

2019 SUPPLEMENT to Texas Business Organizations Manual

This supplement adds new practice notes explaining general limited liability company concepts, LLC taxation and audit procedures, rules the Texas secretary of state uses to approve names of newly filed entities, ethical considerations when forming entities, and the registration of trademarks and service marks. It also includes new forms for registering trademarks and service marks and a form with optional LLC company agreement language that addresses tax audit considerations.

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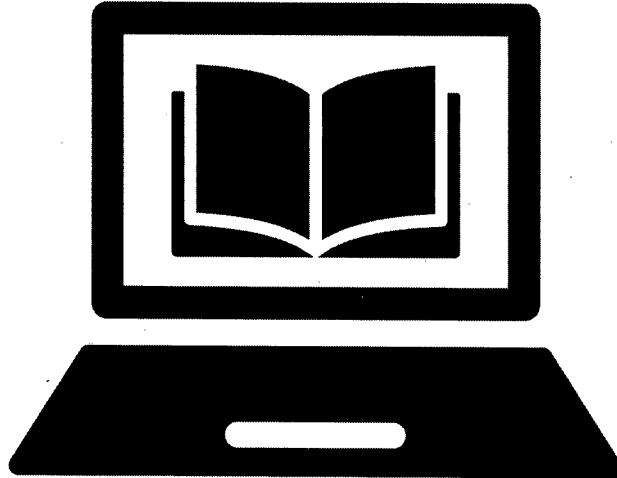
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TEXAS BUSINESS ORGANIZATIONS MANUAL



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The State Bar of Texas is proud to present this first edition of the *Texas Business Organizations Manual*. For more than three decades, the State Bar has published books that offer Texas lawyers authoritative resources to improve their practices. This manual continues that tradition by providing attorneys with forms that address many of the day-to-day issues that arise in the formation and operation of various types of business organizations in Texas.

We sincerely thank Casey Barthel for her work in drafting the limited liability company agreement forms and acknowledge the earlier work of the Corporation Law committee of the Business Law section of the State Bar of Texas, which produced the *Texas Business Entities Forms Manual: Corporations*, the predecessor to this manual. The dedication and service of all of these individuals has resulted in a valuable contribution to the practice of law and a useful resource for Texas practitioners.

A handwritten signature in black ink, appearing to read "Lisa M. Tatum", with a horizontal line extending to the right.

Lisa M. Tatum
President, State Bar of Texas



Preface

The State Bar of Texas is pleased to publish the first edition of the *Texas Business Organizations Manual*. The manual is designed to provide practitioners with basic forms that address many of the issues that arise in the formation and operation of Texas corporations and limited liability companies. Of course, each of these forms is a template only and none of them is intended to be “one size fits all.” Accordingly, when using these forms, the attorney is cautioned to review them carefully and modify them as needed to meet the specific needs and particular circumstances of the client.

The digital version of this manual contains the complete text in word-searchable PDF format, along with word-processing forms. Custom toolbars accompany the word-processing forms and allow you to show, hide, print, and delete all instructional material in the forms as needed, whether you prefer to create forms on screen or print out a draft to work on paper. Other features include prompts to facilitate completing the forms.

We are also excited to announce that the *Texas Business Organizations Manual* now resides online as well as in print and downloadable form. The many advantages of an online subscription include search functions, hyperlinks to statutes, cases, and other online resources, and downloadable forms. Importantly, practitioners wishing to propose changes or edits to the manual will be able to contact the editorial committee at books@texasbar.com for quick review and ongoing edits.

We would like to acknowledge the Corporation Law committee of the Business Law section of the State Bar for its work in producing the *Texas Business Entities Forms Manual: Corporations*, the predecessor to this manual. We would also like to express our appreciation to Casey Barthel for her assistance in crafting the limited liability company agreement forms. Finally, we are indebted to the new editorial committee for its work in updating the manual.

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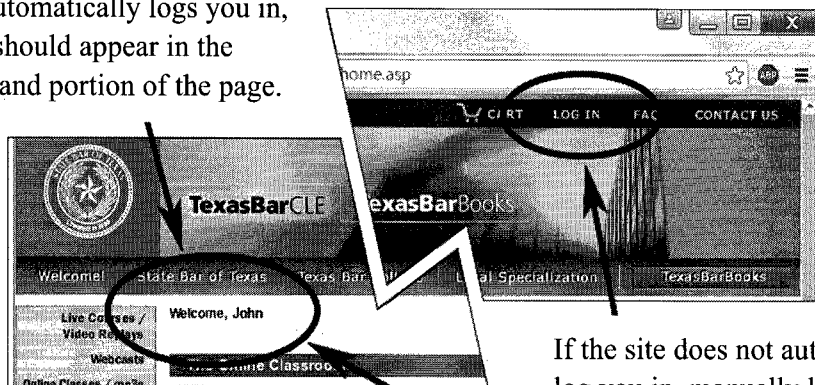
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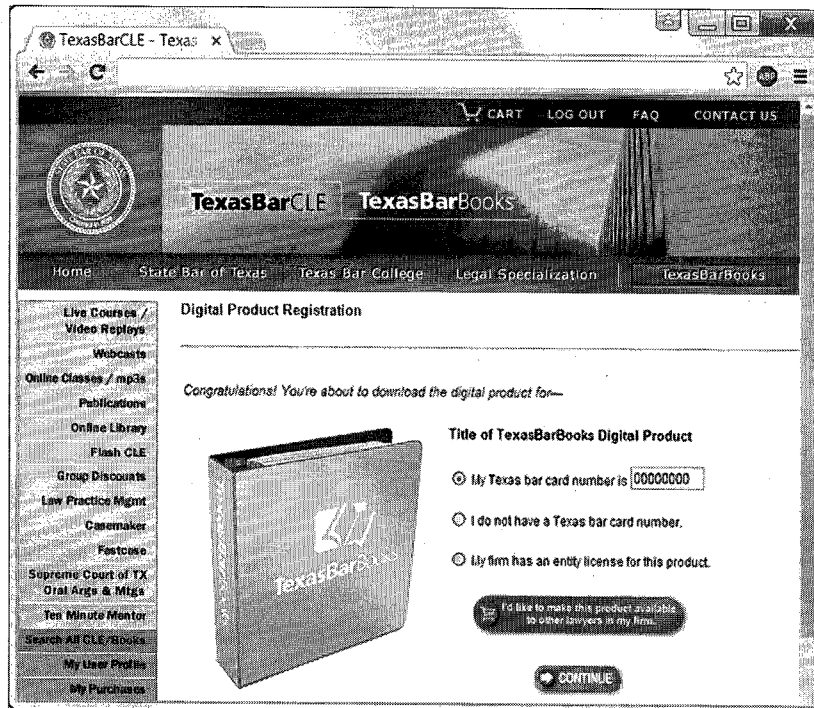


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Introduction

The *Texas Business Organizations Manual* is organized into three main sections. The first section addresses business entities generally and contains commentary and forms that apply to a variety of entities. The second section includes commentary and forms specific to corporations, and the third section includes commentary and forms specific to limited liability companies. The attorney looking for information on limited liability companies, for example, should refer to both the first and third sections. Each chapter within each section contains a detailed table of contents. Following the three main sections is a fourth section containing a bibliography and a number of forms indexes.

§ 1 Commentary

Chapters 1, 2, and 21 contain commentary concerning business entities generally, corporations, and limited liability companies (LLCs), respectively. The chapter 1 commentary provides short synopses of the law, designed to serve as a primer to the basic matters involved in business entity formation and organizational filing requirements. This commentary is, at most, black-letter law and does not try to resolve questions in controversial areas. The chapter 2 commentary discusses reporting, merger, and conversion topics involving corporations, while the chapter 21 commentary addresses filing and formation issues specific to nonprofit and series LLCs. For the attorney experienced with business organizations law, this commentary is a reminder of some of the basics; for the attorney not so experienced with the law, it is a guide to the major matters that the attorney should consider when forming a business entity.

§ 2 Forms

The forms (except those promulgated by governmental agencies) were prepared by experts in the business law field, and great care has gone into their preparation. The forms represent the best thinking of the attorneys who prepared them. Perfection, however, is hard to achieve, and each attorney using these materials must

depend on his or her own expertise and knowledge of the law; there is no substitute in a particular case for the legal mind. Thus, care should be taken to ensure that any form used fits the specific situation.

A number of basic forms in this manual were prepared by the staff of the Texas Secretary of State's office. These forms are designed to meet statutory requirements and to facilitate filings with the office; use of the forms is permissive. Before using these forms, the attorney should verify their currency by visiting the secretary of state's website at www.sos.state.tx.us/corp/forms_boc.shtml or by calling (512) 463-5555. These and many other forms are freely available at that site in online-fillable versions, and many may be filed online through SOSDirect.

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4. Blank lines

Signature lines appear as blank lines. Spaces for dates, times, and amounts that would be filled in *after* the document is prepared also appear as blank lines. (If an actual date, time, or amount should be inserted in the form when it is prepared, “[date],” “[time],” or “\$[amount]” appears instead.)

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§ 3 Page Numbers

Page numbers are consecutive for both commentary and forms within each chapter. Commentary pages begin with the number of the chapter, followed by the number of the page within the chapter. Forms begin with the number of the form, followed by the number of the page within the form. This system is used to permit revisions within any chapter or form without renumbering the pages in the remaining chapters.

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§ 5 Corrections and Updates

In drafting the manual, the authors and editors devoted a great deal of effort to making it error free, but it undoubtedly contains some errors. We would appreciate your pointing out any errors you find in the manual as well as any revisions you believe are advisable. Please mail any corrections or suggestions to the following address:

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Periodic updating of the manual is planned to reflect changes in the law. It is also expected that, over time, additional topics will be covered and the scope of coverage of existing topics will be expanded. We welcome your suggestions about new topics that you would find helpful. Please send your suggestions to the address shown above.

[Reserved]

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Caution: Before using any SOS forms, the attorney should verify their currency by visiting the secretary of state's website at www.sos.state.tx.us or by calling (512) 463-5555. Note that many of these forms may also be filed online through SOSDirect.

Chapter 1

Formation and Filing with Texas Secretary of State; Ethics

Note: The commentary in this chapter addresses business entity formation and organizational filing requirements generally. For information on reporting, merger, and conversion topics involving corporations, see the commentary in chapter 2 of this manual. For information on filing and formation issues specific to nonprofit and series LLCs, see the commentary in chapter 21.

I. Formation

§ 1.1 Entity Name

§ 1.1:1 Name Availability

One of the first hurdles a practitioner must overcome is the Texas Secretary of State's review of the business entity name selected by the client. The availability of an entity name remains the most frequently deliberated, and heavily contested, reason for rejection of a filing instrument.

§ 1.1:2 Entity Name Standards

General Standards for Name

Availability: Section 5.053 of the Texas Business Organizations Code sets forth the general standards for name availability, namely that a filing entity must be distinguishable in the records of the secretary of state from the name of another existing filing entity or an entity name that is reserved or registered with the secretary of state. *See* Tex. Bus. Orgs. Code § 5.053(a). Administrative rules on the availability of names of entities filed with the secretary of state are contained in 1 Tex. Admin. Code §§ 79.30–.54 and may be viewed at www.sos.state.tx.us/tac.

Entity names may consist of letters of the Roman alphabet, Arabic numerals, or symbols capable of being reproduced on a standard

English-language keyboard. No distinction will be made between typeface, font, superscript, or subscript. 1 Tex. Admin. Code § 79.32. Any words not in English will not be translated. 1 Tex. Admin. Code § 79.35.

PRACTICE TIP: On June 1, 2018, the test that an entity name be “distinguishable in the records” replaced the previous test that an entity name not be “deceptively similar” to another entity name. The intention of this revision was to simplify the naming convention of business entities. *See* Tex. Bus. Orgs. Code § 5.053; Acts 2017, 85th Leg., R.S., ch. 503, § 3 (H.B. 2856), eff. June 1, 2018.

Applicability: Chapter 79, subchapter C, of the Texas Administrative Code applies to all name availability determinations made for foreign and domestic corporations (for-profit, professional, and nonprofit), limited liability companies, limited partnerships, and professional associations. *See* 1 Tex. Admin. Code § 79.31; *see also* Tex. Bus. Orgs. Code §§ 5.052, 5.053, 9.004(b)(1). The name availability rules do not apply to limited liability partnerships. Tex. Bus. Orgs. Code § 5.063(b).

Name Availability: A proposed name is available for filing if it is distinguishable from an existing, reserved, or registered entity name. *See* Tex. Bus. Orgs. Code § 5.053(a). Names are distinguishable if a comparison of the names

reveals sufficient differences or if one or more of the following conditions exist:

1. A difference of at least one key word.
 - a. "Sunshine Community Development" is distinguishable from "Sunshine Community Properties."
 - b. "United" is distinguishable from "United One."
 - c. "Real Homes of Austin" is distinguishable from "Real Homes."
 - d. "Texas Cowboys" is the same as "The Texas Cowboys."
2. The key words are the same but are in a different order.
 - a. "Summit Energy" is distinguishable from "Energy Summit."
 - b. "Global One" is distinguishable from "One Global."
 - c. "Austin Auto Parts" is distinguishable from "Auto Parts of Austin."
3. The key words or contractions of key words are derived from the same root word.
 - a. "Great Products" is distinguishable from "Great Productions."
 - b. "Magic Professionals" is distinguishable from "Magical Professionals."
4. The key words are the same but are in a different language.
 - a. "Casa Blanca Productions" is distinguishable from "White House Productions."
 - b. "Tejas Enterprises" is distinguishable from "Texas Enterprises."
5. The key word or words sound the same, but at least one word, on its face, has a different meaning or connotation.
 - a. "El Rodeo" is the same as "Rodeo" or "The Rodeo."
 - a. "Jones Tires" is distinguishable from "Joan's Tires."
 - b. "Capitol Investments" is distinguishable from "Capital Investments."
 - c. "Express Auto" is the same as "Xpress Auto."
 - d. "One World" is the same as "1 World."
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 distinguishable.
 - a. "In the Know" is distinguishable from "Know."
 - b. "Friends" is distinguishable from "Between Friends."
 - c. "Books for People" is distinguishable from "Books by People."
 - d. "Look to the Future" is the same as "Look toward the Future."

1 Tex. Admin. Code § 79.38.

Names That Are the Same: The secretary may not accept for filing proposed entity names that are the same. 1 Tex. Admin. Code § 79.31(c). Names are considered the same if a comparison of the names reveals no differences or if the only difference between the proposed name and the existing names is one or more of the following conditions:

1. The use of uppercase or lowercase letters, distinctive lettering or typeface,

- or the use of superscript or subscript letters or numerals.
- a. "ACE Woodworks" is the same as "Ace Woodworks."
 - b. "H2O Supplies" is the same as "H₂O Supplies."
 - c. "NXNW" is the same as "NxNw."
2. The addition, substitution, or omission of punctuation marks, accent marks, periods, spaces, or symbols that do not alter the name sufficiently to make the names distinguishable.
 - a. "A.F.G. Consulting" is the same as "AFG Consulting."
 - b. "Explore!" is the same as "Explore."
 - c. "Crossroads Productions" is the same as "Cross Roads Productions."
 - d. "Gotham" is distinguishable from "Got Ham."
 3. Except as provided by 1 Tex. Admin. Code § 79.43 (relating to alphabet names), the addition, substitution, or omission of different articles or conjunctions.
 - a. "The Truck Stop" is the same as "Truck Stop."
 - b. "Fair View, a Rest Home" is the same as "Fairview Rest Home."
 4. The repetition, absence, or difference in letters that does not alter the names sufficiently to make the names distinguishable.
 - a. "Texxas Strong" is the same as "Texas Strong."
 - b. "Going Strong" is the same as "Goin' Strong."
- c. "XX Tires" is distinguishable from "X Tires."
- 1 Tex. Admin. Code § 79.39.
- Names Available with Consent:** If the secretary of state determines that a proposed name is not the same as, but is also not distinguishable from, an existing, reserved, or registered entity name, the proposed name may be available with consent from the existing entity. *See* Tex. Bus. Orgs. Code § 5.053(b); 1 Tex. Admin. Code § 79.31(c). A proposed name is available with consent from the existing entity under one or more of the following conditions:
1. The existence, addition, substitution, or absence of a word, phrase, or abbreviation that identifies or indicates different types of entities.
 - a. "Sampson, Inc." is available with consent from "Sampson, PLLC."
 - b. "Adventure Unlimited, a Limited Liability Company" is available with consent from "Adventure Unlimited, LP."
 - c. "Love Foundation" is the same as "Love Foundation, Inc."
 - d. "ABC, LLC" is the same as "ABC Limited Liability Company."
 - e. "Wild West, Inc." is distinguishable from "Wild West Companies, Ltd."
 2. The use of a common abbreviation of the same word.
 - a. "Smith Brothers Plumbing" is available with consent from "Smith Bros. Plumbing."
 - b. "Steel Manufacturing Supplies" is available with consent from "Steel Mfg. Supplies."

