

PRESENTED AT

25th Annual LLCs, LPs and Partnerships

July 14-15, 2016
Austin, Texas

Update from the Office of the Secretary of State

Carmen I Flores



Author Contact Information:
Carmen I. Flores
Office of the Texas Secretary of State
Austin, TX 78711

cflores@sos.texas.gov
512-463-5588

Table of Contents

I.	THE TEXAS BUSINESS LANDSCAPE.....	1
II.	ENTITY NAMES	1
A.	Entity Name Standards.....	1
B.	Name Clearance—A Trap for the Unwary	3
C.	Troublesome Words.....	4
D.	Limited Partnership Name Issues	5
E.	Name Reservations	6
F.	Assumed Names.....	7
III.	SERIES LLCs AND NONPROFIT LLCs.....	8
A.	The Texas Series LLC.....	8
B.	Notice of Limitations	9
C.	Establishment of a Series	9
D.	Nonprofit Limited Liability Companies.....	10
IV.	PROFESSIONAL ENTITIES—TO BE OR NOT TO BE	10
A.	Is Entity Providing a Professional Service?	10
B.	What Type of Entity Should Be Formed?.....	11
C.	Joint Ownership and Practice.....	11
D.	Physicians and Physician Assistants	12
E.	Certificate of Formation Issues	12
F.	Name Issues for Professional Entities.....	13
V.	LLPS—THE 2016 SEA CHANGE	14
A.	LLP Registration—From Annual Renewal to Annual Report.....	14
B.	LLP Registration—Delinquency, Termination, and Reinstatement	14
C.	LLP Registration—From Strict to Substantial Compliance.....	16
VI.	LLPS—SOME ISSUES REMAIN THE SAME	16
A.	LPs Registered as LLPs	16
B.	Facilitating Linkage Between the LP and LLP Records	16
C.	Common Reason for Rejection of a Registration	17
VII.	FOREIGN ENTITIES—REGISTRATION ISSUES	17
A.	Entities Required to Register	17
B.	Failure to Register.....	18
C.	Late Filing Penalty	18
D.	Late Filing Penalty Caps.....	19
E.	Transfer/Succession of a Foreign Registration	20
F.	Required Amendments.....	21
VIII.	FOREIGN PARTNERSHIPS AND LLCs.....	21
A.	Foreign LLPs	21
B.	Registration of Foreign Series LLCs and LPs.....	23
C.	Registration of Foreign Professional Entities	24
IX.	POST FORMATION MAINTENANCE ISSUES.....	24
A.	Maintenance of Registered Agent/Office.....	24
B.	Periodic Reports and Public Information Reports—Limited Partnerships	25
X.	REINSTATING AN INACTIVE DOMESTIC ENTITY	27
A.	Forfeited Existence—Chapter 171 Tax Code	27
B.	Reinstatement—Chapter 171 Tax Forfeiture	27
C.	Involuntary Terminations—Chapter 11 BOC.....	28
D.	Reinstatement—Chapter 11 BOC Involuntary Termination.....	29

E.	Failure to File Periodic Report—Chapter 153 BOC Involuntary Terminations	30
F.	Reinstatement After Involuntary Termination-Chapter 153	30
G.	Reinstatement After Voluntary Termination-Chapter 11 BOC	31
H.	Intervening Events May Give Rise to Rejection.....	31
XI.	MERGERS.....	32
A.	Authority and Scope of a BOC Merger.....	32
B.	Other Terms Defining Scope of Transaction/Filing.....	33
C.	Certificate of Merger Required	33
D.	Alternative Certified Statement in Lieu of a Plan of Merger	34
E.	Special Merger Provisions under the BOC	35
F.	Common Errors to Avoid.....	35
XII.	CONVERSIONS.....	36
A.	Certificate of Conversion	36
B.	Common Errors to Avoid.....	38
C.	Nonprofit Conversions.....	38
D.	How to Avoid Last Minute Problems with Tax Clearance	38
XIII.	OTHER MERGER AND CONVERSION ISSUES	39
A.	Corrections to Mergers or Conversions	39
B.	Abandonment of Mergers and Conversions.....	39
C.	Merger and Conversion Forms	40
XIV.	FRANCHISE TAX ACCOUNT STATUS	41
A.	Account Status Determined by Entity’s Right to Transact Business	41
B.	Comptroller Account Terminology.....	41
XV.	DELAYED EFFECTIVENESS.....	42
A.	Effectiveness Delayed to Specific Date and Time	42
B.	Effectiveness Conditioned on Event or Fact	43
C.	Actions Taken at Time of Filing.....	43
XVI.	POST FORMATION CORRECTIONS AND RESTATEMENTS	44
A.	Certificates of Correction 101	44
B.	Restated Certificates of Formation—Drafting Issues	45
XVII.	DOING BUSINESS WITH THE SECRETARY OF STATE	45
A.	Ministerial Duties.....	45
B.	Accessing Information	45
	ENDNOTES	47

