issues:

- Even though the correction may apply to multiple entities, it is sufficient if the correction is signed on behalf of a surviving party to the merger, the converted entity, or an acquiring party. The certificate of correction does not need to be signed by all parties that were required to sign the original document.
- Certificate of correction does not void a filing.
- Certificate of correction may not alter, add, or delete a statement that by its alteration, addition or deletion would have caused the SOS to determine that the original filing instrument did not conform to law.

Certificates of Fact

SB 1442 was amended to specify that a certificate issued by the SOS may be relied on to determine that a domestic entity is in existence and a foreign entity registered to transact business in Texas.

- Ordering certificates regarding existence: *Order a certificate of fact—status.*
- Verifying the issuance of a certificate by SOS: Each certificate issued by the Corporations Section is assigned a unique document number and may be viewed on SOSDirect by using the *certificate validation* function found on the Help/Fees page.

Changes in General Partner by a Foreign LP

Currently an amended registration is required to reflect:

- a change in name; or
- a change in the business or activity stated in the application for registration.

As of September 1, 2009, an amended registration for a *limited partnership* will be required to reflect:

- the admission of a new general partner;
- the withdrawal of a general partner; or
- a change in the name of the general partner stated in the application for registration.

Automatic Withdrawal of Foreign Registration on Conversion

SB 1442 amends the BOC to provide that a foreign filing entity or foreign LLP registered in this state that converts to a domestic filing entity is considered to have withdrawn its registration on the effective date of conversion.

Remember that a foreign entity of one type that converts to a foreign entity of the same or different type may amend its registration to reflect the conversion. (SOS Form 422)

Assumed Name Re-codification

Effective April 1, 2009, the Assumed Business or Professional Name Act was re-codified as ***chapter 71*** *of the Texas Business & Commerce Code.*

Changes to Assumed Names in SB 1442

- Adds definition of *foreign filing entity* to correct the anomaly regarding filing of assumed name certificates for a foreign REIT or foreign statutory trust required to register with the SOS as a foreign filing entity under the BOC.
- Eliminates the need to include the registered office address in the assumed name certificate.
- Excludes a change of registered agent or change in registered office address as a material change requiring the filing of a new assumed name certificate.

Series LLC

SB 1442 amends the BOC to permit the creation of a series LLC.

SOS computer records will not reflect whether the LLC is authorized to establish or has established a series. However, the certificate of formation of a series LLC will contain a notice reflecting this option.

Conversions

SB 1442 includes a new definition of conversion to resolve confusion between what is considered a conversion in Texas and considered a domestication, continuance or transfer transaction in another jurisdiction. §1.002(10)

Conversion means:

...the continuance of a domestic entity of one type as a foreign entity of the same type that may be treated as a domestication, continuance, or transfer transaction under the laws of the jurisdiction of formation of the foreign entity; or

the continuance of a foreign entity of one type as a domestic entity of the same type that may be treated as a domestication, continuance, or transfer under the laws of the jurisdiction of formation of the foreign entity.

Conversion and Continuance

SB 1442 provides for a new type of conversion when the converted or converting entity is a ***non-United States*** *entity. §§10.1025, 10.109, & 10.154*

A converting entity may elect to continue its existence in its current organizational form and jurisdiction of formation after conversion if:

- adopted and approved as part of the plan of conversion;
- permitted by or not prohibited by or inconsistent with the laws of the applicable non-United States jurisdiction; and
- the converted entity is a domestic entity or non-United States entity of the same organizational form.

Other Conversion Issues

♦ 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 the 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

Registered Agents

★ Look for the appointment of registered agent consent form to be adopted by the SOS pursuant to HB 1787.

★ New registered agent search capability on SOSDirect: RA activity past 60 days.

★ Be aware that Comptroller sends initial tax notices to the registered office address (but does not include the name of the registered agent on that notice). Address changes for tax mailings can be made on the Comptroller's web site: https://www.window.state.tx.us/franchise/changeaddress.html.

Law Enforcement Access to Entity Information Act

In response to proposed federal legislation to require beneficial ownership information in order to combat terrorism and bring the United States into compliance with federal treaties, the Uniform Law Commissioners and the ABA working with NASS and IACA drafted a compromise:

The Uniform Law Enforcement Access to Entity Information Act

The bill is in the final stages of drafting and is available on the NCCUSL web site.

ULEAEI Act

Key provisions:

1. All corporations and LLCs must declare in the certificate of formation whether or not the entity is a *conventional privately-held entity*.
2. CPE must file a signed and notarized initial *entity information statement* with the SOS at the time of formation.
3. EIS must include the name and address of the *record contact* and *responsible individual*.

Responsibilities of the Record Contact

On receipt of a subpoena from law enforcement, record contact must provide information regarding ownership and control:

– name and address of each interest holder and transferee;

– name and address of each governing person;

– voting power of each interest holder; and

– names of the persons who prepared the information.

Responsibilities of Responsible Individual

Responsible individual is a person who participates in the control or management of the entity, who has detailed knowledge about the entity, and who is able to respond to questions about the entity and its operations.

If the principal residence of the responsible individual or any governing person is outside the US, those persons must provide photo identification to the entity.

What Happens Next?

- S. 569 (beneficial ownership requirement) pending in US Senate, but is not expected to pass in its current form.

- Likely that federal legislation will pass in the future requiring states to adopt ULEAEI Act within a certain timeframe or face loss of Homeland Security funding.

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www.sos.state.tx.us

Forms

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

Online Filing and Orders

SOSDirect
click here to enter

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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Contact individual at SOS:

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