

PRESENTED AT**33rd Annual LLCs, LPs and Partnerships**

July 11-12, 2024

Austin, TX

**Update from the Office of the
Secretary of State****David R. Eskew****Prepared Initially by:****Carmen Flores****Updated by:****Melissa L. Clark****David R. Eskew****Skyler D. Parks****Co-Author & Presenter Contact Information:**

David R. Eskew

Office of the Secretary of State of Texas

Austin, TX

DEskew@sos.texas.gov

512.463.5586

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	5
E.	Limited Partnership Name Issues	7
F.	Name Reservations.....	7
G.	Fictitious Names.....	8
H.	Assumed Names.....	9
III.	SERIES LLCS AND NONPROFIT LLCS.....	12
A.	The Texas Series LLC.....	12
B.	Notice of Limitations.....	12
C.	Registered Series—A Brief Introduction/Overview	13
D.	Certifications Relating to Registered Series of an LLC.....	15
E.	Service of Process on a Series of an LLC.....	15
F.	Nonprofit Limited Liability Companies.....	16
IV.	PROFESSIONAL ENTITIES—TO BE OR NOT TO BE	16
A.	Is Entity Providing a Professional Service?.....	16
B.	What Type of Entity Should Be Formed?.....	17
C.	Joint Ownership and Practice	18
D.	Physicians and Physician Assistants.....	19
E.	Certificate of Formation Issues.....	19
F.	Name Issues for Professional Entities	20
V.	LLPS—ANNUAL REPORTS	20
A.	Domestic LLP Registration—Annual Reports	20
B.	LLP Registration—Delinquency	21
C.	LLP Registration—Termination and Reinstatement.....	22
VI.	LLPS—OTHER ISSUES TO CONSIDER	22
A.	LPs Registered as LLPs.....	23
B.	Facilitating Linkage between the LP and LLP Records.....	23
C.	Common Reason for Rejection of a Registration	24
VII.	FOREIGN ENTITIES—REGISTRATION ISSUES	24
A.	Entities Required to Register	24
B.	Failure to Register	25
C.	Late Filing Penalty	25
D.	Late Filing Penalty Caps.....	26
E.	Transfer/Succession of a Foreign Registration	27
F.	Required Amendments	28
VIII.	FOREIGN PARTNERSHIPS AND LLCS.....	28
A.	Foreign LLPs.....	28
B.	Registration of Foreign Series LLCs and LPs	30
C.	Registration of Foreign Professional Entities	31
IX.	POST FORMATION MAINTENANCE ISSUES.....	31
A.	Maintenance of Registered Agent/Office.....	31
B.	Initial Mailing Address—How to Update.....	32
C.	Periodic Reports and Public Information Reports—Limited Partnerships.....	32

X.	REINSTATING AN INACTIVE DOMESTIC ENTITY.....	34
A.	Forfeited Existence—Chapter 171 Tax Code	34
B.	Reinstatement—Chapter 171 Tax Forfeiture.....	34
C.	Involuntary Terminations—Chapter 11 BOC.....	35
D.	Reinstatement—Chapter 11 BOC Involuntary Termination.....	36
E.	Failure to File Periodic Report—Chapter 153 BOC Involuntary Terminations.....	37
F.	Reinstatement after Involuntary Termination-Chapter 153	37
G.	Reinstatement after Voluntary Termination-Chapter 11 BOC.....	38
H.	Intervening Events May Give Rise to Rejection.....	38
XI.	MERGERS.....	39
A.	Authority and Scope of a BOC Merger.	39
B.	Other Terms Defining Scope of Transaction/Filing.....	40
C.	Certificate of Merger Required.....	41
D.	Alternative Certified Statement in Lieu of a Plan of Merger.....	41
E.	Special Merger Provisions under the BOC.....	42
F.	Common Errors to Avoid	43
XII.	CONVERSIONS	44
A.	Certificate of Conversion.....	44
B.	Common Errors to Avoid	45
C.	Nonprofit Conversions	46
D.	How to Avoid Last Minute Problems with Tax Clearance	46
XIII.	OTHER MERGER AND CONVERSION ISSUES.....	47
A.	Corrections to Mergers or Conversions	47
B.	Abandonment of Mergers and Conversions	48
C.	Merger and Conversion Forms	48
XIV.	POST FORMATION CORRECTIONS, AMENDMENTS, AND RESTATEMENTS	49
A.	Certificates of Correction 101	49
B.	Certificates of Amendment.....	50
C.	Restated Certificates of Formation—Drafting Issues	51
XV.	DOING BUSINESS WITH THE SECRETARY OF STATE.....	51
A.	Ministerial Duties	51
B.	Accessing Information.....	52
C.	SOSUpload—Another Electronic Filing Option	53
D.	Modernization.....	54
	ENDNOTES.....	55

Update from the Office of the Secretary of State



I. THE TEXAS BUSINESS LANDSCAPE

In calendar year 2023, the Office of the Secretary of State saw a 3.5 percent increase in the number of domestic entity formations when compared to CY 2022 and a 3 percent increase when compared to CY 2021. This significant growth was driven in part by the rise in limited liability company formations. The number of domestic limited liability company formations in CY 2023 increased approximately 4.09 percent from CY 2022 and 4.36 percent from CY 2021. The limited liability company is indeed the entity of choice for persons creating a new business entity of limited liability in Texas. As of June 1, 2024, limited liability companies make up approximately 73.11 percent of the total population of active domestic entities. The table below shows a breakdown of domestic formations for calendar years 2022 and 2023.

Entity Type Description	2022	2023
For-Profit Corporation	23,083	21,798
Nonprofit Corporation	14,445	15,983
Professional Corporation	662	643
Professional Association	227	215
Limited Liability Company	351,055	365,416
Limited Partnership	4,636	3,865
Totals:	394,108	407,920

The statistics shown above do not include initial limited liability partnership registrations or domestic entities that were created pursuant to a plan of merger or plan of conversion. The information is based on production statistics for the number of Certificates of Formation filed in the calendar year for the entity type described.

II. ENTITY NAMES

A. Names Must Be Distinguishable

The entity name availability standard in Texas was changed in 2018 to a “distinguishable in the records” standard. Although the Texas entity name standard is 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 Texas Business Organizations Code (BOC) sets forth the general standard for name availability; namely, a filing entity name, and the name of a registered series, must be distinguishable in the records of the 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, any name reservation or registration, or registered series name 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, including a registered series of a limited liability company, 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 and 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.²

B. Three-Tiered Entity Name Availability Standard

1. The Texas entity name availability standard has *three* tiers:³

a. *Distinguishable*. Names that are distinguishable in the records of the secretary of state and therefore available; that is, in accordance with 1 TAC §79.38, a comparison of the proposed name and existing names reveals sufficient differences or if one or more of the following conditions exist:

(1) A difference in at least one key word (e.g., *China Silk, LLC* vs *China Silk Imports, L.C.*);

(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 Ltd. Co.* vs *ABC Bakers LLC*);

(4) The key words are the same but are in a different language⁴ (e.g., *Paloma Gallery, LP* 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 Corp.*); or

(6) The key word or words are the same except for the addition, substitution, or omission of prepositions that alter the names sufficiently to make the names readily distinguishable (e.g., *Light Entertainment Ltd.* vs *Into the Light Entertainment, Inc.*).

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

First appeared as part of the conference materials for the
33rd Annual LLCs, LPs and Partnerships session
"Secretary of State Update"