

# **The Walking Dead: Forfeitures and Involuntary Terminations of Filing Entities**

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Voluntary and Involuntary Winding Up and Termination by Act of Entity or Owner (Table)\*

Involuntary Termination and Administrative Forfeiture by Secretary of State (Table)\*

Secretary of State Form 801 (Application for Reinstatement and Request to Set Aside Tax Forfeiture)

Secretary of State Form 802 (Periodic Report–Nonprofit Corporation Reinstatement)

Secretary of State Form 804 (Periodic Report–Limited Partnership Reinstatement)

Secretary of State Form 811 (Certificate of Reinstatement of Filing Entity Voluntarily or Involuntarily Terminated Under Chapter 11 of BOC)

Secretary of State Form 814 (Certificate of Reinstatement of Professional Association After Failure to File Annual Statement)

Comptroller Form 05-359 (Request for Certificate of Account Status for Voluntary Termination of Taxable Entity)

Comptroller Form 05-391 (Request for Tax Clearance Letter for Reinstatement)

\* The tables included as appendices to this paper were prepared by the author and Carmen I. Flores, Deputy Director, Business and Public Filings Division, Office of the Secretary of State of Texas. The author would like to acknowledge the invaluable insight provided by Deputy Director Flores in connection with the author’s preparation of these materials and the conference presentation.

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### **I. Introduction**

Do any of these sound familiar?

From your client:

I'm no longer doing business, but I still keep getting notices from the Comptroller's office to file my franchise tax report. I just want this thing dead. I have heard that if I simply ignore the notices and don't do anything that the state will dissolve my company for me. I called the Secretary of State's office and they said I need to file documents with the Comptroller and Secretary of State. Why should I go to all that trouble when the state will just forfeit the entity for me anyway?

I own 50% of an LLC and the other 50% partner cannot be found/is in jail/refuses to agree on anything. I just want to get rid of this thing/wash my hands of everything. I heard that I can resign as the registered agent and the state will involuntarily terminate the existence of the entity. Is that true?

From your associate or partner:

Our client came to me and told me he wants to terminate his entity. I checked the Secretary of State's records and found that the entity is in a "forfeited existence" status. What do I need to do to file a voluntary termination? Once the answer is provided, the first question is then followed by: Why should the client make an application for reinstatement, pay additional fees, and file a voluntary termination, when the client doesn't have any assets or any existing claims by or against the company? In short, I don't think that there are any risks to my client that would outweigh the effort/cost.

Our client's existence was forfeited for failure to pay franchise taxes in 2007, but the company has continued to operate and has a substantial amount of real and personal property, including intangible property such as receivables. This situation came to my attention when we filed suit for the company to collect on a promissory note executed in favor of the company in 2006 that became due in 2012. The maker of the note is arguing that the company cannot sue on the note and that the claim is barred because it was not brought within three years after the company's existence was forfeited. Now that the company's "forfeited existence" has come to my attention, the client and I have many questions. Can the company collect on the note? Where does the company stand with respect to its assets, rights, and liabilities? Does anyone in the company have any personal liability for liabilities incurred in the business? Can the company reinstate even though it is beyond the three-year post-termination survival period? What effect will a reinstatement have?

The Secretary of State's records show that our client, a limited partnership, was involuntarily terminated on April 16, 2011, for failure to file a periodic report. It was reinstated on May 9, 2013. Was its reinstatement retroactive? In other words, did the entity legally exist between April 16, 2011 and May 9, 2013? How does this affect any actions/contracts/agreements that occurred during the time the entity was involuntarily terminated?

## **II. Types of Forfeitures and Involuntary Terminations of Filing Entities**

**Forfeiture of Taxable Entity Under Tax Code:** The Secretary of State forfeits a taxable entity's charter or certificate if the Comptroller has forfeited the entity's privileges for failure to file a required report or pay franchise tax or penalty and has notified the Secretary of State that the entity has not revived its privileges within 120 days after the forfeiture of its privileges. Tax Code §§ 171.251, 171.2515, 171.309-171.311, 171.3125.

**Involuntary Termination of Filing Entity by Secretary of State under Chapter 11 of BOC:** The Secretary of State involuntarily terminates the existence of a filing entity for failure to maintain a registered office or registered agent or failure to timely file a required report (e.g., annual report of professional association), pay a fee or penalty, or cure the nonpayment or dishonor of a filing fee in connection with the filing of a certificate of formation. BOC §§ 11.251-11.252.

In the past, there has often been confusion about whether a termination arising from failure to pay franchise taxes was effectuated under the Tax Code or Article 7.01 of the Texas Business Corporation Act (TBCA), the predecessor to Section 11.251 of the BOC. Even though Article 7.01 of the TBCA provided that failure to pay franchise taxes was a ground for involuntary dissolution by the Secretary of State under Article 7.01, it has long been the practice of the Secretary of State to proceed against a corporation that failed to pay its franchise tax by forfeiting the corporation's charter as provided under the Tax Code (after notification by the Comptroller that the corporation's privileges had been forfeited) rather than involuntarily dissolving the corporation under Article 7.01. There should be less confusion under current law in this regard since, unlike Article 7.01 of the TBCA, Section 11.251 of the BOC does not specify failure to pay franchise taxes as a ground for involuntary termination under the BOC.

**Involuntary Termination of Limited Partnership by Secretary of State under Chapter 153 of BOC:** The Secretary of State forfeits a limited partnership's right to transact business and ultimately terminates its certificate of formation if the limited partnership fails to file the periodic report required by Section 153.301 of the BOC. BOC §§ 153.307-153.311.

**Involuntary Termination of Nonprofit Corporation by Secretary of State under Chapter 22 of BOC:** The Secretary of State forfeits a nonprofit corporation's right to conduct affairs and ultimately involuntarily terminates the nonprofit corporation if the corporation fails to file its periodic report. BOC §§ 22.360-22.364.

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