

**Presented:**  
2017 LLCs, LPs and Partnerships

July 12, 13-14, 2017  
Austin, TX

## **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](mailto: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.	Service of Process on a Series of an LLC .....	10
E.	Nonprofit Limited Liability Companies.....	10
IV.	PROFESSIONAL ENTITIES—TO BE OR NOT TO BE .....	11
A.	Is Entity Providing a Professional Service? .....	11
B.	What Type of Entity Should Be Formed?.....	11
C.	Joint Ownership and Practice.....	12
D.	Physicians and Physician Assistants .....	13
E.	Certificate of Formation Issues .....	13
F.	Name Issues for Professional Entities.....	14
V.	LLPS—ANNUAL REPORTS.....	15
A.	Domestic LLP Registration—From Annual Renewal to Annual Report.....	15
B.	LLP Registration—Delinquency.....	16
C.	LLP Registration—Termination and Reinstatement.....	16
VI.	LLPS—SOME ISSUES REMAIN THE SAME .....	17
A.	LPs Registered as LLPs .....	17
B.	Facilitating Linkage Between the LP and LLP Records .....	17
C.	Common Reason for Rejection of a Registration .....	18
VII.	FOREIGN ENTITIES—REGISTRATION ISSUES .....	18
A.	Entities Required to Register .....	19
B.	Failure to Register.....	19
C.	Late Filing Penalty .....	19
D.	Late Filing Penalty Caps .....	20
E.	Transfer/Succession of a Foreign Registration .....	21
F.	Required Amendments.....	22
VIII.	FOREIGN PARTNERSHIPS AND LLCs .....	23
A.	Foreign LLPs .....	23
B.	Registration of Foreign Series LLCs and LPs.....	24
C.	Registration of Foreign Professional Entities .....	25
IX.	POST FORMATION MAINTENANCE ISSUES.....	25
A.	Maintenance of Registered Agent/Office .....	25
B.	Periodic Reports and Public Information Reports—Limited Partnerships .....	26
X.	REINSTATING AN INACTIVE DOMESTIC ENTITY .....	28
A.	Forfeited Existence—Chapter 171 Tax Code .....	28
B.	Reinstatement—Chapter 171 Tax Forfeiture .....	28
C.	Involuntary Terminations—Chapter 11 BOC.....	29
D.	Reinstatement—Chapter 11 BOC Involuntary Termination.....	30

E.	Failure to File Periodic Report—Chapter 153 BOC Involuntary Terminations .....	31
F.	Reinstatement After Involuntary Termination-Chapter 153 .....	31
G.	Reinstatement After Voluntary Termination-Chapter 11 BOC .....	32
H.	Intervening Events May Give Rise to Rejection.....	32
XI.	MERGERS.....	33
A.	Authority and Scope of a BOC Merger .....	33
B.	Other Terms Defining Scope of Transaction/Filing.....	34
C.	Certificate of Merger Required.....	35
D.	Alternative Certified Statement in Lieu of a Plan of Merger.....	35
E.	Special Merger Provisions under the BOC .....	36
F.	Common Errors to Avoid.....	37
XII.	CONVERSIONS.....	37
A.	Certificate of Conversion .....	37
B.	Common Errors to Avoid.....	39
C.	Nonprofit Conversions.....	39
D.	How to Avoid Last Minute Problems with Tax Clearance .....	40
XIII.	OTHER MERGER AND CONVERSION ISSUES .....	40
A.	Corrections to Mergers or Conversions .....	40
B.	Abandonment of Mergers and Conversions.....	41
C.	Merger and Conversion Forms .....	42
XIV.	FRANCHISE TAX ACCOUNT STATUS .....	43
A.	Account Status Determined by Entity’s Right to Transact Business .....	43
B.	Comptroller Account Terminology.....	43
XV.	POST FORMATION CORRECTIONS AND RESTATEMENTS.....	44
A.	Certificates of Correction 101.....	44
B.	Restated Certificates of Formation—Drafting Issues .....	45
XVI.	LEGISLATIVE UPDATE—85 <sup>TH</sup> LEGISLATURE, REGULAR SESSION .....	45
A.	Bills Affecting Business Entity Filings.....	45
B.	Other Legislation of Interest .....	48
XVII.	DOING BUSINESS WITH THE SECRETARY OF STATE .....	49
A.	Ministerial Duties.....	49
B.	Accessing Information .....	50
	ENDNOTES .....	52

## Update from the Office of the Secretary of State



### I. THE TEXAS BUSINESS LANDSCAPE

The office continues to see an increase in the number of domestic entity formations due in large part to the increase in limited liability company formations. In 2016, the secretary of state filed 190,826 certificates of formation, which represents an 8.49% increase in new formation filings when compared to 2015. The breakdown of domestic formations is provided below:

Entity Type Description	2015	2016
For-profit Corporation	22,755	22,407
Nonprofit Corporation	10,856	11,888
Professional Corporation	748	674
Professional Association	597	537
Limited Liability Company	135,249	150,266
Limited Partnership	5,676	5,054
<b>Totals:</b>	<b>175,881</b>	<b>190,826</b>

Thus far, the upward trend continues in 2017. During March of 2017, the Secretary of State filed 19,345 certificates of formation creating new Texas corporations, professional associations, limited liability companies and limited partnerships. This is a new high-water mark for business entity formations. As has been the trend for many years, the limited liability company is the prevailing entity of choice. As of June 1, 2017, this entity type now makes up approximately 56% 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.<sup>1</sup> 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:<sup>2</sup>

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 organization<sup>3</sup> (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

[2017 LLCs, LPs, and Partnerships eConference](#)

First appeared as part of the conference materials for the

26<sup>th</sup> Annual LLCs, LPs and Partnerships session

"Secretary of State Update"