- c. "Sweet Treats of Dallas Ft. Worth" is available with consent from "Sweet Treats of DFW."
 - d. "United States Enterprises" is available with consent from "U.S.A. Enterprises."
3. The use of the singular, plural, or possessive form of a word if the difference does not alter the name sufficiently to make the names distinguishable.
- a. "On the Banks" is available with consent from "On the Bank."
 - b. "Child's Play" is distinguishable from "Children's Play."
4. The addition or omission of a state to a name that already includes a city and that does not alter the name sufficiently to make the names distinguishable.
- a. "Resources of Austin, Texas" is available with consent from "Resources of Austin."
 - b. "Atlanta Feed Company" is available with consent from "Atlanta, Georgia Feed Co."
 - c. "Elite Realty of Athens, TX" is distinguishable from "Elite Realty of Athens, GA."

1 Tex. Admin. Code § 79.40. The consent must accompany the document to which the consent relates at the time of submission. Upon the simultaneous submission of any filing instruments relating to the formation of two or more related entities, consent for the use of a name requiring consent will be implied. For example, consent is not required for the simultaneous formation of a Texas limited partnership named ABC Ventures, Ltd., and its general partner, ABC Ventures, LLC. If a proposed entity name conflicts with more than one entity name, the secretary of state will request that consent be

obtained from the entity or name registrant, as applicable, with the longest continuous use of the entity name as determined by the records of the secretary of state. 1 Tex. Admin. Code § 79.41(b)–(d).

The consent must be in writing and signed by an officer or authorized agent of the consenting entity. The signature of the person providing consent must be notarized. Consent given orally cannot be accepted. Consent from more than one entity may be required in some instances. Consent must not state conditions; it must give unequivocal consent. 1 Tex. Admin. Code § 79.42. SOS Form 509 (form 1-1 in this chapter) may be used to document an existing entity's consent.

Effect of Name Clearance: Formation under a given name does not give the newly organized entity the right to use the name in violation of another person's rights. In fact, the certificate issued by the secretary of state to a domestic filing entity under the Business Organizations Code specifically includes a statement that the issuance of the certificate of filing for the formation of an entity or the reservation of an entity name does not authorize the use of the entity name in this state in violation of the rights of another under the federal Trademark Act of 1946 (15 U.S.C. §§ 1051–1127), the Texas trademark law (Tex. Bus. & Com. Code ch. 16), or the common law. This restatement of the common law is codified in Business Organizations Code section 5.001. *See* Tex. Bus. Orgs. Code § 5.001.

When the secretary of state is requested to give advice about the availability of an entity name, the secretary of state is reviewing only the names of active domestic and foreign filing entities, as well as name reservations and name registrations on file with the secretary of state. The secretary of state does not consider state or federal trademark registrations, assumed names filed with the county or the secretary of state

under chapter 71 of the Texas Business and Commerce Code, names of limited liability partnerships registered with the secretary of state, or other sources that might indicate common-law usage or reveal possible trade name or trademark infringement.

Troublesome Words: Not all entity name issues involve an existing conflicting entity name. Other statutory provisions may prohibit or place restrictions on the use of terms within a business name. Words that might imply a purpose for which the entity could not be organized should not be included in a business entity name. *See* Tex. Bus. Orgs. Code § 5.052. These troublesome words include the following:

1. *Insurance* must be accompanied by other words, such as *agency*, that remove the implication that the purpose of the entity is to be an insurer. Persons forming a Texas captive insurance company under chapter 964 of the Texas Insurance Code or domesticating a foreign captive insurance company should contact the legal staff at the corporations section of the secretary of state's office regarding submission procedures if the company will include the term *insurance* in its entity name.
2. *Bail bonds* and *surety* imply that the entity has insurance powers and should be formed under the Texas Insurance Code.
3. *Bank* and derivatives of that term may not be used in a context that implies the purpose to exercise the powers of a bank. *See* Tex. Fin. Code § 31.005. The Texas Department of Banking can advise practitioners on the use of the words *bank*, *banc*, and the like and will issue a letter of no objection for use when filing documents with the secretary of state.
- a. Persons seeking a letter of no objection are to contact the corporate activities division of the Texas Department of Banking.
- b. Submission of a written request and provision of certain information, together with (currently) a \$100 filing fee, is required for consideration of the proposed name regardless of whether approval is granted. Submission of the materials and fee is not a guarantee that the name will be approved. Contact the corporate activities division for current processing time for a letter of no objection.

For additional information, see the department's website at www.dob.texas.gov/.

4. *Trust* generally implies that the entity has trust powers; accordingly, prior approval of the Department of Banking is required. A foreign business trust or foreign real estate investment trust registering under the provisions of the Business Organizations Code that uses the term *trust* in its name is not required to obtain a letter of no objection for purposes of filing the application for registration.
5. *Cooperative* and *co-op* should be used only by an entity operating on a cooperative basis. A firm or business that uses such a term in its business name or that represents itself as conducting business on a cooperative basis when not authorized by law to do so commits an offense. The offense is classified as a misdemeanor that is punishable by the imposition of fines or by confinement in the county jail or both. *See* Tex. Bus. Orgs. Code §§ 5.057, 251.452.

6. *Perpetual care* or *endowment care*, or any other terms that suggest “perpetual care” or “endowment care” standards, should be used only in the name of a cemetery that operates as a perpetual care cemetery in accordance with Texas Health and Safety Code chapter 712. *See* Tex. Health & Safety Code § 711.021(h).

Words That Require Prior Approval:

Entities desiring to use the terms *college*, *university*, *school of medicine*, *medical school*, *health science center*, *school of law*, *law school*, *law center*, and words of similar meaning must obtain prior approval of the Texas Higher Education Coordinating Board. *See* Tex. Educ. Code § 61.313.

Entities desiring to use the terms *veteran*, *legion*, *foreign*, *Spanish*, *disabled*, *war*, or *world war* in a manner that might imply that the entity is a veterans organization should obtain written approval from a congressionally recognized veterans organization. *See* Tex. Bus. Orgs. Code § 5.062.

Prohibited Words: A domestic or foreign filing entity may not use the term *lotto* or *lottery* in its entity name. *See* Tex. Bus. Orgs. Code § 5.061.

State and federal law generally precludes the use of the words *olympic*, *olympiad*, *olympian*, and *olympus* unless authorized by the United States Olympic Committee. *See* Tex. Bus. & Com. Code § 16.105; 36 U.S.C. ch. 2205.

§ 1.1:3 Name Reservations

If there will be a delay between the name selection and the submission of the filing instrument, the practitioner should submit an application to reserve the name.

Name Reservation Process: The Texas Business Organizations Code provisions relating to

name reservations apply to all filing entity types; consequently, a name reservation may be used in connection with a document submitted by any foreign or domestic filing entity.

Although a name reservation is not limited to a specific entity type, the selection of a specific entity type when submitting a name reservation application in person or by mail will facilitate review of the entity name. A proposed entity name for one entity type may imply or indicate an unlawful purpose for another entity type. For example, the entity name *Derma Medical Services* implies an unlawful purpose for a for-profit corporation but does not imply an unlawful purpose for a professional limited liability company. The current filing fee for a name reservation is a standard fee of \$40.

PRACTICE TIP: Once an application for name reservation is filed, the name reservation is recorded exclusively in the name of the person named as the applicant. An application for name reservation that names the practitioner, a service company, or a law firm as the applicant may result in the unexpected rejection of the certificate of formation if the secretary of state cannot determine the connection between the certificate's submitter, or parties named in the certificate of formation, and the applicant shown in the existing name reservation. Consequently, consider who should be named as the applicant of the name reservation. Pursuant to Business Organizations Code section 5.101(b), the application for name reservation may be signed by the applicant or by the agent or attorney of the applicant.

Renewal of Name Reservation: Business Organizations Code section 5.105 permits the renewal of a current name reservation. The reservation may be renewed for an additional 120-day period by filing a new application for name reservation during the 30-day period preceding the expiration of the current reservation. *See*

Tex. Bus. Orgs. Code § 5.105. The current filing fee for a renewal of name reservation is \$40.

The applicant of record must submit the name reservation renewal. If the renewal of reservation lists an applicant other than the applicant of record with the secretary of state, a transfer of the name reservation will be required. *See* Tex. Bus. Orgs. Code § 5.106. The current fee for a transfer of name reservation is \$15.

Termination of Name Reservation: An applicant seeking to terminate a name reservation before the expiration of its 120-day term should file a withdrawal of the name reservation pursuant to Business Organizations Code section 5.104(2). There is no fee for filing a withdrawal of a name reservation. *See* Tex. Bus. Orgs. Code § 5.1041.

Date of Record for Name Reservation: In general, the date of filing of a filing instrument that conforms to law is the date of its receipt by the secretary of state. *See* 1 Tex. Admin. Code § 79.9(b). This general rule does not, however, apply to an application for name reservation or to a withdrawal of name reservation. The file date of record for these filings reflects the date the secretary of state actually processes the application or withdrawal and enters the filing into the business entity database.

§ 1.1:4 Assumed Names

Section 5.051 of the Texas Business Organizations Code authorizes the use of an assumed name by a domestic or foreign entity having authority to transact business in Texas. *See* Tex. Bus. Orgs. Code § 5.051.

Definition and Filing Requirements: The secretary of state does not check an assumed name for purposes of availability; however, the secretary of state will reject an assumed name certificate if the name shown in the certificate

does not meet the definition of an assumed name.

Pursuant to section 71.002(2) of the Texas Business and Commerce Code, an assumed name is defined as—

1. for a corporation, any name other than the name stated in its certificate of formation or comparable document;
2. for a limited partnership, any name other than the name stated in its certificate of formation;
3. for a limited liability company, any name other than the name stated in its certificate of formation or comparable document, including the name of any series of the limited liability company established by its company agreement; and
4. for a limited liability partnership, any name other than the name on its application for registration or comparable document.

See Tex. Bus. & Com. Code § 71.002(2).

For this reason, a foreign filing entity that must obtain its registration under an assumed name (a.k.a. “fictitious name”) should not submit an assumed name certificate that attempts to list the entity’s legal name as its “assumed name.” Although the Business Organizations Code may bar the foreign entity from obtaining a registration under its legal name, the legal name of the entity in its jurisdiction of organization is not an assumed name as defined by section 71.002(2).

The filing requirements for assumed name certificates for limited partnerships, limited liability companies, limited liability partnerships, and foreign filing entities are similar to filing requirements for assumed name certificates filed by an incorporated business or profession.

Execution Requirements: The execution requirements for assumed name certificates filed with the secretary of state differ from county-level filing requirements. The execution requirements are similar to the execution requirements for other documents filed with the secretary of state. Business and Commerce Code chapter 71 authorizes the secretary of state to accept photocopies of originally signed assumed name documents and eliminates the notarization requirement for assumed name documents filed with the secretary of state.

Dual Filing: Dual filing of the assumed name certificate is required when the entity is a corporation, limited liability company, limited partnership, limited liability partnership, or foreign filing entity. An assumed name certificate is filed with the secretary of state and with the county clerk.

An entity that maintains a registered office in this state is required to file its assumed name certificate with the secretary of state and with the county clerk of the county in which the entity's—

1. registered office is located, if the entity's principal office is not located in Texas, or
2. principal office is located, if the entity's principal office is located in Texas.

Tex. Bus. & Com. Code § 71.103(b).

An entity that is not required to or that does not maintain a registered office address, such as a domestic general partnership registered as a limited liability partnership, would file its county-level assumed name certificate in the county in which the entity maintains its office address. *See* Tex. Bus. & Com. Code § 71.103(c).

PRACTICE TIP: Due to differences in filing requirements, the assumed name certificate form promulgated by the secretary of state (SOS

Form 503, form 21-6 in this manual) should not be used to file an assumed name certificate on the county level.

Assumed Name Certificates for Other Kinds of Entities: Business and Commerce Code chapter 71 authorizes the secretary of state to accept and file an assumed name certificate for a foreign real estate investment trust (REIT); foreign business or statutory trust; or foreign entity that is not characterized as a corporation, limited partnership, limited liability company, or limited liability partnership. A domestic REIT is not authorized to file its assumed name certificate with the secretary of state. A domestic REIT doing business under an assumed name would follow county filing requirements established under sections 71.051 through 71.054 of the Business and Commerce Code.

Correction to Assumed Name Certificate: Business and Commerce Code chapter 71 does not provide for the filing of a correction to an assumed name certificate. If the assumed name certificate filed contains incorrect information or a typographical error, the assumed name certificate may be abandoned and a new assumed name certificate filed.

§ 1.2 Designation of Registered Agent

§ 1.2:1 Registered Agent Consent

Consent Required: Pursuant to Texas Business Organizations Code section 5.201(b), a person designated as a registered agent must have consent, in a written or electronic form, to act as registered agent. *See* Tex. Bus. Orgs. Code § 5.201(b).

Form for Consent: Business Organizations Code section 5.201(b) requires the secretary of state to develop the form of the written or electronic consent. Pursuant to Texas Administrative Code title 1, section 79.29, an electronic or writ-

ten consent must contain the following elements:

- (1) the name of the represented entity;
- (2) an express statement of consent to serve as the entity's registered agent;
- (3) the name of the registered agent;
- (4) the signature of the registered agent; and
- (5) the date of execution.

1 Tex. Admin. Code § 79.29(a). SOS Form 401-A (form 1-2 in this chapter) may be used to document a registered agent's acceptance of appointment.

The appointment of a person as registered agent by an organizer or managerial official of an entity is an affirmation by that organizer or managerial official that the person has consented to serve in the capacity of registered agent. *See* Tex. Bus. Orgs. Code § 5.2011(a).

PRACTICE TIP: While not required by the Business Organizations Code, the best practice is to maintain the registered agent's consent in the entity's records.

§ 1.2:2 Verification of Registered Agent upon Sale, Acquisition, or Transfer

Before the sale, acquisition, or transfer of a majority-in-interest or majority interest of the outstanding ownership or membership interests of a represented entity, the governing authority of the entity must verify whether the person designated as registered agent before the sale, acquisition, or transfer has consented to continue to serve the represented entity in that capacity. *See* Tex. Bus. Orgs. Code § 5.2011(b).

§ 1.2:3 Penalty for False Statement Concerning Registered Agent

Texas Business Organizations Code section 5.207 provides that sections 4.007 and 4.008 impose liabilities and penalties on a false statement in a filing instrument that designates and appoints a person as the registered agent of an entity without that person's consent. *See* Tex. Bus. Orgs. Code § 5.207. Section 4.007 provides for damages, court costs, and reasonable attorney's fees if a person incurs a loss caused by the false statement. *See* Tex. Bus. Orgs. Code § 4.007(a). An offense under section 4.008 is a class A misdemeanor unless the person's intent is to harm or defraud another, in which case the offense is a state jail felony. *See* Tex. Bus. Orgs. Code § 4.008(b).

