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Update from the Office of the Secretary of State

I. THE TEXAS BUSINESS LANDSCAPE

In calendar year 2019, the Office of the Secretary of State saw only a slight increase (3.4%) in the number of domestic entity formations when compared to the previous calendar year. As has been the trend for a number of years, the limited liability company is the entity of choice for persons creating a new business entity of limited liability. The breakdown of domestic formations is shown below:

Entity Type Description	2018	2019
For-profit Corporation	21,135	21,747
Nonprofit Corporation	12,830	13,016
Professional Corporation	686	570
Professional Association	408	304
Limited Liability Company	192,284	202,901
Limited Partnership	4,599	4,478
Totals:	234,942	243,016

As of July 1, 2020, limited liability companies make up approximately 63% of the total population of active domestic entities.

II. ENTITY NAMES

A. Names Must Be Distinguishable

As you know, on June 1, 2018, the entity name standard in Texas was changed from the complex "cannot be the same as, deceptively similar to, or similar" standard to a "distinguishable in the records" standard.[1] Although this legislative change brought Texas into line with the name availability standards of most other jurisdictions, the manner in which the "distinguishable in the records" is interpreted and applied from state to state is varied. Consequently, it is still necessary for you to be familiar with the application of the entity name availability rules as adopted by the secretary of state to avoid rejection of your filing instrument.

1. Section 5.053 of the Business Organizations Code (BOC) sets forth the new general standard for name availability; namely, a filing entity name must be distinguishable in the records of secretary of state from the name of any existing domestic or foreign filing entity, any fictitious name under which a foreign filing entity is registered to transact business in this state, or any name reservation or registration filed with the secretary of state. The administrative rules used to determine the availability of entity names are contained in §§79.30-79.46 of Title 1, Part Four of the Texas Administrative Code (TAC), which may be viewed at https://www.sos.texas.gov/tac/index.shtml.

2. Chapter 79 rules apply to all filing instruments required to be reviewed for name availability received by the secretary of state. These rules apply to both domestic and foreign corporations (for-profit, nonprofit, and professional), limited liability companies, limited partnerships, as well as professional associations. See 1 TAC §§79.31.[2] These sections do not apply to limited

liability partnerships. Section 5.063 of the BOC does not require the secretary of state to determine the availability of a limited liability partnership's name.

3. The administrative rules adopted by the secretary of state for use in determining the availability of an entity name hinge on an understanding of the term "key word", which is used throughout Subchapter C of Chapter 79. A "key word" is a substantive element of an entity name. By rule "key word" is defined as "a word or words that alters the proposed name sufficiently to make it distinguishable in the record.[3] A key word does not include:

a. an article of speech or a conjunction;
b. a preposition, unless the addition, substitution, or omission of the preposition alters the name sufficiently to make the name distinguishable;
c. the word "Company" or the abbreviation "Co." unless the addition or omission of the word or abbreviation alters the name sufficiently to make the name distinguishable; or
d. an organizational identifier that operates as an organizational identifier for the entity or that appears after all key words in the entity name.

B. Three-Tiered Name Standard

1. The Texas entity name standard has *three* tiers:[4]

a. *Distinguishable.* Names that are the distinguishable in the records of the secretary of state; that is, a comparison of the names sufficient differences to make the name distinguishable in the records. (1 TAC §79.38) In accordance with 1 TAC §79.38, a proposed name is distinguishable in the records if one or more of the following conditions exist:

(1) A comparison of the names reveals a difference in at least one key word. (e.g., *China Silk, LLC* vs *China Silk Imports, LP*);
(2) The key words are the same but are in a different order. (e.g., *123 Auto Repair, Inc.* vs *Auto Repair 123 Company*);
(3) The key words or contractions of key words are derived from the same root word. (e.g., *ABC Bakery Co.* vs *ABC Bakers LLC*);
(4) The key words are the same but are in a different language[5]. (e.g., *Paloma Gallery, LLC* vs *Dove Galería, Ltd.*);
(5) The key word or words sound the same but at least one word, on its face, has a different meaning or connotation. (e.g., *Mussel Beach Café, Inc.* vs *Muscle Beach Café Co.*); or
(6) The key word or words are the same except for the addition, substitution, or omission of prepositions which alter the names sufficiently to make the names readily distinguishable. (e.g., *Light Entertainment LLC* vs *Into the Light Entertainment, Inc.*)

b. *Same*. A proposed name that is deemed to be the same by the secretary of state cannot be filed even if the existing entity is willing to provide notarized consent. In accordance with 1 TAC §79.39, an entity name is the same when a comparison of the names reveals no differences or if the only difference between the proposed name and the existing name is one or more of the following.

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