

Presented:30th Annual LLCs, LPs and Partnerships

July 7-9, 2021

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

512-463-5588

Table of Contents

I.	THE TEXAS BUSINESS LANDSCAPE.....	1
II.	ENTITY NAMES	1
A.	Names Must Be Distinguishable.....	1
B.	Three-Tiered Name Standard.....	2
C.	Name Clearance—A Trap for the Unwary	4
D.	Troublesome Words.....	4
E.	Limited Partnership Name Issues	6
F.	Name Reservations	6
G.	Fictitious Names	8
H.	Assumed Names.....	8
III.	SERIES LLCs AND NONPROFIT LLCs.....	10
A.	The Texas Series LLC.....	10
B.	Notice of Limitations	10
C.	Establishment of a Series Before June 1, 2022	11
D.	Service of Process on a Series of an LLC	11
E.	Nonprofit Limited Liability Companies.....	12
IV.	PROFESSIONAL ENTITIES—TO BE OR NOT TO BE	13
A.	Is Entity Providing a Professional Service?	13
B.	What Type of Entity Should Be Formed?.....	13
C.	Joint Ownership and Practice.....	14
D.	Physicians and Physician Assistants	15
E.	Certificate of Formation Issues.....	15
F.	Name Issues for Professional Entities.....	16
V.	LLPS—ANNUAL REPORTS.....	16
A.	Domestic LLP Registration—Annual Reports.....	16
B.	LLP Registration—Delinquency.....	17
C.	LLP Registration—Termination and Reinstatement.....	18
VI.	LLPS—SOME ISSUES REMAIN THE SAME	18
A.	LPs Registered as LLPs	18
B.	Facilitating Linkage Between the LP and LLP Records	19
C.	Common Reason for Rejection of a Registration	20
VII.	FOREIGN ENTITIES—REGISTRATION ISSUES	20
A.	Entities Required to Register	20
B.	Failure to Register.....	20
C.	Late Filing Penalty	21
D.	Late Filing Penalty Caps	22
E.	Transfer/Succession of a Foreign Registration	23
F.	Required Amendments.....	24
VIII.	FOREIGN PARTNERSHIPS AND LLCs.....	24
A.	Foreign LLPs	24
B.	Registration of Foreign Series LLCs and LPs.....	26
C.	Registration of Foreign Professional Entities	27
IX.	POST FORMATION MAINTENANCE ISSUES.....	27
A.	Maintenance of Registered Agent/Office.....	27
B.	Periodic Reports and Public Information Reports—Limited Partnerships	28
X.	REINSTATING AN INACTIVE DOMESTIC ENTITY	29
A.	Forfeited Existence—Chapter 171 Tax Code	29

B.	Reinstatement—Chapter 171 Tax Forfeiture	30
C.	Involuntary Terminations—Chapter 11 BOC	31
D.	Reinstatement—Chapter 11 BOC Involuntary Termination.....	32
E.	Failure to File Periodic Report—Chapter 153 BOC Involuntary Terminations	33
F.	Reinstatement After Involuntary Termination-Chapter 153	33
G.	Reinstatement After Voluntary Termination-Chapter 11 BOC	33
H.	Intervening Events May Give Rise to Rejection.....	34
XI.	MERGERS.....	35
A.	Authority and Scope of a BOC Merger.....	35
B.	Other Terms Defining Scope of Transaction/Filing.....	36
C.	Certificate of Merger Required	36
D.	Alternative Certified Statement in Lieu of a Plan of Merger	37
E.	Special Merger Provisions under the BOC	38
F.	Common Errors to Avoid.....	38
XII.	CONVERSIONS.....	39
A.	Certificate of Conversion	39
B.	Common Errors to Avoid.....	41
C.	Nonprofit Conversions.....	41
D.	How to Avoid Last Minute Problems with Tax Clearance	42
XIII.	OTHER MERGER AND CONVERSION ISSUES	42
A.	Corrections to Mergers or Conversions	42
B.	Abandonment of Mergers and Conversions.....	43
C.	To Delay...or Not to Delay – What are my Options?.....	44
XIV.	POST FORMATION CORRECTIONS AND RESTATEMENTS	44
A.	Certificates of Correction 101.....	44
B.	Restated Certificates of Formation—Drafting Issues under Current Law	45
XV.	LEGISLATIVE UPDATE—87th LEGISLATURE, REGULAR SESSION	46
A.	Bills Impacting Business Entity Filings Made with Secretary of State	46
B.	Other Bills of Interest.....	49
XVI.	DOING BUSINESS WITH THE SECRETARY OF STATE	50
A.	Ministerial Duties.....	50
B.	Accessing Information	50
C.	SOSUpload-New Electronic Filing Option.....	51
	ENDNOTES	53
	Appendix A—Merger Flowchart for Registered Foreign Entities	
	Appendix B—Conversion Flowchart for Registered Foreign Entities	

Update from the Office of the Secretary of State



I. THE TEXAS BUSINESS LANDSCAPE

In calendar year 2020, the Office of the Secretary of State saw a 22.74 percent increase in the number of domestic entity formations when compared to the previous calendar year. This significant growth was driven in part by the rise in limited liability company formations, which increased approximately 26.8 percent. As statistics show, the limited liability company is the entity of choice for persons creating a new business entity of limited liability in Texas. As of June 1, 2021, limited liability companies make up approximately 67 percent of the total population of active domestic entities. The breakdown of domestic formations is shown below:

Entity Type Description	2019	2020
For-profit Corporation	21,747	22,255
Nonprofit Corporation	13,016	13,799
Professional Corporation	570	518
Professional Association	304	268
Limited Liability Company	202,901	257,292
Limited Partnership	4,478	4,134
Totals:	243,016	298,266

Based on the number of domestic entity formations in the first quarter of calendar year 2021, the uptick in business entity formations may continue for 2021. A review of production statistics for Q1 2021 indicates that the Secretary of State filed 95,630 certificates of formation which is approximately a 50.4 percent increase from the number of domestic entity formations filed in Q1 of 2020.

II. ENTITY NAMES

A. Names Must Be Distinguishable

Effective June 1, 2018, the entity name availability standard in Texas was changed to a “distinguishable in the records” standard.¹ Although the Texas entity name standard is now similar to the standard used by many jurisdictions, the manner in which the “distinguishable in the records” standard is interpreted and applied from state to state varies. 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 language⁵. (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

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 \(utcle.org/elibrary\)](https://utcle.org/elibrary)

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

Also available as part of the eCourse

[2021 Case Law, Legislative, and Secretary of State Updates for LLCs, LPs, and Partnerships](#)

First appeared as part of the conference materials for the
30th Annual LLCs, LPs and Partnerships session
"Secretary of State Update"