§ 1.2:4 Filing Registered Agent's Consent Permitted but Not Required

The signed consent of the registered agent should be sent to and retained by the represented entity. Unless otherwise required by the provisions of the Texas Business Organizations Code or other law applicable to the represented entity, the consent of the registered agent is not required to be submitted with or included as part of the filing designating the registered agent ("registered agent filing"). *See* 1 Tex. Admin. Code § 79.29(c).

However, the appointment of a statutory agent for an unincorporated nonprofit association pursuant to section 252.011(c) of the Business Organizations Code requires the signature of the appointed agent to be included with the appointment.

The secretary of state will not reject a filing that includes the consent of registered agent. When the consent of agent is submitted with or included as part of the registered agent filing,

the consent will be imaged as part of the original document. *See* 1 Tex. Admin. Code § 79.29(d).

A statement of consent of registered agent that is submitted separately for purposes of filing with the secretary of state will be indexed in the filing history of the represented entity if the consent is accompanied by a fee of (currently) \$15, unless the consent is submitted on behalf of a nonprofit corporation or cooperative association, in which case the current fee is \$5. *See* 1 Tex. Admin. Code § 79.29(e), (f).

§ 1.2:5 Rejection of Appointment as Registered Agent

Texas Business Organizations Code section 5.206 permits a person designated as a registered agent to reject the appointment as agent if the person was named as registered agent without that person's consent. A person who has been named as the registered agent of an entity without that person's consent is not required to perform the duties of a registered agent. *See* Tex. Bus. Orgs. Code § 5.206(b). SOS Form 428 (form 1-3 in this chapter) may be used to file a

rejection of appointment of agent. There is no fee for filing a rejection of appointment.

Effect of Filing Rejection of Appointment:

The filing of a rejection of appointment by the secretary of state immediately terminates the appointment of the agent and the registered office address. On filing, the secretary of state will notify the organizer or managerial official of the entity of the need to appoint a new registered agent and registered office. Failure to appoint a new registered agent and registered office will result in the involuntary termination of the domestic filing entity or the revocation of the foreign filing entity's registration to transact business in Texas.

Resignation for Persons Appointed before

January 1, 2010: A person who was appointed without consent before January 1, 2010, would file a statement of resignation of agent pursuant to Business Organizations Code section 5.204, which is effective on the thirty-first day after the date the secretary of state receives the notice of resignation. *See* Tex. Bus. Orgs. Code § 5.204(d). There is no fee for filing a resignation of registered agent.

II. Maintenance

§ 1.3 Maintenance of Registered Agent and Office

In fiscal year 2018, the secretary of state processed 105 allegations that filing entities had failed to maintain registered agents and registered office addresses as required by Texas Business Organizations Code chapter 5, notified 16,237 entities of the resignation of their registered agents, and filed 50 rejections of registered agent appointments.

§ 1.3:1 Requirements for Registered Agent's Office

Pursuant to Texas Business Organizations Code section 5.201(c), the registered office address of a filing entity must be a street address where process may be personally served on the entity's registered agent. *See* Tex. Bus. Orgs. Code § 5.201(c). This means that the address provided as a registered office address must be the physical address where the registered agent may be found. It may not be solely the address of a business that provides the entity (or designated agent) with mailbox or telephone answering services.

The registered office address does not need to be the business office address of the represented entity, but it is required to be the business office address of the designated registered agent. *See* Tex. Bus. Orgs. Code § 5.201(b)(3).

A registered agent that is an organization must have an employee available at the registered office address during normal business hours to receive service of process. Any employee of that organization may receive service at the registered office. Tex. Bus. Orgs. Code § 5.201(d).

§ 1.3:2 Failure to Maintain Registered Office

If the secretary of state determines that the registered agent is not located at the street address provided as the registered office address or that the registered office address is merely the street address of a business providing mailbox services, the secretary will notify the entity of its failure to maintain a registered agent and office as required by law.

§ 1.3:3 Updating Registered Office Address

The address of the registered office may be updated by a filing submitted by the entity itself or by the registered agent. An address correction or update made by the designated registered agent pursuant to section 5.203 of the Texas Business Organizations Code should be made using SOS Form 408 (form 1-4 in this chapter) rather than SOS Form 401 (form 1-5). A registered agent may file a statement under section 5.203 that applies to more than one filing entity. There are individual fees as well as maximum fees for each different type of entity represented. *See* Tex. Bus. Orgs. Code § 5.203.

PRACTICE TIP: When making a change to the legal name or registered office address of a filing entity, determine whether the entity itself is designated as the registered agent of another entity (e.g., LLC general partner of a Texas LP is the designated registered agent of the LP). A filing effecting a change to the name or address of the designated agent (in this example, the LLC general partner) does not effect a change or update to the certificate of formation of the represented entity (the LP).

III. Mergers and Conversions

§ 1.4 Mergers

§ 1.4:1 Certificate of Merger

A certificate of merger is required to be filed in accordance with Texas Business Organizations Code chapter 10 when any party to the merger is a domestic filing entity or when any entity created pursuant to a plan of merger is a domestic filing entity.

§ 1.4:2 Mergers Governed by Statutes Other than Business Organizations Code

A merger transaction controlled by another statute is governed by the other statute. For example, chapter 162 of the Texas Utilities Code will govern the consolidation or merger of telephone cooperatives.

§ 1.4:3 Alternative Certified Statement in Lieu of Plan of Merger

A plan of merger is a document that conforms to the requirements of sections 10.002 and 10.003 of the Texas Business Organizations Code. Pursuant to section 10.002, a plan of merger must be in writing. *See* Tex. Bus. Orgs. Code § 10.002(a).

The plan of merger must be set forth as part of the certificate of merger unless the certificate of merger includes a statement certifying—

1. the name, organizational form, and jurisdiction of formation of each domestic or foreign entity that is a party to the plan of merger or that will be created as a result of the merger;
2. that the plan of merger has been approved by each organization;
3. any amendments to the certificate of formation or a statement that no amendments are to be effected by the merger;
4. that the certificates of formation of each new Texas corporation, limited partnership, or limited liability company to be created as a result of the merger are being filed with the secretary of state as part of the certificate of merger;
5. that an executed plan of merger is on file at the principal place of business of each surviving or newly created domestic or foreign corporation, limited partnership, or limited liability company and the address of each principal place of business; and
6. that a copy of the plan will be on written request furnished without cost by each surviving, acquiring, or new

domestic entity or non-code organization to any owner or member of any domestic entity that is a party to the merger and, for a merger with multiple surviving domestic entities or non-code organizations, to any creditor or obligee of the parties to the merger if a liability or obligation is then outstanding.

See Tex. Bus. Orgs. Code § 10.151(b)(1).

PRACTICE TIP: The cost for a certified copy of a filing instrument is currently \$15 for the certification and \$1 per page. If the complete plan of merger adopted by the constituent entities is lengthy or contains numerous exhibits, schedules, or attachments, the total cost of a certified copy of the merger may be more than expected. Keep in mind that if the entity record contains multiple filing instruments, including multiple merger or conversion transactions, the total cost of providing a certified copy of all documents in the entity's record may be considerable. Providing the alternative certified statements in lieu of the plan of merger may be more cost-efficient and convenient.

The certificate of merger also must contain a statement that the plan of merger was approved as required by the laws of the jurisdiction of formation of each organization that is a party to the merger and by the governing document of those organizations. Tex. Bus. Orgs. Code § 10.151(b)(3).

Procedures for the approval of fundamental business transactions are found in the Code sections applicable to the specific domestic entity type. For example, provisions for for-profit and professional corporations are found in Business Organizations Code sections 21.451 through 21.462, while LLC provisions are located in section 101.365.

§ 1.4:4 Special Merger Provisions under Business Organizations Code

Texas Business Organizations Code sections 10.006 and 10.152 apply to mergers between parent and subsidiary entities and permit a short-form merger of—

1. one or more subsidiary entities into a parent,
2. a parent into a subsidiary, or
3. one or more subsidiaries and the parent into another subsidiary.

The parent organization must own at least 90 percent of the outstanding ownership or membership interests of each class and series of each of one or more subsidiary organizations. At least one of the parties to the merger must be a domestic entity. No action by any domestic subsidiary organization is required to approve a short-form merger. If the parent organization survives the merger, the merger is required to be approved only by a resolution adopted by the governing authority of the parent. *See* Tex. Bus. Orgs. Code §§ 10.006, 10.152.

The short-form merger provisions do not apply if a subsidiary organization is a partnership. *See* Tex. Bus. Orgs. Code § 10.006(i).

§ 1.4:5 Common Errors to Avoid in Merger Documents

Generally, the most frequent reason for rejection of a merger document is the failure to set forth all necessary recitations in the certificate of merger or alternative statements.

Omission of Authorization Statement: The most frequent omission in a certificate of merger is the authorization statement. Although a merger document drafted to contain the alternative statements certifies that the plan of merger has been approved, the certificate of merger also

must include a statement that “the plan of merger . . . has been approved as required by the laws of the jurisdiction of formation of each organization that is a party to the merger . . . and by the governing documents of those organizations.” Tex. Bus. Orgs. Code § 10.151(b)(3).

PRACTICE TIP: Persons using an SOS certificate of formation form for a domestic filing entity created pursuant to a plan of merger often fail to include the additional statement regarding the entity’s formation pursuant to a plan of merger, which is required under Texas Business Organizations Code section 3.005(a)(7). If using an SOS form the additional required statement may be set forth as additional text in the “Supplemental Provisions/Information” section of the promulgated form.

Errors Concerning Effective Date of Merger: Under Business Organizations Code section 3.006, the formation and existence of a domestic filing entity created pursuant to a plan of merger takes effect and commences on the effectiveness of the merger. Consequently, the certificate of formation of a domestic filing entity created pursuant to the plan of merger cannot have an effective date (or delayed effective date and time) that differs from the effective date of the certificate of merger.

Restatement of Certificate of Formation Must Be Filed Separately: While Business Organizations Code section 10.004 permits a plan of merger to include amendments to the governing documents of a domestic filing entity, a domestic entity may not effect a restatement of its certificate of formation pursuant to a plan of merger. The restatement of a certificate of formation has a different legal effect than an amendment to the certificate of formation. If the surviving entity desires to amend and restate its certificate of formation, it may do so by submitting a separate filing instrument to be filed immediately after the filing of the certificate of merger.

§ 1.5 Conversions

§ 1.5:1 Plan of Conversion

Under the Texas Business Organizations Code, the *converting entity* is the entity before conversion and the *converted entity* is the resulting entity after conversion. Tex. Bus. Orgs. Code § 1.002(11), (12). The organizational documents for the converted entity will appear in the plan of conversion.

Filing Plan of Conversion or Certificate of Conversion: Like a plan of merger, the plan of conversion can but is not required to be filed with the certificate of conversion. In lieu of filing the plan, the converted entity may include a statement in the certificate of conversion certifying—

1. the name, organizational form, and jurisdiction of formation of the converting entity;
2. the name, organizational form, and jurisdiction of formation of the converted entity;
3. that the plan has been approved;
4. that the plan is on file at the principal place of business of the converting entity and the address thereof, and that the plan will be on file from and after conversion at the principal place of business of the converted entity and the address thereof; and
5. that a copy of the plan will be furnished by the converted entity on written request and without cost to any shareholder or comparable interest holder of the converting or converted entity.

See Tex. Bus. Orgs. Code § 10.154(b)(1).

The certificate of conversion also must contain a statement that the approval of the plan of con-

version was duly authorized by all action required by the laws under which the converting entity was incorporated, formed, or organized and by its constituent or governing documents. See Tex. Bus. Orgs. Code § 10.154(b)(2).

While the organizational documents of the converted entity are included as part of the plan of conversion and are not required to be filed independently, the statutes anticipate that separate organizational documents for any domestic entity formed by conversion (other than general partnerships) will be submitted with the certificate of conversion.

Franchise Taxes: Pursuant to Business Organizations Code section 10.156, the secretary of state cannot accept a certificate of conversion if the required franchise taxes of the converting entity have not been paid. Tex. Bus. Orgs. Code § 10.156(2). If a converting entity is a taxable entity under the franchise tax statutes and the converting entity is not in good standing for purposes of the conversion, the secretary of state must refuse to file the conversion.

PRACTICE TIP: A printout obtained from the comptroller of public accounts' franchise account status online search is not sufficient for purposes of evidencing tax clearance pursuant to Business Organizations Code section 10.156. A practitioner must obtain a certificate of account status from the comptroller (comptroller form 05-359) or include a statement in the certificate of conversion that the converted entity will be liable for the payment of all franchise taxes.

§ 1.5:2 Applicability of Conversion Provisions of Business Organizations Code

The conversion provisions in Texas Business Organizations Code chapter 10 are applicable to all entities (other than unincorporated nonprofit associations). Business Organizations Code section 4.151 provides for one filing fee for the cer-

tificate of conversion, plus the fee for filing the certificate of formation for the converted domestic entity.

The conversion provisions do not apply when a domestic limited liability company is changing its purpose to come under the provisions relating to professional limited liability companies and vice versa. A certificate of amendment is sufficient to effectuate this change as a limited liability company includes a professional limited liability company and there is not a change to the type of entity.

An unincorporated nonprofit association is not authorized to engage in a statutory conversion under Business Organizations Code chapter 10. Business Organizations Code section 252.017 specifically provides that the only statutes that apply to an unincorporated nonprofit association are chapters 1 and 4 and, if a nonprofit association has designated an agent for service of process, the provisions of subchapter E of chapter 5. Accordingly, a Texas unincorporated nonprofit association cannot convert to a nonprofit corporation.

§ 1.5:3 Common Errors to Avoid in Conversions

Submitting Certificate of Formation before Certificate of Conversion: Submitting a certificate of formation to form the domestic “converted” entity before submission of the certificate of conversion may require the practitioner to redraft and restructure the transaction as a merger with the newly created entity as the surviving entity.

Failure to Include Additional Statements in Formation Document: Failure to include additional statements relating to the conversion in the formation document of the converted entity is a frequent error. The formation document of a converted entity must include—

1. a statement that the entity is being formed pursuant to a plan of conversion and
2. the name, address, date of formation, and prior form of organization and jurisdiction of organization of the converting entity.

See Tex. Bus. Orgs. Code § 3.005(a)(7).

PRACTICE TIP: If the converted entity is a domestic filing entity and you are using an SOS form for the converted entity, the additional required statements may be set forth in the “Supplemental Provisions/Information” section of the promulgated form.

Failure to Ensure Tax Clearance for Converting Entity: Avoid failing to ensure tax clearance for the converting entity either by including the appropriate tax certificate or by including a statement relating to the payment of such taxes by the converted entity.

§ 1.6 Problems with Tax Clearance

Failure to obtain tax clearance for the transaction is a common reason for rejection. Texas law requires the secretary of state to determine that a merging or converting entity subject to franchise tax has paid all taxes due before the merger or conversion can be accepted and filed. Texas Business Organizations Code section 10.156(2) requires franchise tax clearance as a condition of acceptance. *See* Tex. Bus. Orgs. Code § 10.156(2). The secretary of state will require tax certification or the alternative statement for merging and converting taxable entities. Tax clearance also is a condition for acceptance under the merger and conversion provisions of prior law. The requirement for tax clearance is not limited to specific entity types; consequently, this requirement applies to any taxable entity that is a nonsurviving party to the merger or the converting entity in a conversion.

