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Update from the Office of the Secretary of State

Traci Cotton

**Written by:
Carmen Flores**



Author & Presenter Contact Information:
Carmen I. Flores
Traci Cotton
Office of the Texas Secretary of State
Austin, Texas 78711

cflores@sos.texas.gov
tcotton@sos.texas.gov
512.463-5588; 512.463.9856

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
	ENDNOTES	55

Update from the Office of the Secretary of State



I. THE TEXAS BUSINESS LANDSCAPE

In calendar year 2021, the Office of the Secretary of State saw a 32.78 percent increase in the number of domestic entity formations when compared to CY 2020 and a 62.97 percent increase when compared to CY 2019. 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 2021 increased approximately 38.08 percent from CY 2020, and 72.56 percent from limited liability company formations in CY 2019. 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, 2022, limited liability companies make up approximately 70 percent of the total population of active domestic entities. The table below shows a breakdown of domestic formations for calendar years 2020 and 2021.

Entity Type Description	2020	2021
For-profit Corporation	22,255	25,102
Nonprofit Corporation	13,799	14,259
Professional Corporation	518	565
Professional Association	268	254
Limited Liability Company	257,292	350,146
Limited Partnership	4,134	5,722
Totals:	298,266	396,048

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 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."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 reveals 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.*); 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 LLC* vs *Into the Light Entertainment, Inc.*)

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