

Update from the Secretary of State's Office

2013 LLCs, LPs and Partnerships

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New Texas Business Filings

	<u>2012</u>	<u>2011</u>
For-Profit Corporations	22,918	24,123
Limited Liability Companies	100,452	86,947
Limited Partnerships	7,728	5,633
Limited Liability Partnerships (new & renewal)	3,701	3,857



Active Entities as of June 1, 2013

For-Profit Corporations	367,170
Limited Liability Companies	529,056
Limited Partnerships	130,483
Limited Liability Partnerships	3,829



Restated Certificates of Formation and Amendment Issues



Restated Certificates of Formation

Common Errors to Avoid

- Omission of governing authority information
*Organizer information may be omitted, but restated certificates **must** include the number, names, and addresses of the entity's governing authority.*



Restated Certificates of Formation *Statements Required by §3.005(a)(7)*

- Was entity formed pursuant to a plan of merger?
Restated certificate must include statement that entity was formed pursuant to plan of merger.



Restated Certificates of Formation *Statements Required by §3.005(a)(7)*

- Was entity formed pursuant to a plan of conversion?

Restated certificate must include:

1. *Statement of its formation pursuant to plan of conversion, and:*
2. *Name, address, date of formation, prior form of organization, and jurisdiction of formation of the converting entity.*



Restated Certificates of Formation

- SOS Form 414—Restated Certificate of Formation with New Amendments
- SOS Form 415—Restated Certificate of Formation without New Amendments

*Look for new forms complying with SB 847 on
September 1st*



Amendments

- If a certificate of amendment is filed changing the name of an entity that is a general partner in an LP, remember to file an amendment to the certificate of formation of the LP noting the change.

A certificate of amendment only changes the certificate of formation for which it is submitted and does not update other documents that may reference the entity.



Amendments

- If the name of an entity that is a manager or managing member of LLC is changed, the certificate of formation for an LLC for which the newly named entity serves as a manager or member is not automatically updated.

A certificate of amendment only changes the certificate of formation of the entity for which it is submitted and does not update other documents that may reference the entity.



Updates in Periodic Reports

- Periodic reports for LPs may update the registered office and agent, principal office where records are kept, and the address of the general partner.
- Periodic reports do not update the name of the general partner. §153.306 BOC.



Updates in Periodic Reports

- Change of registered office/agent under §5.202 BOC does not update the office where records are kept or the address of the general partner. If all addresses are the same, voluntarily file a report under §153.302 BOC.



Series LLCs



Establishing a Series LLC

- A company agreement may establish or provide for the establishment of one or more designated series of members, managers, membership interests, or assets.
- Section 101.602(b)(3) BOC requires certificate of formation to include notice of limitations on liabilities of the series. No requirement that the notice reference a specific series.



Establishing a Series LLC

- Statement that a series LLC is being created not required in certificate of formation.
- No requirement that the notice of limitation of liability reference a specific series.



Notice of Limitations

Section 101.602(a) BOC requires notice to state:

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



How Popular is the Texas Series LLC?

- Since there is no filing with the SOS when a series is actually established, SOS records do not reflect when and how many series have been created.
- SOS reviewed a representative sample of LLCs formed in 2011 to identify certificates of formation that included the notice of limitations. Between 0.75% and 1% of new LLCs might be series LLCs.



Conducting Business in the Name of a Series

- A series has the power, in the series' own name, to:
 - sue and be sued;
 - contract;
 - hold title to assets; and
 - grant liens and security interests in those assets.



Conducting Business in the Name of a Series

- If any series conducts business under a name other than the name of the LLC, the LLC must file an assumed name certificate in compliance with chapter 71 of the Texas Business & Commerce Code. (HB 1624)



Registration of a Foreign Series LLC

- Unless the jurisdiction of formation treats each series as a separate legal entity, the LLC rather than the individual series would register as the legal entity that is transacting business in Texas.
- The secretary of state has a separate application for registration form for foreign series LLC. See *Form 313*.



Supplemental Information Required in the Application for Registration

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



Supplemental Information Required in the Application for Registration

- whether any debts, liabilities, obligations, and expenses with respect to the LLC generally, or any other series shall be enforceable against the assets of that series.



Assumed Name for Foreign Series

- Like a Texas series: If any series of the LLC transacting business in Texas transacts business under a name other than the name of the LLC, the LLC should file an assumed name certificate in compliance with chapter 71 of the Texas Business & Commerce Code. (HB 1624)



Conversions



Conversion Pitfalls

- *Don't file the certificate of formation of the "converted" entity before the conversion!*
- A domestic entity created by a plan of conversion is formed by filing the certificate of conversion. Its existence is effective on the effectiveness of the conversion.



Conversion Pitfalls

Don't use SOS certificate of formation forms for the formation document in a conversion unless the language required by §3.005(7) is added:

- A statement that entity is formed under a plan of conversion; and
- The name, address, date of formation, prior form of organization, and jurisdiction of formation of the converting entity.