The secretary of state suggests two alternatives to avoid last-minute refusal to file the merger or conversion for tax reasons:

1. Submit the merger or conversion with a certificate of account status from the comptroller of public accounts for each merging or converting filing entity that is a taxable entity. If the merging or converting entity is a passive entity, provide a statement or certification from the comptroller that the entity is not a taxable entity. A certificate of account status provided for a merging or converting entity must specifically indicate that it is for the purpose of merger or conversion.
2. Include in the plan of merger or conversion, or in the alternative statement provided in lieu of a plan of merger or conversion, a statement that one or more of the surviving, new, or acquiring entities will be responsible for the payment of all fees and franchise taxes and that all of such surviving, new, or acquiring domestic or foreign entities will be obligated to pay any fees and franchise taxes if not timely filed.

§ 1.7 Abandonment of Mergers and Conversions

Subchapter E of chapter 10 of the Business Organizations Code governs the abandonment of a merger, conversion, or exchange that has been approved but has not become effective. A certificate of merger, conversion, or exchange is effective on filing with the secretary of state, unless the effectiveness of the transaction is delayed pursuant to Texas Business Organizations Code section 4.052.

The abandonment of the transaction is subject to any contractual rights and would be abandoned in the manner set forth in the plan of merger, conversion, or exchange. If the plan does not

contain a provision regarding the procedures for abandoning the plan, the plan of merger, conversion, or exchange would be abandoned in the manner determined by the governing authority of the domestic entity. *See* Tex. Bus. Orgs. Code § 10.201.

An abandonment of a merger, conversion, or exchange need not have the approval of the domestic entity's owners or members. If the merger, conversion, or exchange has been filed with the secretary of state, the domestic entity must file a statement of abandonment in accordance with Business Organizations Code section 4.057, the general provision applicable to any filing instrument filed with a delayed effectiveness. *See* Tex. Bus. Orgs. Code § 10.202. The abandonment must be signed on behalf of each entity that signed the certificate of merger, conversion, or exchange. *See* Tex. Bus. Orgs. Code § 4.057(c).

PRACTICE TIP: On filing, the secretary of state records the filing of a merger or conversion instrument with a delayed effective date or condition and takes necessary action at that time to create new entities, change the status of merged or converting entities, and change names when amended by the filed document. Consequently, when a statement of abandonment is submitted as permitted by law, the secretary must determine whether the former name of any entity is available or whether the organizational documents need to be amended to change the name. *See* Tex. Bus. Orgs. Code § 4.057(e); 1 Tex. Admin. Code § 79.82. If the likelihood exists that the parties might abandon a merger transaction, consider filing a name reservation for the prior or former name of a merged entity that may need to be reactivated.

When the effectiveness of a document is conditioned on the occurrence of a future event other than the passage of time (delayed effective condition), the entity is required to file a statement with the secretary of state within ninety days

from the date of execution of the instrument to effect the transaction evidenced by the filing. *See* Tex. Bus. Orgs. Code §§ 4.052–.055. Failure to file the statement regarding the satisfaction or waiver of the delayed effective condition does not affect an abandonment of the filed document. To abandon the document, a certificate of abandonment must be filed with the secretary of state.

§ 1.8 Secretary of State Merger and Conversion Forms

Secretary of state merger forms do not include a form for a plan of merger. The plan of merger may be attached to the certificate of merger form, or the alternative statements contained within the form may be checked and completed.

Nor do secretary of state merger forms include a form for a domestic filing entity to be created pursuant to a plan of merger. If the plan of merger results in the creation of a domestic filing entity, the certificate of formation of a domestic filing entity created pursuant to the plan of merger must contain a statement that the entity is being formed under a plan of merger. *See* Tex. Bus. Orgs. Code § 3.005(a)(7).

Secretary of state conversion forms comply with the provisions of the Texas Business Organizations Code and are not designed for cross-

statutory transactions. The forms are entity specific: SOS Forms 631 through 634 are used when the converting entity is a for-profit or professional corporation, SOS Forms 635 through 638 are used when the converting entity is a limited liability company, and SOS Forms 641 through 644 are used when the converting entity is a limited partnership. SOS Form 645 (form 1-6 in this chapter) may be used to convert a professional association to a professional limited liability company. A domestic general partnership, including a general partnership that is registered as a limited liability partnership, seeking to convert to a domestic filing entity may use SOS Form 646.

The secretary of state does not have a form for the specific purpose of “domesticating” or converting a foreign entity to a Texas entity of the same entity type. The secretary of state has, however, a summary (SOS Form 647, form 1-7 in this chapter) that includes general information and a checklist for a conversion of this nature.

Secretary of state conversion forms do not include a plan of conversion or a certificate of formation for a converted entity that is to be a domestic filing entity. When drafting the certificate of formation of a converted entity that is a domestic filing entity, include the additional statements required under Business Organizations Code section 3.005(a)(7).

IV. Franchise Tax

§ 1.9 Franchise Tax

§ 1.9:1 Franchise Tax Account Status

Effective May 5, 2013, the comptroller of public accounts changed the manner in which the

account status of a taxable entity is determined and described and ceased to issue online certifications of account status indicating that an entity was in “good standing” through a date certain. An entity’s franchise tax account status can be found at the comptroller’s website, <https://comptroller.texas.gov>.

§ 1.9:2 Account Status Is Determined by Entity's Right to Transact Business

Before May 5, 2013, the public was able to obtain from the comptroller of public accounts' website a certification that a taxable entity had met all franchise tax filing requirements with a certification that no tax was due through a date certain. After the revision of the franchise tax in 2008 and the resulting changes to filing requirements, however, the issuance of a "good standing" certification became more complicated. Because of this, the comptroller changed the terminology used to describe a taxable entity's status to clarify that references made to status referred to an entity's franchise tax account status.

As of May 5, 2013, the phrases *good standing*, *temporary good standing*, and *not in good standing* are no longer used by the comptroller to describe a business entity's account status. Instead, the account status of an entity is based on whether the comptroller has forfeited the entity's right to transact business in Texas pursuant to Texas Tax Code sections 171.251, 171.2515, and 171.256.

The comptroller is authorized to forfeit a taxable entity's right to transact business when the entity does not file a franchise tax report or pay a tax or penalty required under chapter 171 of the Tax Code. Before the forfeiture actually occurs, the comptroller mails the entity a notice providing at least forty-five days within which to cure the franchise tax deficiencies.

§ 1.9:3 Comptroller Account Terminology

Active: A person using the comptroller's website to verify a taxable entity's "status" must look to the entity's "Right to Transact Business." A status of "Active" means that the

entity's right to transact business in Texas has not been forfeited by the comptroller.

Active, Eligible for Termination/Withdrawal:

A status of "Active, Eligible for Termination/Withdrawal" means that the entity has met those franchise tax requirements that would make the entity eligible to obtain a certification for purposes of filing a certificate of termination or withdrawal with the secretary of state. This status is displayed when the taxable entity has filed an annual franchise tax report, as well as a final tax report, for the current tax year. A printout from the comptroller's website showing this status does not, however, satisfy the requirements of Texas Business Organizations Code section 11.101(b) or 9.011(c) for purposes of filing the certificate of termination or withdrawal.

Forfeited: A status of "Forfeited" means that the comptroller has forfeited the entity's right to transact business in accordance with subchapter F of chapter 171 of the Texas Tax Code. The records of the secretary of state may still reflect the status of a domestic taxable entity with this status as "in existence."

Franchise Tax Ended: A status of "Franchise Tax Ended" with respect to a domestic taxable filing entity means that the entity terminated its existence with its right to transact business intact. With respect to a domestic filing entity, this status would apply if an entity terminated its existence by virtue of filing a voluntary termination or merger.

Franchise Tax Involuntarily Ended: A status of "Franchise Tax Involuntarily Ended" with respect to a domestic taxable entity means that the existence of the entity ended due to action taken by the secretary of state. The action taken may have been an administrative tax forfeiture or an involuntary termination. To verify the statutory basis for the entity's inactive status, contact the secretary of state.

Right to Transact Business: A foreign taxable entity's "right to transact business" for franchise tax liability purposes is not tied to the "transaction of business" for purposes of registration with the secretary of state under chapter 9 of the Business Organizations Code. *See Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991). Consequently, in the case of a for-

foreign entity, an active status does not necessarily indicate that the foreign entity has an active registration to transact business on file with the secretary of state. Similarly, an account status of "Franchise Tax Ended" is not tied to the status of a foreign entity's registration with the secretary of state.

V. Reinstating Inactive Domestic Entity

§ 1.10 Reinstating Inactive Domestic Entity

§ 1.10:1 Forfeited Existence—Texas Tax Code Chapter 171

The secretary of state has statutory authority to forfeit the charter, certificate, or registration of a domestic or foreign corporation, limited liability company, professional association, limited partnership, or foreign business trust that the comptroller of public accounts certifies has not revived its forfeited privileges.

The secretary of state is not required to notify a taxable entity of the forfeiture of its existence or registration. The taxable entity has already received statutory notification regarding the forfeiture of its corporate or business privileges from the comptroller under subchapter F of chapter 171 of the Texas Tax Code.

On forfeiture, the secretary of state changes the status of the taxable entity from "in existence" to "forfeited existence." While the secretary of state can provide the effective date of the forfeiture of an entity's certificate or registration, it is the comptroller who determines the effective date that a taxable entity forfeits its corporate or business privileges under Tax Code sections 171.251 and 17.2515.

The secretary of state has authority to revive the certificate or registration of a taxable entity after

forfeiture by the secretary of state. An application for reinstatement and request to set aside a tax forfeiture is governed by sections 171.312 through 171.315 of the Tax Code rather than the Texas Business Organizations Code or its source statutes. *See* Tex. Bus. Orgs. Code § 11.254. The revival and reinstatement of a taxable entity follows the same procedures used when reinstating a corporate entity.

Tax Code chapter 171 does not establish a time frame within which an entity must file an application for reinstatement with the secretary of state.

Section 171.313 requires the secretary of state to determine whether a taxable entity has filed each delinquent report and paid any delinquent tax before filing an application for reinstatement and setting aside the forfeiture. *See* Tex. Tax Code § 171.313(b). A tax clearance letter issued by the comptroller stating that the entity is in good standing for purposes of reinstatement fulfills this requirement, must accompany the application for reinstatement, and must be valid through the date of filing of the application for reinstatement.

An application for reinstatement and request to set aside forfeiture under Tax Code chapter 171 must be submitted on behalf of and executed by a person who was a managerial official or owner of the taxable entity at the time of forfeiture. In the case of a limited partnership, the application

for reinstatement would be submitted and executed by a person who was a partner in the partnership at the time of forfeiture.

The specific SOS form for making an application for reinstatement and request to set aside forfeiture is SOS Form 801 (form 1-8 in this chapter). The current filing fee for a taxable entity, other than a nonprofit corporation, is \$75. There is no filing fee assessed for an application for reinstatement and request to set aside a tax forfeiture filed on behalf of a nonprofit corporation.

**§ 1.10:2 Involuntary Terminations—
Texas Business
Organizations Code
Chapter 11**

Texas Business Organizations Code section 11.251 authorizes the secretary of state to involuntarily terminate the existence of a domestic entity if the secretary finds that—

- (1) the entity has failed to, and, before the 91st day after the date notice was mailed has not corrected the entity's failure to:
 - (A) file a report within the period required by law or pay a fee or penalty prescribed by law when due and payable; or
 - (B) maintain a registered agent or registered office in this state as required by law; or
- (2) the entity has failed to, and, before the 16th day after the date notice was mailed has not corrected the entity's failure to, pay a fee required in connection with the filing of its certificate of formation, or payment of the fee was dishonored when pre-

vented for payment by the state for payment.

Tex. Bus. Orgs. Code § 11.251(b).

Registered Agent and Office: The most frequent basis for involuntary termination of a domestic entity's existence is an entity's failure to maintain a registered agent or registered office address in Texas as required by law. Typically, notice of delinquency follows the receipt and filing of a resignation of registered agent or rejection of appointment. Notice of the need to designate a new registered agent or office is sent to the entity by certified mail. In fiscal year 2018, the secretary of state received 1,838 notices of nondelivery of the certified mailings sent to domestic entities. If an additional contact address is shown in the records of the secretary of state, additional notice may be sent by regular mail to the secondary address.

Dishonored Payment: Failure to satisfy the statutory fee for a certificate of formation will result in the involuntary termination of a domestic filing entity. An initial notice regarding non-payment or dishonor of payment of the formation fee is sent to the submitting party-payer name and address. If substitute payment is not received within the time frame specified in the initial contact letter, notice of the entity's failure to satisfy the formation fee and intent to involuntarily terminate the entity is sent to the registered agent at the registered office address of record by regular mail. The time frame for curing this deficiency-delinquency is fifteen days. The time given is shorter than the ninety days provided to cure other delinquencies because a person submitting payment also receives notice from the person's financial institution or credit card issuer.

Reinstatement: An involuntarily terminated entity may reinstate its existence by filing a certificate of reinstatement under Business Organizations Code section 11.253 and by correcting the circumstances that gave rise to the involun-

tary termination and any other circumstances that may exist of the types described by section 11.251(b). *See* Tex. Bus. Orgs. Code § 11.253. Additional fees and filings may be required depending on the circumstances that led to the involuntary termination and any intervening events that may require an amendment to the domestic entity's certificate of formation.

Pursuant to section 11.253(d), a certificate of reinstatement after involuntary termination may be filed at any time. However, the entity is considered to have continued in existence without interruption from the date of its involuntary termination only if the entity is reinstated before the third anniversary of the date of its involuntary termination. *See* Tex. Bus. Orgs. Code § 11.253(d).

A domestic entity that was involuntarily terminated for its failure to pay a fee required in connection with the filing of its certificate of formation is required to submit the certificate of reinstatement together with a fee sufficient to cover the filing fee for the reinstatement and the amount owed to the secretary of state.

A domestic entity that was involuntarily terminated for its failure to maintain a registered agent or registered office as required by law need not provide a separate statement of change of registered agent or office with its certificate of reinstatement. Each entity requesting reinstatement must provide a current registered agent and registered office in the certificate of reinstatement. A certificate of reinstatement that does not include current registered agent and registered office information cannot be filed and will be rejected.

SOS Forms 811 and 814 (forms 1-9 and 1-10, respectively, in this chapter) have been promulgated for filing a certificate of reinstatement. SOS Form 811 is the generic certificate of reinstatement form. SOS Form 814 is designed specifically for use by professional associations that have been involuntarily terminated for failing to

file an annual statement. If these forms are not used, the certificate of reinstatement must satisfy the requirements of section 11.253(b) and (c).

A certificate of reinstatement submitted on behalf of a domestic filing entity, other than a nonprofit corporation, requires a tax clearance letter issued by the comptroller stating that the entity is in good standing for purposes of reinstatement.

§ 1.10:3 Reinstatement after Voluntary Termination

Texas Business Organizations Code sections 11.201 and 11.202 permit the reinstatement of a domestic entity that has been voluntarily terminated if the owners, members, governing persons, or other persons specified by the Code approve the reinstatement in the manner provided by the title governing the entity and—

1. the termination was by mistake or inadvertent;
2. the termination occurred without the approval of the entity's governing persons when approval is required by the title governing the entity;
3. the process of winding up before termination had not been completed by the entity; or
4. the legal existence of the entity is necessary to convey or assign property, to settle or release a claim or liability, to take an action, or to sign an instrument or agreement.

Tex. Bus. Orgs. Code § 11.201(a).

The certificate of reinstatement of an entity that has been voluntarily terminated must be filed no later than the third anniversary of the effective date of the termination. Tex. Bus. Orgs. Code § 11.202(a).

An application for reinstatement following a voluntary termination submitted on behalf of a domestic filing entity, other than a nonprofit corporation, made pursuant to section 11.202 requires a tax clearance letter issued by the comptroller stating that the entity is in good standing for purposes of reinstatement. Tex. Bus. Orgs. Code § 11.202(e).