Update from the Office of the Secretary of State



I. THE TEXAS BUSINESS LANDSCAPE

While the secretary of state did not experience the same double digit increase in domestic formation filings in 2015 as experienced in 2014, the office continues to see an increase in the number of domestic entity formations due largely to the increase in limited liability company formations. In 2015, the secretary of state filed 175,882 certificates of formation, which represents a 4.7% increase in new formation filings when compared to 2014. The breakdown of domestic formations is provided below:

Entity Type Description	2014	2015
For-profit Corporation	23,750	22,756
Nonprofit Corporation	10,616	10,856
Professional Corporation	814	747
Professional Association	707	597
Limited Liability Company	126,091	135,250
Limited Partnership	5,888	5,676
Totals:	167,866	175,882

Thus far, the upward trend continues in 2016. During March of 2016, the Secretary of State filed 17,657 certificates of formation creating new Texas corporations, professional associations, limited liability companies and limited partnerships. This is the high-water mark for new business formations. The limited liability company continues to be the entity of choice and, as of June 1, 2016, makes up approximately 53% of the total population of active domestic entities.

II. ENTITY NAMES

A. Entity Name Standards

The availability of a business entity name remains the most frequently deliberated, and heavily contested, reason for rejection of a filing instrument.

1. Section 5.053 of the Business Organizations Code (BOC) sets forth the general standards for name availability, namely, that a filing entity may not have a name that is the same as, or that the secretary of state determines to be deceptively similar or similar to a name of another existing filing entity or an entity name that is reserved or registered with the secretary of state. The administrative rules used to determine the availability of entity names are contained in §§79.30-79.54 of Title 1, Part Four of the Texas Administrative Code (TAC) and may be viewed at <http://www.sos.state.tx.us/tac/index.shtml>

2. Chapter 79 rules apply to all name availability determinations made for foreign and domestic corporations (for-profit, professional, and nonprofit), limited liability companies, limited partnerships, as well as professional associations. See 1 TAC §§79.30 and 79.50 to 79.52.¹ 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 Texas entity name standard has *three* tiers of conflict:²

a. Names that are the same; that is, a comparison of the names reveals no differences. (1 TAC §79.36)

b. Names that are deceptively similar; that is, a comparison of the names reveals an apparent difference but the difference is such that the names are likely to be confused. (1 TAC §79.37) In accordance with 1 TAC §79.39, if any of the following conditions exist a proposed name is deceptively similar to that of an existing entity:

(1) The difference in the names consists in the use of different words or abbreviations of incorporation or organization³ (e.g., *China Silk Ltd., LLC* vs *China Silk, LP*);

(2) The difference in the names consists in the use of different articles, prepositions, or conjunctions (e.g., *El Matador Inc.* vs *Matador Ltd.*);

(3) The difference in the names consists in the appearance of periods, spaces, or other spacing symbols that do not alter the names sufficiently to make them readily distinguishable (e.g., *ABC Co.* vs *A/B•C LLC*);

(4) The difference in names consists of the use of common abbreviations or acronyms for the same term (e.g., *DFW Rentals, LLC* vs *Dallas-Ft. Worth Rentals, Ltd.*);

(5) The names are spelled differently or use alternative symbols, but are phonetically similar or equivalent (*L8R G8R Ltd.* vs *Later Gator LLC*); or

(6) The difference in the name consists in the presence or absence of letters that do not alter the names sufficiently to make them readily distinguishable. This may include the use of singular, plural or possessive terms. (e.g., *Cole Cabinets LLC* vs *Cole's Cabinets Co.*)

c. Names that are similar and require the written consent of another entity or person; that is, a comparison of the names reveals similarities that may tend to mislead as to the identity or affiliation of the entity. (1 TAC §79.40) In accordance with 1 TAC §79.43, if any of the following conditions exists, a name is similar and a written consent is required:

(1) The proposed name is the same as or deceptively similar to another name except for a geographical designation at the end of the name (e.g., *Acme LLC* vs *Acme Southwest Ltd.*);

(2) The first two words of the proposed name are the same as or deceptively similar to another name and those words are not frequently used in combination (e.g., *Summit Energy Co.* vs *Summit Energy Resources LP*);

(3) The proposed name is the same as or deceptively similar to another name except for a numerical expression that implies that the proposed name is an affiliate or in a series with another entity (e.g., *United Co.* vs *United II LLC*);

(4) The proposed name uses the same words as another name but the words are in a different order in the names (e.g., *Ballet Austin* vs *Austin Ballet*);

(5) The proposed name is the same as or deceptively similar to another name except for an Internet locator designation at the end or at the beginning of the name (e.g., *www.Business Solutions LLC* vs *Business Solutions Co.*); or

(6) The difference in names consists of words or contractions of words that are derived from the same root word and there is no other distinguishing word in the name (e.g., *ABC Electric Co* vs *ABC Electrical LLC*).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Update from the Office of the Secretary of State

Also available as part of the eCourse

[LLCs, LPs and Partnerships Update: Case Law Update and Secretary of State Update](#)

First appeared as part of the conference materials for the
25th Annual LLCs, LPs and Partnerships session
"Secretary of State Update"