Nonprofit Conversion Issues

- A domestic nonprofit corporation may not convert into a for-profit entity. §10.108 BOC
- SOS will accept a certificate of conversion that converts a Texas nonprofit corporation to a:
 - foreign nonprofit corporation;
 - nonprofit LLC; or
 - special nonprofit corporation formed under a code other than BOC.



Nonprofit Conversion Issues

- Chapter 10 of the BOC does not apply to an unincorporated nonprofit association. §252.017 BOC
- An unincorporated nonprofit association may not convert to a nonprofit corporation.



Conversion Effective Dates

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

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



Amendments to Foreign Registrations Following a Conversion or Merger

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



Delayed Effective Dates



Delayed Effectiveness

- Sec. 4.052 BOC provides that a filing instrument may take effect at:
 - a specified date and time; or
 - on the occurrence of a future event or fact, including the act of any person.



Delayed Effectiveness

- The date may not be later than the 90th day after the instrument is signed.
- The time may not be specified at 12:00 a.m. or 12:00 p.m.



Delayed Effectiveness

SOS records show delayed effective times in filing officer time, that is Central Time. Filing instrument may use another time zone, but SOS records convert time to Central Time.



Delayed Effectiveness

On the filing of a document with a delayed effective date, the SOS computer records will be changed to show the filing of the document, the date of the filing, the future date on which the document will be effective or a code indicating that the effectiveness is based on a future condition.



Delayed Effectiveness

- An entity that files a filing instrument that takes effect on the occurrence of a future event or fact, must file a statement with the SOS that confirms that the event or fact has been satisfied or waived. §4.055 BOC.
- Statement must be filed not later than the 90th day after the date the filing instrument is filed.



Delayed Effectiveness

If the future event or fact does not occur and is not waived, the parties to the filing instrument must sign and file with the SOS a certificate of abandonment under §4.057 BOC.



Delayed Effectiveness

The delayed effective provisions do not apply to name reservations, name registrations, statements of event or fact, or certificates of abandonment.
§4.058.



Involuntary Terminations and Forfeitures by the Secretary of State



Statutory Provisions

- Chapter 171 Tax Code (applies to taxable entities).



Statutory Provisions

- Chapter 153 BOC (applies to LPs that fail to file periodic reports).
- Chapter 22 BOC (applies to nonprofit corporations that fail to file periodic reports).



Statutory Provisions

- Chapter 11 BOC (applies to a domestic entity that fails to maintain a registered agent/office or for which the payment of a formation filing fee is dishonored; and to professional associations that do not file an annual statement).
- * *Documents, other than formation documents, are revoked under chapter 405 of the Government Code if payment is dishonored.*



Reinstatements After Tax Forfeiture (76,377 forfeitures in 2012)

- Entity reinstates under chapter 171 of Tax Code rather than BOC.



Reinstatements After Tax Forfeiture (76,377 forfeitures in 2012)

- To reinstate, entity must obtain a tax clearance letter from the Comptroller of Public Accounts.
- Submit an application for reinstatement with the SOS (*Form 801*). Filing fee \$75.
- Application for reinstatement must be submitted and signed by an officer, director, or shareholder *at the time of forfeiture*.
- No time limit for reinstatement.



Reinstatement of LP After Termination for Failure to File a Report

- LP reinstates under §153.312 BOC.



Reinstatement of LP After Termination for Failure to File a Report

- To reinstate, the LP files the delinquent report.
- No application for reinstatement submitted.
- Pay the fees under §4.155 (11) BOC: \$225 (\$50 plus a late fee of \$100 and a reinstatement fee of \$75).
- Tax clearance letter required from Comptroller.
- No time limit set for filing delinquent report to reinstate.



Reinstatement of a Nonprofit After Termination for Failure to File a Report

- Nonprofit corporation reinstates under §22.365 BOC.



Reinstatement of a Nonprofit After Termination for Failure to File a Report

- To reinstate, the NP files the delinquent report.
- No application for reinstatement submitted.
- Filing fee \$25. See §4.153(13) BOC.
- Tax clearance required.
- No time limit.



Reinstatements After Involuntary Termination under Chapter 11

- Entity reinstates under §11.253 BOC after correcting the circumstances that led to the involuntary termination.



Reinstatements After Involuntary Termination under Chapter 11

- To reinstate, the entity must obtain a tax clearance letter from the Comptroller.
- Submit a certificate of reinstatement (*Form 811*) to the SOS. Filing fee \$75.
- No time limit. (If the reinstatement is filed before the 3rd anniversary of the termination, the entity is considered to have continued in existence without interruption. §11.253(d))



Name Issues on Reinstatement

- Secretary of State only considers names of active entities when determining name availability.
- On reinstatement, the terminated/forfeited entity will be required to submit a certificate of amendment to change its name if there is a name conflict that arose while the entity was inactive.
- BOC §§11.253(c); §153.312(c); §22.365(c) and Tax Code §171.315



Thorny Issues that May Haunt an Entity After Involuntary Termination or Forfeiture

Professor Miller will discuss in the next program on the Walking Dead.



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Legal questions relating to filing issues:

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SOSDirect assistance & issues:

sosdirect@sos.state.tx.us



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