§ 1.10:4 Events That Might Give Rise to Rejection of Reinstatement

Entity Name Issues: Before filing for reinstatement, the secretary of state must determine whether the name of the entity seeking reinstatement is still available for purposes of its reinstatement. If the entity's name is no longer available for its use at the time of submission of the reinstatement filing, the instrument cannot be filed. In the case of a domestic entity, the reinstatement must be accompanied by a certificate of amendment to change the name of the domestic entity. In the case of a foreign entity, the reinstatement must be accompanied by an amendment to the registration for purposes of adopting an assumed name under which the entity may register to transact business.

No Registered Agent: Before submitting an application for reinstatement and request to set aside forfeiture, the practitioner should determine whether there is a need to update the entity's registered agent or registered office address. If the entity's registered agent submitted a resignation to the secretary of state during the period the entity was in a tax-forfeited status, the application for reinstatement and request to set aside forfeiture will be rejected. Acceptance of the application will be conditioned on the simultaneous submission of a statement of change of registered agent and registered office.

Entity Expired: While the vast majority of entities are formed with a perpetual duration, a domestic entity seeking reinstatement of its existence may be unable to do so if its certificate

of formation provides for a limited duration. If the duration of an entity expires between termination-forfeiture and reinstatement, the entity ceases to exist due to the expiration of its duration and no longer has an existence that may be reactivated. Consequently, a reinstatement may be filed after a tax forfeiture or involuntary termination as long as the entity would otherwise have continued to exist.

§ 1.10:5 Issues Faced by Involuntarily Terminated or Forfeited Entity

Pursuant to Texas Business Organizations Code section 11.356(b), a terminated entity may not continue its existence for the purpose of continuing the business for which it was formed unless the entity is reinstated. Tex. Bus. Orgs. Code § 11.356(b).

Section 11.001 defines a "terminated entity" as a domestic entity the existence of which has been—

1. terminated in a manner authorized or required by the Business Organizations Code, unless the entity has been reinstated in the manner provided by the Business Organizations Code, or
2. forfeited pursuant to the Texas Tax Code, unless the forfeiture has been set aside.

Tex. Bus. Orgs. Code § 11.001(4).

A terminated domestic filing entity continues in existence until the third anniversary of the effective date of its termination only for the purposes set forth in section 11.356, which include—

1. prosecuting or defending in the entity's name an action or proceeding brought by or against the terminated filing entity and

2. permitting the survival of an existing claim by or against the terminated filing entity.

Tex. Bus. Orgs. Code § 11.356(a)(1), (2).

Pursuant to section 11.001, an “existing claim” means—

1. a claim against an entity that existed before the entity’s termination and that is not barred by limitations, or
2. a contractual obligation incurred after termination.

Tex. Bus. Orgs. Code § 11.001(3).

An existing claim by or against a terminated filing entity is extinguished unless an action or proceeding is brought on the claim no later than the third anniversary of the date of termination of the entity. *See* Tex. Bus. Orgs. Code § 11.359.

While the secretary of state may accept and file an application for reinstatement submitted on behalf of an entity that has been involuntarily terminated or forfeited, the secretary’s reinstatement of the entity may not cure the issues that may be faced by the forfeited or involuntarily terminated entity. *See* Tex. Bus. Orgs. Code § 11.253.

Pursuant to sections 171.251 through 171.252 of the Tax Code, the managerial officials of a taxable entity that has forfeited its right to do busi-

ness are liable for the debts of an entity created or incurred in Texas after the date on which the report, tax, or penalty is due and before the corporate privileges are revived. These officials are liable as if the entity were a partnership and the managerial officials were partners in such partnership. Although the Tax Code provisions speak of “officers” and “directors,” the provisions also apply to noncorporate entities. *See Bruce v. Freeman Decorating Services, Inc.*, No. 14-10-00611-CV, 2011 WL 3585619 (Tex. App.—Houston [14th Dist.] Aug. 15, 2011, pet. denied) (mem. op.). This liability is not affected by the restoration of the taxable entity’s corporate privileges.

While a taxable entity whose existence has been forfeited under the Tax Code or involuntarily terminated under the Business Organizations Code may submit an application for reinstatement at any time, the secretary of state’s filing of the application and reactivation of the existence of an entity does not revive any claims that may have been extinguished under subchapter H of chapter 11 of the Business Organizations Code. *See Emmett Properties, Inc. v. Halliburton Energy Services, Inc.*, 167 S.W.3d 365 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (corporation bringing suit and reinstating its existence more than three years after its forfeiture by secretary of state cannot sue on preforfeiture claims).

VI. Certificates of Correction

§ 1.11 Certificates of Correction

§ 1.11:1 Procedure to Correct Filing Instrument

A domestic or foreign filing entity may correct a filing instrument that was filed with the secretary of state when the instrument is an inaccur-

rate record of the action referred to in the instrument, contains an inaccurate or erroneous statement, or was defectively executed. *See* Tex. Bus. Orgs. Code §§ 4.101–.105.

A certificate of correction must be executed by a person authorized by the Texas Business Organizations Code to execute the instrument being corrected. *See* Tex. Bus. Orgs. Code § 4.101(b).

This means that an entity's organizer must sign a certificate of correction to a certificate of formation. If the organizer is identified as John Doe, and Mary Smith, an initial member of the limited liability company, signs the certificate of correction, it will be rejected. However, if the organizer is identified as a corporation, limited liability company, or partnership (e.g., ABC Servco, Inc.), the certificate of correction need not be signed by the same person who signed the certificate of formation on behalf of the legal entity but may be signed by an authorized managerial official of the organizer.

A certificate of correction is not to be used as a less expensive alternative to a certificate of amendment. The secretary of state may subject a certificate of correction to greater scrutiny and may reject the submission of a certificate of correction if—

1. it appears that an amendment rather than a correction is being made to a formation instrument,
2. multiple corrections have been filed to correct the same filing instrument,
3. the filing instrument to be corrected has been on file for more than one year, or
4. the certificate of correction attempts to change a domestic nonprofit corporation to a special purpose nonprofit corporation governed by a law other than the Business Organizations Code.

Documents may be corrected to contain only those statements that lawfully could have been included in the original instrument. The certificate of correction may not be used to alter, include, or delete a statement that by its alteration, inclusion, or deletion would have caused the secretary of state to determine that the document did not conform to law. This means that a certificate of correction cannot be used to change the type of document filed. For example, a certificate of correction cannot be used to

change a certificate of formation of a domestic entity to an application for registration of a foreign entity (or vice versa) or an application for registration as a limited liability partnership to a certificate of formation for a limited partnership (or vice versa).

The filing of the certificate of correction relates back to the original date of the filing, except for those persons who are adversely affected by the correction, for whom the filing instrument is considered to have been corrected on the date the certificate of correction is filed. *See* Tex. Bus. Orgs. Code § 4.105(a), (b).

Corrections do not void or revoke the original filing; Business Organizations Code section 4.105(c) provides that any acknowledgment of filing issued by the secretary of state with respect to the effect of the filing is considered to apply to the instrument as corrected. *See* Tex. Bus. Orgs. Code § 4.105(c).

An assumed name certificate is not a filing instrument governed by the Business Organizations Code. Consequently, an assumed name certificate is not an instrument that can be corrected by filing a certificate of correction under Business Organizations Code chapter 4. If the information is materially misleading or inaccurate, the practitioner should consider filing a new assumed name certificate. *See* Tex. Bus. & Com. Code § 71.152.

§ 1.11:2 Corrections to Mergers or Conversions

Generally, the filing instrument to be corrected relates to a single entity. In the case of a filing instrument that involves multiple entities as parties to the transaction evidenced by the instrument, certain procedures should be taken to facilitate processing.

Only one correction filing is required to correct errors in the merger, conversion, or exchange

filing instrument. If the practitioner is using SOS Form 403 (form 1-11 in this chapter) to submit the certificate of correction, the best practice is to show the name and file number of any surviving entity to a merger, the converted entity in a conversion, and the acquiring entity in an interest exchange in the field that asks for the name of the entity submitting the correction instrument.

The certificate of correction should also include the name and file number of any merging filing entities, the name and file number of the converting entity, or the name of each acquired domestic filing entity, as applicable. The additional names and file numbers may be included on the form itself or provided as an attachment to the form. Failure to include the names and file numbers of the other filing entities will not be

grounds for refusal of the correction instrument; however, providing the additional information saves the secretary of state time and ensures that the correction instrument is properly indexed.

Even though the correction instrument may apply to multiple entities, the certificate of correction need not be signed by all parties that were required to sign the instrument being corrected. It is sufficient if the correction instrument is signed on behalf of a surviving party to the merger, the converted entity in a conversion, or an acquiring entity in the interest exchange.

The current fee for filing the certificate of correction is \$15 regardless of the number of entities that may be affected by the correction instrument.

VII. Delayed Effectiveness

§ 1.12 Delayed Effectiveness

§ 1.12:1 Effectiveness Delayed to Specific Date and Time

In general, a filing instrument takes effect on filing by the secretary of state. However, Texas Business Organizations Code section 4.052 allows an instrument to take effect after the time the filing instrument would otherwise take effect. *See* Tex. Bus. Orgs. Code § 4.052.

PRACTICE TIP: The review and processing of a filing instrument that will have its effectiveness delayed is facilitated if the filing instrument clearly and expressly provides a separate section or paragraph relating to the delayed effectiveness of the filing.

If the effectiveness of a filing instrument is to be delayed to a specific date and time, the future date may not be later than ninety days from the date of signing, and the time cannot be stated as

“12:00 A.M.” or “12:00 P.M.” *See* Tex. Bus. Orgs. Code § 4.052(b). In addition, the time must be stated as a specific time. For example, it is not sufficient to state that the instrument will be effective on a certain date “immediately after” or “immediately before” a stated time.

PRACTICE TIP: When drafting filing instruments for multijurisdictional transactions, note that all delayed effective dates and times will be recorded as the date and time in the time zone of the filing office—central standard time. For example, a delayed effective date and time stated in the filing instrument as June 1, 2020, at 12:01 A.M. eastern standard time will be evidenced in the certificate of filing and in the records of the secretary of state as May 31, 2020, at 11:01 P.M.

Delayed effectiveness is not permitted for name reservations, name registrations, statements of event or fact, or abandonment of filings before effectiveness. *See* Tex. Bus. Orgs. Code § 4.058.

Due to the effect and nature of a certificate of correction, the effectiveness of a correction may not be delayed.

See Tex. Bus. Orgs. Code § 4.056.

§ 1.12:2 Effectiveness Conditioned on Event or Fact

A filing instrument the effectiveness of which is conditioned on the occurrence of a future event or fact (“delayed condition”) must clearly and expressly state—

1. the manner in which the event or fact will cause the instrument to take effect and
2. the date of the ninetieth day after the date the instrument is signed.

Tex. Bus. Orgs. Code § 4.053(a)(2).

Texas Business Organizations Code section 4.055 requires the entity to file a statement confirming (1) that each event or fact on which the effect of the instrument is conditioned has been satisfied or waived and (2) the date and time on which the condition was satisfied or waived. See SOS Form 805 (form 1-12 in this chapter). The statement must be filed not later than the ninetieth day after the instrument is filed.

If the statement of event or fact is not filed, the filing instrument is not effective. In this case, the parties must either—

1. file a subsequent filing instrument to make the action or transaction evidenced by the original filing effective or
2. file a statement of abandonment of filing under section 4.057.

§ 1.12:3 Actions Taken at Time of Filing

When delaying the effectiveness of a filing instrument, it is important to note that the secretary of state updates its computer records and takes action to reflect the changes effected by the filing instrument as of the date of filing. *See* 1 Tex. Admin. Code § 79.73. This means that the filing history of the entity will be changed to show the filing of the filing instrument, the date of its filing, and the future date of its effectiveness or a notation (“condition”) to denote that the effectiveness is conditioned on the occurrence of a future event or fact.

The secretary of state also takes action to effect the actions referenced in the filing instrument at the time of filing. For example, a certificate of formation that has its effectiveness delayed to a future date and time will be reflected in the records of the secretary of state and will have an active status of “in existence.” In the case of a merger with a delayed effectiveness provision the secretary of state will change the status of any nonsurviving domestic party to the merger from an active status (“in existence”) to an inactive status (“merged”) on the date of filing.

Certificates of fact reflect what is evidenced in the computer records of the secretary of state. Consequently, a practitioner will not be able to obtain a certificate of status for the nonsurviving party to the merger that indicates that the status of the entity is “in existence” once the secretary of state accepts and files a certificate of merger even if the effectiveness of the merger was delayed to a later date and time.

VIII. Privacy Issues

§ 1.13 Privacy Issues

§ 1.13:1 Documents Subject to Public Access and Disclosure

Unless otherwise exempted by constitutional provision, statutory provision, or judicial decision, all documents on file with the secretary of state's corporations section, including correspondence, and information contained therein are subject to public access and disclosure under chapter 552 of the Texas Government Code.

§ 1.13:2 Social Security Numbers

The Texas Business Organizations Code does not require an individual to include a Social Security number in any filing instrument required or permitted to be filed with the secretary of state. While individual Social Security number information is not a statutory filing requirement, sometimes persons voluntarily provide such information in documents that are accepted, indexed, and recorded by the corporations section.

The secretary of state will redact entire Social Security numbers on documents displayed on the secretary of state's online access system, displayed on SOSDirect, and used for the production of copies in response to public information requests. Unredacted copies of the documents will be retained for access by secretary of state staff in response to requests from law enforcement or other authorized requestors.

§ 1.13:3 Public Information Reports

Many people remain unaware of the extent of access to public information reports.

Much of the information provided to the comptroller of public accounts under the Texas Tax Code is confidential under state law; however,

the Tax Code specifically provides that the information contained in a public information report (PIR) is not confidential. *See* Tex. Tax Code §§ 171.203, 171.207(2).

The purpose of the PIR is to provide a "snapshot" of the entity as of the date the report is filed. It is required to be filed only annually, in May. An entity is not required to file (nor is the comptroller required to accept) an "updated PIR" whenever an event occurs that changes the information provided in the report. Consequently, the information contained in the PIR may no longer be current when the information is accessed by a third party.

Once a corporation or limited liability company files its PIR with the comptroller, the comptroller forwards the report to the secretary of state. The secretary of state indexes the PIR against the entity's record. The corporations section maintains the PIR management information in its database. When changes to management information are reflected in a PIR, the information is updated by the secretary of state. Management information is accessible electronically through SOSDirect.

An individual whose name was included on a PIR but who was not an officer or director on the date the report was filed may file a sworn statement to that effect with the comptroller. The comptroller will then forward the sworn statement to the secretary of state to update the management information accordingly.

§ 1.13:4 Home Addresses and Other Expectations of Privacy

The secretary of state provides any information deemed to be public information to both the public and private sectors and cannot limit or restrict the purposes for which the information may be used by a requesting party.

If a client has an expectation of privacy regarding home address information, the practitioner should not use that address as the registered office address. Of course, if the registered agent has no address other than a home address, there can be no expectation of privacy.

When required to provide management address information in a filing instrument or public information report, the better practice is to provide a business office address rather than a home address.

IX. Restated Certificates of Formation—Issues

§ 1.14 Restated Certificates of Formation—Issues

ther amendment” made to the certificate of formation.

§ 1.14:1 Names and Addresses of Governing Authority

§ 1.14:2 Entities Created by Merger or Conversion

Texas Business Organizations Code section 3.059 requires a restated certificate of formation to restate the text of the certificate of formation, as amended, corrected, or restated, in its entirety. *See* Tex. Bus. Orgs. Code § 3.059. While organizer information may be omitted, the secretary of state requires a restated certificate to include the number, names, and addresses of the entity’s governing authority. Sections 3.060(a), 3.061(a), and 3.0611 permit the entity to update the certificate of formation provision relating to the governing authority by providing the names and addresses of the current governing authority. These sections provide supplemental filing requirements for restated certificates of formation that are filed by for-profit and nonprofit corporations and limited liability companies. The use of the term *may* within the cited sections does not mean that the requirement is optional or discretionary. The term *may* permits the entity to provide updated information in lieu of the information initially provided in its certificate of formation. Updating the information would not be seen as a “further amendment.” Also note that an update to the governing authority is not deemed to be a “fur-

As noted in section 1.14:1 above, a restated certificate of formation restates the text of its certificate of formation, as amended, corrected, or restated, in its entirety. If the domestic filing entity was formed pursuant to a plan of merger or conversion, the additional statements required under Texas Business Organizations Code section 3.005(a)(7) must be included. *See* Tex. Bus. Orgs. Code § 3.005(a)(7).

