

Presented:
2018 LLCs, LPs and Partnerships

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Update from the Office of the Secretary of State

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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 2017, the secretary of state filed 206,533 certificates of formation, which represents an 8.23% increase in new formation filings when compared to 2016. The breakdown of domestic formations is provided below:

Entity Type Description	2016	2017
For-profit Corporation	22,404	21,939
Nonprofit Corporation	11,890	12,338
Professional Corporation	674	719
Professional Association	537	432
Limited Liability Company	150,266	166,589
Limited Partnership	5,054	4,516
Totals:	190,826	206,533

The upward trend continues in 2018. During April of 2018, the Secretary of State filed 21,108 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. During the first quarter of 2018, the secretary of state file 59,923 certificates of formation creating new Texas corporations, professional associations, limited liability companies and limited partnerships. This represents an 11.76% in new business formations when compared to quarter 1 of 2017. As evidenced by the statistics, the limited liability company is the entity of choice. As of June 1, 2018, limited liability companies make up approximately 59% of the total population of active domestic entities.

II. ENTITY NAMES

A. Names Must Be Distinguishable

On June 1, 2018, bells rang in the Business and Commercial Filings Section of the Office of the Secretary of State commemorating the end of an era and the beginning of the new distinguishable entity name standard.

1. The name availability standard, which had been in effect for over 60 years, was changed by the 85th Legislature, Regular Session, by the enactment of House Bill 2856, which became effective June 1, 2018. Section 5.053 of the Business Organizations Code (BOC) sets forth the new general standard for name availability, namely, that 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 <http://www.sos.state.tx.us/tac/index.shtml> A copy of the rules are found as an appendix to this article.

2. Chapter 79 rules apply to all filing instruments required to be reviewed for name availability received by the secretary of state on and after June 1, 2018. 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 §§79.31.¹ 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 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.”² 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;
- 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 new Texas entity name standard has *three* tiers:³

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 language⁴. (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.*) Bakery); 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.*)

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