§ 1.14:3 Legislative Change

Texas Business Organizations Code section 3.059 was amended by the Eighty-third Legislature, Senate Bill 847, effective September 1, 2013, to eliminate the requirement that a restated certificate of formation that makes further amendments must “identify by reference or description each added, altered, or deleted provision.” *See* Tex. Bus. Orgs. Code § 3.059. Now a restated certificate of formation that makes further amendments may simply state language to the effect that “the Certificate of Formation is amended and restated in its entirety as shown in the attachment.”

X. Public Benefit Corporations

§ 1.15 Overview of Public Benefit Corporations

Effective September 1, 2017, Texas has a new type of corporation known as a “public benefit corporation.” The statutory provisions regarding the public benefit corporation, otherwise referred to as a “PBC” (or “B-Corp” in some other states), are found in Tex. Bus. Orgs. Code §§ 21.951–.959. *See* Acts 2017, 85th Leg., R.S., ch. 776, § 4 (H.B. 3488), eff. Sept. 1, 2017.

A PBC is formed with the intent to produce a public benefit or benefits and to operate in a responsible and sustainable way. Tex. Bus. Orgs. Code § 21.953(a). Public benefit means a positive effect, or a reduction of a negative effect, on one or more categories of persons, entities, communities, or interests, other than shareholders in their capacities as shareholders. The effects may include those of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological nature. Tex. Bus. Orgs. Code § 21.952(1).

Unlike a for-profit corporation, which must operate solely for the purpose of maximizing the financial return to the shareholders, the PBC balances the shareholders’ interests with that of the public benefit declared by the PBC and the best interests of those persons materially affected by the PBC’s conduct. Tex. Bus. Orgs. Code § 21.953(b). The board of directors must manage or direct the business or affairs of the PBC in a manner that balances those same interests. Tex. Bus. Orgs. Code § 21.956(a). When making a decision implicating this balance, a director satisfies the duties to shareholders and the PBC if the decision is both informed and disinterested and is not a decision that no person of ordinary, sound judgment would approve. Tex. Bus. Orgs. Code § 21.956(c). The certificate of formation for the PBC may include a provision

that any disinterested failure to satisfy these requirements does not constitute an act or omission not in good faith or a breach of the duty of loyalty. Tex. Bus. Orgs. Code § 21.956(d). A director does not owe any duty to any person because of any interest the person has in the specified public benefit or benefits or any interest materially affected by the PBC’s conduct. Tex. Bus. Orgs. Code § 21.956(b).

§ 1.15:1 Distinguished from Nonprofit and Social Purpose Corporations

The Texas Business Organizations Code is clear that the PBC is not a nonprofit corporation. *See* Tex. Bus. Orgs. Code §§ 2.008, 3.007(e), 21.954(e). The PBC is also distinguished from a “social purpose” corporation already allowed under the Code. Tex. Bus. Orgs. Code § 3.007(d).

If a corporation elects to be a PBC, it is subject to the remaining provisions of the Code applicable to for-profit corporations. Tex. Bus. Orgs. Code § 21.951(b). In the event of a conflict between the PBC subchapter and the other for-profit corporation Code provisions, the PBC subchapter controls. Tex. Bus. Orgs. Code § 21.951(c).

§ 1.15:2 Certificate of Formation Requirements

Tex. Bus. Orgs. Code § 3.007(e) provides that a PBC must include the following in its initially filed certificate of formation or in a certificate of formation amended in accordance with Tex. Bus. Orgs. Code § 21.954: (1) one or more specific public benefits, as defined by Tex. Bus. Orgs. Code § 21.952, to be promoted by the corporation; and (2) instead of the statement required by Tex. Bus. Orgs. Code § 3.005(a)(2), a statement that the filing entity is a for-profit

corporation electing to be a public benefit corporation.

The secretary of state has not yet promulgated a form to use in forming a PBC. Therefore, the required language would need to be included either in a form custom-drafted by the practitioner or on SOS Form 201 in the “Supplemental Provisions/Information” box. See form 2-1 in this manual.

§ 1.15:3 Corporate Name Requirements

The name of the PBC may contain the words “public benefit corporation” or the abbreviation “P.B.C.” or the designation “PBC” instead of the words “company,” “corporation,” “incorporated,” or “limited” (or any abbreviation thereof). Tex. Bus. Orgs. Code § 21.953(c), (e). In the event the name does not include public benefit corporation, P.B.C., or PBC, it must provide notice in some other way to its shareholders that it is a public benefit corporation (unless the shares are registered under the Securities Act of 1933). Tex. Bus. Orgs. Code § 21.953(c), (d). Such notice would presumably be accomplished by the requirement that the stock certificate (or the notice required by section 3.205 for uncertificated ownership interests) specify that the corporation is a public benefit corporation. Tex. Bus. Orgs. Code § 21.955.

§ 1.15:4 Notice Requirements

A PBC, at least biennially, shall provide to its shareholders (or to the public if required by the certificate of formation or the bylaws) a statement pertaining to the PBC’s promotion of the public benefit or benefits and promotion of the best interests of those materially affected by the PBC’s conduct. This statement must include:

1. the objectives the board of directors has established to promote the public benefit or benefits and interests;

2. the standards the board of directors has adopted to measure the PBC’s progress in promoting the public benefit or benefits and interests;
3. objective factual information based on those standards regarding the PBC’s success in meeting the objectives for promoting the public benefit or benefits and interests; and
4. an assessment of the PBC’s success in meeting the objectives and promoting the public benefit or benefits and interests.

Tex. Bus. Orgs. Code § 21.957.

All notices of shareholder meetings must contain a statement to the effect that the corporation is a public benefits corporation governed by chapter 21, subchapter S, of the Texas Business Organizations Code. Tex. Bus. Orgs. Code § 21.957.

§ 1.15:5 Converting between For-Profit Corporation and Public Benefit Corporation

See Tex. Bus. Orgs. Code § 21.954 regarding entities desiring to be governed as a PBC (or convert shares to such) or a PBC desiring to convert to a non-PBC entity, all of which require the approval of the owners of two-thirds of the outstanding shares of the corporation entitled to vote on the matter. However, a nonprofit corporation or nonprofit association may not convert to a PBC. Tex. Bus. Orgs. Code § 21.954(e).

§ 1.15:6 Derivative Actions

A shareholder of a PBC may maintain a derivative action on behalf of the PBC to enforce compliance by its board of directors with the requirements to manage or direct the business and affairs of the PBC in a manner that balances its various interests. Tex. Bus. Orgs. Code § 21.958. See Tex. Bus. Orgs. Code § 21.958(a)

for the definition of “shareholder” in the context of derivative suits.

XI. Trademarks and Service Marks

§ 1.16 State vs. Federal Registration

The commentary in this part addresses trademark and service mark registration in the state of Texas. For federal registration of trademarks and patents, refer to the Trademarks and Patents sections, respectively, of the United States Patent and Trademark Office website, www.uspto.gov. For copyright registrations, refer to the United States Copyright Office website, www.copyright.gov.

§ 1.17 Definitions

Trademarks identify tangible goods. A trademark is a word, name, symbol, or device, or any combination of those terms, used by a person to identify and distinguish the person’s goods, including a unique product, from the goods manufactured or sold by another, and indicate the source of the goods, regardless of whether the source is unknown. Tex. Bus. & Com. Code § 16.001(10).

Service marks identify services. A service mark is a word, name, symbol, or device, or any combination of those terms, used by a person to identify and distinguish the services of one person, including a unique service, from the services of another, and indicate the source of the services, regardless of whether the source is unknown. The term also includes the titles, character names used by a person, and other distinctive features of radio or television programs, regardless of whether the titles, character names, or programs advertise the sponsor’s goods. Tex. Bus. & Com. Code § 16.001(8).

The word *mark* is often used generally to refer to both trade and service marks. *See* Tex. Bus. & Com. Code § 16.001(5).

PRACTICE TIP: Trade and service marks are commonly referred to as brand names, logos, or slogans. Trade names, on the other hand, are terms used only to identify a business organization, rather than to distinguish the goods or services provided by the business, and are not registrable. *See* Tex. Bus. & Com. Code § 16.001(9).

§ 1.18 Registration of Marks

Marks used in connection with the sale of goods or provision of services in Texas may be registered with the secretary of state. *See* Tex. Bus. & Com. Code § 16.051. The secretary of state has promulgated certain forms designed to meet statutory requirements and facilitate filings with the office. However, use of the forms is permissive, and applicants may draft their own application as long as they provide all required information in the application. *See* Tex. Bus. & Com. Code § 16.052. The registration of a mark with the secretary of state expires on the fifth anniversary of the date of registration. Tex. Bus. & Com. Code § 16.059. *See* SOS Forms 901 through 904 (forms 1-13 through 1-16 in this chapter).

PRACTICE TIP: The secretary of state provides standard forms that practitioners can use to file a trademark or service mark application. Use of the forms is recommended but not mandatory. The secretary of state’s office recommends that applicants mail, rather than fax, applications for trademarks and service marks to the Secretary of State, P.O. Box 13697, Aus-

tin, TX 78711-3697. A cover letter with the applicant's phone number should accompany the application, along with payment by check or, if payment by credit card is desired, SOS Form 807. Once the application is submitted, along with the necessary documents, it undergoes an examination process. Upon approval, the secretary of state mails a certificate of registration to the applicant. See Tex. Bus. & Com. Code §§ 16.053, 16.058.

§ 1.19 Effect of Registration

The registration of a mark with the secretary of state creates a statewide priority of rights in the mark against any other person who subsequently adopts the same or a confusingly similar mark. Registration also provides “constructive notice” to all persons in the state of Texas of the priority of the registered mark and provides the owner with certain procedural advantages when the owner seeks judicial relief for infringement. See Tex. Bus. & Com. Code §§ 16.060, 16.102(b), (c), 16.104. For these reasons, it is beneficial for an owner of a mark who does business in Texas to register a mark with the secretary of state.

XII. Ethics

§ 1.20 Who Is the Client When Forming a New Business Entity?

As with any legal matter, it is important to identify precisely who the client is for purposes of representation. It is also important that all parties understand who the attorney does and does not represent. When forming a new business entity, the attorney can represent an individual owner, all the owners collectively, or the business entity itself. Clarifying issues of representation is even more critical when forming a new entity because of the numerous potential conflicts of interest that may, and often do, arise when dealing with several parties.

§ 1.20:1 Representing Owners

The attorney may potentially represent a single owner or several owners during formation of an entity and then transition to representing the entity after formation. This transition should be clearly provided for in the retainer agreement and services contract between the attorney and the individual(s). Further, it may require additional authorizations from other owners or

authorized personnel in the business before the transition may take effect. This situation has two potential ethical considerations: (1) representing the individual owner may create potential conflicts of interest that prohibit later representation of the entity, and (2) communicating with other owners may inadvertently create unintended attorney-client relationships, with the attendant duties to avoid conflicts of interest that arise when representing multiple clients.

The Texas Disciplinary Rules of Professional Conduct prohibit an attorney from representing a person “if the representation of that person (1) involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client . . . or (2) reasonably appears to be or become adversely limited by the lawyer’s or law firm’s responsibilities to another client.” Tex. Disciplinary Rules Prof’l Conduct R. 1.06(b), *reprinted in* Tex. Gov’t Code Ann., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9). If the conflict is not likely to affect representation, the attorney must obtain written informed consent from the affected clients. See Tex. Disciplinary Rules Prof’l Conduct R.

1.06(c) (An attorney may represent a client in the event of a conflict of interest if “(1) the lawyer reasonably believes the representation of each client will not be materially affected; and (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.”).

The comments to the disciplinary rules state clearly that an attorney “should not give advice to an unrepresented person.” Tex. Disciplinary Rules Prof’l Conduct R. 4.03 cmt. Thus, it is best practice when representing one owner to thoroughly document and preferably have written acknowledgment from each nonclient owner that such a nonclient is not the client and has not been given individual legal advice.

In addition to these concerns, the attorney may discover after representation has already begun that previously unknown adverse interests exist between individual owners, or that new adverse interests have arisen between owners, that prohibit further representation of the initial client.

§ 1.20:2 Representing Business Entities

Tex. Disciplinary Rules Prof’l Conduct R. 1.12 provides that an attorney employed or retained by an organization represents the entity and that “[i]n dealing with an organization’s directors,

officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.” Tex. Disciplinary Rules Prof’l Conduct R. 1.12(e). The constituents of the organizational client, whether incorporated or an unincorporated association, “include its directors, officers, employees, shareholders, members, and others serving in capacities similar to those positions or capacities.” Tex. Disciplinary Rules Prof’l Conduct R. 1.12 cmt. 2.

Comment 1 to Rule 1.12 recognizes that “[u]nlike individual clients who can speak and decide finally and authoritatively for themselves, an organization can speak and decide only through its agents or constituents such as its officers or employees,” and that “[i]n effect, the lawyer-client relationship must be maintained through a constituent who acts as an intermediary between the organizational client and the lawyer.” Tex. Disciplinary Rules Prof’l Conduct R. 1.12 cmt. 1. Because client communications will be conducted through constituent intermediaries, the constituents should be informed in writing that (1) the lawyer represents only the entity and not any individual constituent of the entity and (2) any information supplied by any of them must be shared with other decision-makers for the entity but will remain confidential to the outside world.

[Reserved]

Form 1-1

Effective June 1, 2018, the name a filing entity seeks to use must be “distinguishable in the records of the secretary of state” from names used by existing entities. *See* Tex. Bus. Orgs. Code § 5.053; Acts 2017, 85th Leg., R.S., ch. 503, § 3 (H.B. 2856), eff. June 1, 2018. Instructions that accompany secretary of state forms have not been updated to reflect this new standard as of the publication date of the latest supplement of this manual. See section 1.1:2 in this manual for more information on entity name availability.

**Consent to Use of Similar Name
(SOS Form 509)**

Form 1-1

General Information
(Consent to Use of Similar Name)

The attached form is drafted to meet minimal statutory filing requirements pursuant to the relevant code provisions. This form and the information provided are not substitutes for the advice and services of an attorney.

Commentary

A proposed name for an entity can be similar to an existing name only if the holder of the existing name provides notarized consent. Tex. Bus. Orgs. Code § 5.053. Existing names include the names of active Texas filing entities, the names and fictitious names of active registered foreign filing entities, reserved names, and registered names.

This form can be used by the holder of an existing name to consent to the use of a similar name as the name of a filing entity or foreign filing entity for the purpose of submitting a filing instrument to the secretary of state. Use of this form is permissive. Consent can be given in any written format, but the signature of the person providing consent must be notarized. A proposed name cannot be “the same as” or “deceptively similar to” an existing name, even if the holder of the existing name consents.

The holder of an existing name is not required to give consent. Consent does not authorize the use of a name in Texas in violation of a right of another under the Trademark Act of 1946, as amended (15 U.S.C. Section 1051 et seq.); Chapter 16 or 71, Business & Commerce Code; or common law. The secretary of state does not enforce these rights. Once the secretary of state files an instrument based on written consent to the use of a similar name, consent cannot be withdrawn. The secretary of state cannot enforce any private agreements or conditions the parties may have entered into regarding consent to use of the similar name. *Questions about consent should be addressed to a private attorney.*

Texas Administrative Code, title 1, part 4, chapter 79, subchapter C sets out the rules for determining whether names are the same, deceptively similar, or similar. These rules may be viewed at www.sos.state.tx.us/tac/index.shtml.

Instructions for Form

- Item 1: Enter the name of the entity or individual who holds the existing name.
- Item 2: Enter the proposed name.
- Execution: The form must be signed by the person who holds the existing name; if the existing name is held by an entity, an individual who is authorized to act on behalf of the entity must sign the form. The signed consent must be notarized.

A person commits an offense under section 4.008 of the BOC if the person signs or directs the filing of a filing instrument the person knows is materially false with the intent that the instrument be delivered to the secretary of state for filing. The offense is a Class A misdemeanor unless the person's intent is to harm or defraud another, in which case the offense is a state jail felony.

- Submission: Submit the form with the relevant filing instrument. *Do not submit separately from the relevant filing instrument.* If written consent is not submitted with the relevant filing instrument, the secretary of state will not be able to take the consent into consideration.

Revised 06/15

Form 1-6

Effective June 1, 2018, the name a filing entity seeks to use must be “distinguishable in the records of the secretary of state” from names used by existing entities. *See* Tex. Bus. Orgs. Code § 5.053; Acts 2017, 85th Leg., R.S., ch. 503, § 3 (H.B. 2856), eff. June 1, 2018. Instructions that accompany secretary of state forms have not been updated to reflect this new standard as of the publication date of the latest supplement of this manual. See section 1.1:2 in this manual for more information on entity name availability.

**Certificate of Conversion of a Professional Association Converting
to a Professional Limited Liability Company
(SOS Form 645)**

Form 1-6

Form 645—General Information
(Certificate of Conversion of a Professional Association
Converting to a Professional Limited Liability Company)

The attached form is designed to meet minimal statutory filing requirements pursuant to the relevant code provisions. This form and the information provided are not substitutes for the advice and services of an attorney and tax specialist.

Commentary

Important: If either the professional association or the professional limited liability company is a foreign or out-of-state entity, the conversion must be permitted by the laws of the foreign or out-of-state jurisdiction. BOC §§ 10.101(d), 10.102(c). It is up to the submitter to determine whether a conversion involving a foreign or out-of-state entity is permitted by the laws of the foreign or out-of-state jurisdiction. Additional filings may be required in the foreign or out-of-state jurisdiction. This form is not drafted for use in other jurisdictions.

A professional association may convert into a professional limited liability company by adopting a plan of conversion in accordance with section 10.101 of the Texas Business Organizations Code (BOC) and filing a certificate of conversion with the secretary of state in accordance with sections 10.154 and 10.155 of the BOC. As defined in section 1.002 of the BOC, conversion means the continuance of a Texas entity as a foreign entity of any type, the continuance of a foreign entity as a Texas entity of any type, or the continuance of a Texas entity of one type as a Texas entity of another type. As used in the BOC and in this form, “converting entity” means the entity that existed before the conversion; “converted entity” means the entity resulting from a conversion. This form may be used when a professional association is the converting entity and the converted entity is a professional limited liability company.

Instructions for Form

- **Converting Entity Information:** The certificate of conversion is filed by the professional association and must set forth the legal name of the professional association and its jurisdiction of organization as part of the certificate. It is recommended that the date of formation and file number, if any, assigned by the secretary of state be provided to facilitate processing of the document.
- **Converted Entity Information:** As the entity following the conversion, the professional limited liability company is the converted entity. The certificate of conversion must set forth the legal name of the professional limited liability company and its jurisdiction of formation.
- **Converted Entity Name:** If the professional limited liability company is a Texas professional limited liability company, the name of the professional limited liability company will be checked for availability in accordance with section 5.053 of the BOC. If the professional limited liability company name is the same as, deceptively similar to, or similar to the name of an existing domestic or foreign filing entity, or any name reservation or name registration filed with the secretary of state, the document cannot be filed. However, if the conflicting entity name is the name of the converting professional association, the professional limited liability company name will be accepted.
- **Plan of Conversion:** Unless the professional association opts to complete the Alternative Statements section of the form, a plan of conversion conforming to the requirements of section 10.103 of the BOC must be attached to the certificate of conversion.

Form 1-7

Effective June 1, 2018, the name a filing entity seeks to use must be “distinguishable in the records of the secretary of state” from names used by existing entities. *See* Tex. Bus. Orgs. Code § 5.053; Acts 2017, 85th Leg., R.S., ch. 503, § 3 (H.B. 2856), eff. June 1, 2018. Instructions that accompany secretary of state forms have not been updated to reflect this new standard as of the publication date of the latest supplement of this manual. See section 1.1:2 in this manual for more information on entity name availability.

**Information on Converting a Foreign Entity to a
Texas Filing Entity
(SOS Form 647)**

Form 1-7



Information on Converting a Foreign Entity to a Texas Filing Entity

This information is not a substitute for the advice and services of an attorney and tax specialist.

The Texas Business Organizations Code ("BOC") requires filing with the Texas secretary of state to convert, or "re-domesticate," a foreign or out-of-state entity to any of the following Texas entity types:

- corporation (for profit, nonprofit, professional)
- limited liability company (including professional LLC and series LLC)
- limited partnership
- professional association
- cooperative association

To convert a foreign entity to any of the above Texas entity types, the converting entity must adopt a plan of conversion that complies with BOC §10.103 and file with the Texas secretary of state (1) a certificate of conversion that complies with BOC § 10.154, along with (2) a certificate of formation for the converted Texas entity that complies with BOC chapter 3, including the additional statements for entities formed by conversion required by § 3.005(a)(7) (not included on secretary of state forms).

Important: Not all jurisdictions permit conversions. For a cross-jurisdiction conversion to be effective, the law of both jurisdictions must permit the transaction and be followed. This document provides information about the Texas requirements; the entity's governing documents and the law of the other jurisdiction must also be consulted. If the jurisdiction of formation of the converting entity permits the conversion, additional filings may be required there.

Converted Entity Name: The converted (Texas) entity name must be available under BOC § 5.053. If the converted entity name is the same as, deceptively similar to, or similar to the name of an existing domestic or foreign filing entity, or any name registration or reservation filed with the secretary of state, the conversion cannot be filed. However, the name of the converting entity is not cause for rejection.

Tax Clearance: Evidence that the required franchise taxes have been paid or that the converted (Texas) entity is liable for the payment of required franchise taxes must be included. This requirement may be satisfied by either: (1) a certificate of account status from the Texas Comptroller of Public Accounts indicating that the converting entity is in good standing having no franchise tax reports or payments due (must be valid through effective date of conversion); or (2) a statement in the certificate of conversion that the converted entity is liable for payment of the required franchise taxes.

For tax certificates or questions on tax status, contact the Tax Assistance Section of the Texas Comptroller of Public Accounts at (512) 463-4600, (800) 252-1381 or tax.help@cpa.state.tx.us.

Automatic Withdrawal of Registration: Upon conversion to any of the above Texas entity types by a foreign entity registered to transact business in Texas, the foreign entity registration is automatically withdrawn. Include the secretary of state file number for the registration in the certificate of conversion.

Fees: The filing fee for a certificate of conversion is **\$300** (\$50 for nonprofit corporation or cooperative association) **plus the fee for filing the certificate of formation** (typically \$300; \$25 for nonprofit corporation or cooperative association; \$750 for professional association or limited partnership).

Fees may be paid by personal checks, money orders, LegalEase debit cards, or American Express, Discover, MasterCard, and Visa credit cards. Checks or money orders must be payable to the secretary of state through a U.S. bank or financial institution. Fees paid by credit card are subject to a statutorily authorized convenience fee of 2.7 percent of the total fees.

Form 647
Revised 05/11

Form 1-11

Effective June 1, 2018, the name a filing entity seeks to use must be “distinguishable in the records of the secretary of state” from names used by existing entities. *See* Tex. Bus. Orgs. Code § 5.053; Acts 2017, 85th Leg., R.S., ch. 503, § 3 (H.B. 2856), eff. June 1, 2018. Instructions that accompany secretary of state forms have not been updated to reflect this new standard as of the publication date of the latest supplement of this manual. See section 1.1:2 in this manual for more information on entity name availability.

**Certificate of Correction
(SOS Form 403)**

Form 1-11

Form 403—General Information
(Certificate of Correction)

The attached form is drafted to meet minimal statutory filing requirements pursuant to the relevant code provisions. This form and the information provided are not substitutes for the advice and services of an attorney and tax specialist.

Commentary

Subchapter C of chapter 4 of the Texas Business Organizations Code (BOC) governs a certificate of correction. A filing instrument that is an inaccurate record of the event or transaction evidenced by the instrument, that contains an inaccurate or erroneous statement, or that was defectively or erroneously signed, sealed, acknowledged or verified may be corrected by filing a certificate of correction (BOC §4.101). A filing instrument may be corrected to contain only those statements that the governing law authorizes or requires to be included in the original filing instrument. A certificate of correction may not alter, add, or delete a statement that by its alteration, addition or deletion would have caused the secretary of state to determine that the filing instrument did not conform to the requirements of applicable law at the time of filing (BOC § 4.102).

After the secretary of state files the certificate of correction, the filing instrument is considered to have been corrected on the date the filing instrument was originally filed with one exception. As to a person who is adversely affected by the correction, the filing instrument is considered to have been corrected on the date the certificate of correction is filed.

Instructions for Form

- **Item 1—Entity Information:** The certificate of correction must contain the legal name of the entity. *If the certificate of correction corrects the name of the entity, the name as it currently appears on the records of the secretary of state should be stated.* It is recommended that the file number assigned by the secretary of state be provided to facilitate processing of the document.
- **Item 2—Filing Instrument to be Corrected:** Identify the filing instrument to be corrected by description and date of filing with the secretary of state. Example: “Certificate of formation filed on January 2, 2009.” If the filing instrument to be corrected is a merger, conversion or exchange, additional instructions are found on page 2 of this form.

Identification of Errors and Corrections: Corrections may be made to the entity name, registered agent name, registered office address, stated purpose, or stated duration by checking the applicable box in this section and stating, in corrected form, the portion of the instrument to be corrected. If the necessary corrections are other than those provided for by the check boxes, please use the section entitled “Identification of Other Errors and Corrections.”

Correction to Entity Name: The correction to an entity name will require the secretary of state to determine the availability of the entity name as corrected. If the entity name, as corrected, is the same as, deceptively similar to, or similar to the name of any existing domestic or foreign filing entity (other than the entity filing the correction), or any name reservation or registration filed with the secretary of state, the correction cannot be filed (BOC § 5.053).

Form 1-13**Form 901—Instructions
(Trade or Service Mark Application)**

The attached form is designed to meet minimal statutory filing requirements pursuant to the relevant code provisions. The form and the information provided are not substitutes for the advice and services of an attorney.

General Information

Trade and service marks are commonly referred to as brand names, logos or slogans. Trademarks are used to identify tangible goods. Service marks are used to identify services. The term “mark” is used to refer to both trademarks and service marks.

Trade names not registrable. “Trade names” are terms used only to identify a business organization, rather than to distinguish the goods or services provided by the business. A company name may be viewed to be merely a trade name, instead of a mark, if it is advertised in such a way that it attracts little attention, is used in close proximity to an address or phone number, or is dominated by the presence of another mark. However, a company name may be registered if it is shown to function as a mark.

Effect of registration. The registration of a mark with the secretary of state creates a statewide priority of rights in the mark against any other person who subsequently adopts the same or a confusingly similar mark. Registration also provides “constructive notice” to all persons in the state of Texas of the priority of the registered mark and provides the owner with certain procedural advantages when the owner seeks judicial relief for infringement. For these reasons, it is beneficial for an owner of a mark who does business in Texas to register a mark with the secretary of state.

Applicant should conduct a conflict check. Since identical or confusingly similar marks may not be registered by more than one person, a person planning to use or register a mark should take steps to determine whether others have priority of rights to that mark. Although checking the active registrations on file with the Secretary of State can be a useful step, the absence of a conflicting registration on file does not mean that no one else claims priority of rights in the mark.

Requirements for Registration

Mark Must Be In Use: Registration of marks in Texas is based on actual use of the mark in Texas commerce. For example, before an application can be submitted to the secretary of state, the trademark must be used on a product sold or distributed in Texas, or the service mark must be used in association with services rendered in Texas (during advertising or sale). A proposed mark may not be “reserved” prior to its actual use in Texas commerce or before the submission of a properly completed and filed application. If an application is submitted prior to actual use, registration will be refused, and the processing fee submitted with the application will not be refunded.

Mark Must Be Distinctive: Only distinctive words, names, symbols, devices, or logos are entitled to registration. A designation that is primarily a surname, or that is commonly used in describing the product or service, or that directly describes the qualities or characteristics of a product or service is not distinctive on first use and not entitled to registration. For example, the terms “Food & Beverage On-Line” would not be entitled to registration when used in association with “a news and information service for the food processing industry contained in a database” since such terms would be merely descriptive of such a service. However, sometimes a designation that is not inherently distinctive may acquire distinctiveness through at least five (5) years of continuous and substantially exclusive use.

Instructions for Application

Type or print in black ink in English, subject to the provisions of § 93.31 of 1 Texas Administrative Code Chapter 93. Use of the application form is recommended, but not mandatory. Submit your application along with a drawing, specimens, and filing fee of \$50 per classification:

- by mail to the Secretary of State, PO Box 13697, Austin, Texas 78711-3697;
- fax with credit card information (Form 807) to (512) 463-5709; or
- delivery to the James Earl Rudder Office Building, 1019 Brazos, Austin, Texas 78701.

- Item 1:** The applicant should be the person who owns the mark and controls the use of the mark and the quality of the goods or services. If the applicant is an individual sole proprietor doing business under an assumed name (“d/b/a”), then provide the individual’s name, followed by the assumed name of the business. If the applicant is a general partnership or joint venture, then provide the name of the partnership or joint venture. If the applicant is an organized entity, such as a corporation, limited liability company, or limited partnership, then provide the legal name of the organized entity as shown in its formation document (e.g., ABC Business Company, Inc.)
- Item 2:** Provide the business address of the applicant. (During the examination process, the secretary of state will send correspondence regarding the application to the submitter address provided in the cover letter, envelope, or enclosed check.)
- Item 3:** If the applicant named in Item 1 is a corporation, limited liability company, limited partnership, general partnership, or other business entity, identify the type of business organization and the state under whose laws the entity was incorporated or organized. Out-of-state applicants should also submit invoices or other material demonstrating the sale of goods or the rendition of services in Texas commerce.
- Item 4:** If the applicant is organized as a general or limited partnership, then provide the names of all general partners.
- Item 5:** *Name and/or Description of the Mark.* Describe the mark exactly as it appears in the samples of use and drawing sheet accompanying the application in Item 5A. The description in Item 5A, the drawing of the mark, and the samples of use provided must match.
Color Claim. If color is claimed as a feature of the mark, check the “yes” box in 5B. If no color is claimed, check the “no” box in 5B. If the “yes” box is checked, list the color(s) claimed in 5C, and list the location of each color in 5D.

The applicant can seek to register only one mark per application; a single application may not be used to register multiple variations or multiple color combinations.

- Item 6:** A disclaimer may be included in an original application. Generally, components that are generic or descriptive of the goods or services would be disclaimed (e.g., an outline of the state, a geographic term of origin, or words that are commonly used to describe the goods or services). An applicant cannot disclaim all elements of the proposed mark. A properly worded disclaimer might be: Without waiving any right at common law, no claim is made to the exclusive right to use of _____ apart from the mark as shown.

Item 7: State the number(s) of the class(es) in which the goods or services belong. **Please note, use of this form is recommended for an applicant seeking to register a mark in two or fewer classes.**

For assistance with classifying goods or services, see the chart below or the Acceptable Identification of Goods and Services Manual at www.uspto.gov. If you are unsure of the class, leave this item blank.

Goods

Class 1: Chemicals
 Class 2: Paints
 Class 3: Cosmetics & Cleaning Preparations
 Class 4: Lubricants & Fuels
 Class 5: Pharmaceuticals
 Class 6: Metal Goods
 Class 7: Machinery
 Class 8: Hand Tools
 Class 9: Electrical & Scientific Apparatus
 Class 10: Medical Apparatus
 Class 11: Environmental Control Apparatus
 Class 12: Vehicles
 Class 13: Firearms
 Class 14: Jewelry
 Class 15: Musical Instruments
 Class 16: Paper Goods & Printed Matter
 Class 17: Rubber Goods
 Class 18: Leather Goods
 Class 19: Non-metallic Building Materials
 Class 20: Furniture and articles not otherwise classified

Class 21: Housewares & Glass
 Class 22: Cordage & Fibers
 Class 23: Yarns & Threads
 Class 24: Fabrics
 Class 25: Clothing
 Class 26: Fancy Goods (e.g., buttons, ribbons)
 Class 27: Floor Coverings
 Class 28: Toys & Sporting Goods
 Class 29: Meats & Processed Foods
 Class 30: Staple Foods (e.g., coffee, sugar)
 Class 31: Natural Agricultural Products
 Class 32: Light Beverages
 Class 33: Wine & Spirits
 Class 34: Smokers' Articles

Services

Class 35: Advertising & Business
 Class 36: Insurance & Financial
 Class 37: Building Construction & Repair
 Class 38: Telecommunications
 Class 39: Transportation & Storage
 Class 40: Treatment of Materials
 Class 41: Education & Entertainment
 Class 42: Computer, scientific and legal
 Class 43: Hotels and restaurants
 Class 44: Medical, beauty and agricultural
 Class 45: Personal

For each class listed on the application, describe clearly and concisely the goods or the services currently sold or provided by the applicant on or in connection with which the mark is being used. Limit the description of goods or services to those goods or services under the same class heading.

For each class listed on the application, accurately state the date on which the mark was first publicly used to identify the goods or services being marketed. Both dates of first use "Anywhere" and "in Texas" must be indicated on the application. (If the first use was in Texas, both dates will be the same). State the month, day and year for each date of first use, e.g., "11/30/1983." It is insufficient to note the month and the year without the date, if the application is submitted within the same month.

Item 8 An applicant must fully disclose whether the applicant or the applicant's predecessor in interest has filed an application to register the mark, or a portion or composite of the mark, with the United States Patent and Trademark Office.

- Item 9** List the manner in which the mark is used or communicated to the consuming public, such as tags or labels attached to goods; or newspapers, brochures or signs advertising services. If the application is for more than one (1) class, list the manner in which the mark is used in each class.
- Item 10** *Specimen.* Three (3) specimens supporting the goods/services described in Item 7 and supporting the manner in which the mark is used in Item 9 must be attached to the application. In Item 10, check the box for each type of specimen included. Include at least one (1) specimen for each class. If color is claimed as a feature of the mark, include at least one specimen showing the mark in color.

Appropriate Specimens (samples of use)

Trademarks: Acceptable specimens include actual labels or tags affixed to, or containers used with, the goods. A photograph of an actual display that appears in immediate proximity to the goods ("point-of-sale" display) is also an acceptable specimen. Brochures that advertise the product are not sufficient.

Service marks: Acceptable specimens include actual materials used in selling or advertising the services, such as menus, newspaper advertisements, coupons and the like. To serve as specimens, advertising materials (including letterhead or business cards) must contain some understandable reference to the services described in the application.

Drawing: Include the mark exactly as it appears in the samples of use accompanying the application and exactly as it is described in Item 5 of the application. Do not include other words that are not part of the mark.

If the mark consists only of a word, letter or numeral, or a combination thereof, and is not depicted in a special form, type or print the mark in capital letters on the drawing sheet. If the mark is not only words, letters or numerals, or a combination thereof, and also includes a design, the entire design must appear on the drawing sheet.

If the mark includes a color claim, it may either appear in color or black and white. If the mark appears in color, it must match the color(s) described in the color statement.

The drawing must depict only one mark, and the drawing must fit within the 3.15 inches by 3.15 inches drawing box. The drawing must be an exact reproduction of the mark sought to be registered. If desired, the drawing may be taped to the drawing sheet.

A black and white reproduction of the mark in the drawing box will appear on the certificate issued, so an electronic reproduction of the mark is recommended.

Signature: The registrant named in Item 1 must sign and date the application. An application made by a business entity must be signed by an authorized person. The application must be signed and verified before a notary public or other person authorized to administer oaths and should not be executed before the date of first use of the mark.

Before signing, carefully review the application. An application or registration procured by fraud is subject to cancellation pursuant to Chapter 16, Business & Commerce Code.

Fee: The application fee (\$50 per class) may be paid by personal check, money order, LegalEase debit card, cashier's check, or American Express, Discover, MasterCard, or Visa credit card. Checks or money orders must be payable through a U.S. bank or financial institution and made payable to the secretary of state. Fees paid by credit card are subject to a statutorily authorized convenience fee of 2.7 percent of the total fees. The fee is not refundable regardless of whether the mark is registered, denied, or abandoned.

Examination Process


An application for trade or service mark registration undergoes an examination process similar to the federal registration process. A "trademark examiner" reviews the application to ascertain whether the proposed mark proposed is registrable under Section 16.051, Business & Commerce Code. Texas law, federal statutory law (upon which the Texas trademark statute is based), federal case law, and examining procedures similar to those used by the United States Patent and Trademark Office (USPTO) are used by the secretary of state to examine applications. The Examiner also compares the proposed mark with marks previously registered in Texas and with the USPTO to determine whether the proposed mark will cause a likelihood of confusion.

During the course of the examination process, the trademark examiner may require the applicant to disclaim an unregistrable component of a mark that is otherwise registrable. The purpose of a disclaimer is to permit the registration of a mark that is registrable as a whole but contains matter that would not be registrable standing alone. A disclaimer amounts merely to a statement that, in so far as the particular registration is concerned, no rights are being asserted in the disclaimed component standing alone, but rights are asserted in the mark as a whole. Generally, components that are generic or descriptive of the goods or services would be disclaimed (e.g., an outline of the state, a geographic term of origin, or words that are commonly used to describe the goods or services). A disclaimer may be included in an original application or may be added by amendment. An applicant cannot disclaim all elements of the proposed mark.

If the application for registration is approved, we will return a certificate of registration. Not all applications submitted to the secretary of state are approved for registration. If an application is rejected, we will notify the submitter of the objections to registration. The applicant is given ninety (90) days within which to amend the application, to provide the information requested, or to respond to the denial. Failure to respond within the time specified will terminate the examination process and will result in abandonment of the application. Upon receipt of the applicant's response, the trademark examiner will reexamine the application. The examination procedures described may be repeated until the application is registered, finally denied, or abandoned by the applicant.

The trademark examiners cannot provide legal advice with regard to trademark law applicable to a particular circumstance. Because trademark law is quite complex, the secretary of state recommends that persons seeking to register a mark consult with a private attorney.

Revised 05/13

<p>Form 901 (Revised 05/13)</p> <p>Submit to: Secretary of State PO Box 13697 Austin, TX 78711-3697 512 463-9760 FAX: 512 463-5709 Application Fee: \$50 per class</p>	<p style="font-size: small;">This space reserved for office use.</p>  <p>Application for Registration of a Trade or Service Mark</p>
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<p>1. NAME OF APPLICANT (owner of mark—individual, corporation, or other entity applying for registration):</p>									
<p>2. BUSINESS ADDRESS OF APPLICANT:</p>									
City:	State:	Zip Code:	Country:						
<p>3. BUSINESS STRUCTURE OF APPLICANT (Check One and Complete)</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; padding: 5px;"> <input type="checkbox"/> Corporation (State of Incorporation): _____ </td> <td style="width: 50%; padding: 5px;"> <input type="checkbox"/> General Partnership (State of Organization): _____ </td> </tr> <tr> <td style="padding: 5px;"> <input type="checkbox"/> Limited Liability Company (State of Organization): _____ </td> <td style="padding: 5px;"> <input type="checkbox"/> Sole Proprietor </td> </tr> <tr> <td style="padding: 5px;"> <input type="checkbox"/> Limited Partnership (State of Organization): _____ </td> <td style="padding: 5px;"> <input type="checkbox"/> Other (Describe): _____ </td> </tr> </table>				<input type="checkbox"/> Corporation (State of Incorporation): _____	<input type="checkbox"/> General Partnership (State of Organization): _____	<input type="checkbox"/> Limited Liability Company (State of Organization): _____	<input type="checkbox"/> Sole Proprietor	<input type="checkbox"/> Limited Partnership (State of Organization): _____	<input type="checkbox"/> Other (Describe): _____
<input type="checkbox"/> Corporation (State of Incorporation): _____	<input type="checkbox"/> General Partnership (State of Organization): _____								
<input type="checkbox"/> Limited Liability Company (State of Organization): _____	<input type="checkbox"/> Sole Proprietor								
<input type="checkbox"/> Limited Partnership (State of Organization): _____	<input type="checkbox"/> Other (Describe): _____								
<p>4. NAMES OF GENERAL PARTNERS, IF APPLICANT IS A PARTNERSHIP (attach additional sheet if necessary):</p>									
<p>5A. NAME AND/OR DESCRIPTION OF MARK (For design, provide a brief written description that can be pictured in the mind without reference to the specimens. Do not draw the design on the application. Attach a drawing of the mark.):</p>									

<p>5B. COLOR CLAIM. Is a claim made to color?</p> <p><input type="checkbox"/> Yes (go to 5C and 5D)</p> <p><input type="checkbox"/> No (go to 6)</p>	<p>5C. If yes, claim is made to the following colors:</p> <p>_____</p> <p>_____</p> <p>_____</p>										
<p>5D. COLOR LOCATION STATEMENT. Please include the location of each color (e.g., a red balloon with a yellow ribbon):</p> <p>_____</p> <p>_____</p>											
<p>6. DISCLAIMER (If Applicable) No claim is made to the exclusive right to use the term:</p> <p>_____</p> <p>_____</p>											
<p>7A. CLASS NUMBER(S)</p>	<p>Class #1: _____ (go to 7B)</p>	<p>Class #2: _____ (go to 7C)</p>									
<p>7B. CLASS #1: If a trademark, list specific goods. If a service mark, list specific services:</p> <p>_____</p> <p>_____</p>											
<p>Date the mark was first used in Texas:</p>		<p>Date the mark was first used anywhere:</p>									
<p>7C. CLASS #2: If a trademark, list specific goods. If a service mark, list specific services:</p> <p>_____</p> <p>_____</p>											
<p>Date the mark was first used in Texas:</p>		<p>Date the mark was first used anywhere:</p>									
<p>8. USPTO TRADEMARK REGISTRATION/APPLICATION. Complete the following if the applicant or a predecessor in interest has filed an application to register the mark or portions of the mark with the United States Patent and Trademark Office.</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 25%;">Filing</td> <td style="width: 25%;">Serial/File</td> <td style="width: 25%;">Status of</td> <td style="width: 25%;"></td> </tr> <tr> <td>Date _____</td> <td>No. _____</td> <td>Application _____</td> <td></td> </tr> </table> <p>If Refused, Why? _____</p> <p><input type="checkbox"/> Check here if this item does not apply.</p>				Filing	Serial/File	Status of		Date _____	No. _____	Application _____	
Filing	Serial/File	Status of									
Date _____	No. _____	Application _____									
<p>9. MANNER IN WHICH THE MARK IS USED (If more than one (1) class, list the manner in which the mark is used in each class):</p> <p>_____</p> <p>_____</p>											

10. SPECIMENS (Check the applicable boxes below and enclose three (3) original specimens supporting the goods/services described in Item 7. Include at least one (1) specimen for each class)

- | | |
|--|--|
| <p>For Trademarks Only</p> <p><input type="checkbox"/> Actual Labels</p> <p><input type="checkbox"/> Actual Tags</p> <p><input type="checkbox"/> Photographs of Goods/Containers Showing the Mark</p> <p><input type="checkbox"/> Front Panels of a Paper Container Bearing the Mark</p> <p><input type="checkbox"/> Other: _____</p> | <p>For Service Marks Only</p> <p><input type="checkbox"/> Advertising Leaflets</p> <p><input type="checkbox"/> Advertising Brochures</p> <p><input type="checkbox"/> Menus Showing the Mark</p> <p><input type="checkbox"/> Business Cards that Reference Services</p> <p><input type="checkbox"/> Other: _____</p> |
|--|--|

11. DECLARATION OF OWNERSHIP

Applicant declares that the applicant is the owner of the mark, that the mark is in use, and that to the knowledge of the person verifying the application, no other person has registered the mark, either federally or in this state, or is entitled to use the mark in this state, either in the identical form used by the applicant or in a form that is likely, when used on or in connection with the goods or services of the other person, to cause confusion or mistake, or to deceive, because of its resemblance to the mark.

12. SIGNATURE AND VERIFICATION

DATE

SIGNATURE OF AUTHORIZED PERSON

TYPE OR PRINT NAME AND TITLE

TO BE COMPLETED BY A NOTARY PUBLIC:

STATE OF _____)
COUNTY _____)

On _____, _____ personally appeared before me, and being first duly sworn declared that he/she signed this application in the capacity designated, if any, above application and the statements therein contained are true and and further stated that he/she has read the above application and the statements therein are true and correct.

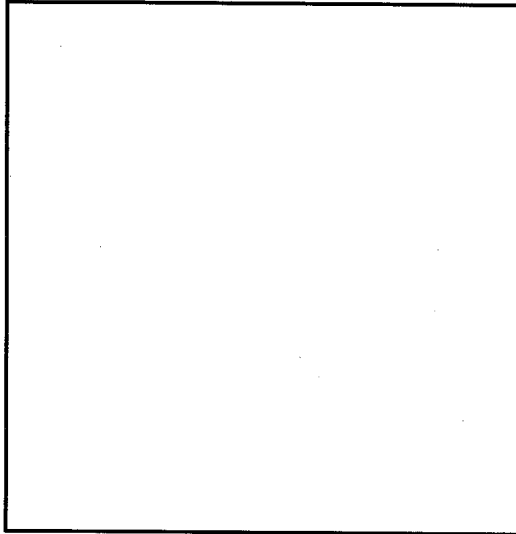
(seal)

NOTARY PUBLIC SIGNATURE

TRADEMARK DRAWING SHEET

Instructions: Include the mark exactly as it appears in the samples of use accompanying the application and exactly as it is described in item 5 of the application. Do not include other words that are not part of the mark.

- If the mark consists only of a word, letter or numeral, or a combination thereof, and is not depicted in a special form, type or print the mark in capital letters on the drawing sheet.
- If the mark is not only words, letters or numerals, or a combination thereof, and also includes a design, the entire design must appear on the drawing sheet.
- The drawing *must*
 - Depict only one mark
 - Fit within the box (3.15 in (8 cm) high by 3.15 in (8 cm) long)
 - Be an exact reproduction of the mark
- A mark including a color claim must either
 - Appear in color and match the color(s) described in the color statement.
 - Appear in black and white
- If desired, you may tape a drawing of the mark to this drawing sheet.
- **A black and white reproduction of the mark in the drawing box will appear on the certificate issued, so an electronic reproduction of the mark is recommended.**



[Reserved]

Form 1-14**Form 902—Instructions
(Renewal Application of Trade or Service Mark)**

The attached form is designed to meet minimal statutory filing requirements pursuant to the relevant code provisions. The form and the information provided are not substitutes for the advice and services of an attorney.

General Information

Texas trademark registrations last for five years and may be renewed for additional five year periods using this form. A registration may be renewed during the six months immediately preceding the expiration date of the current term of registration. Renewal applications must be received on or before the current term of registration expires. *If the renewal application is not received before the registration term expires, a new application for registration must be made.*

A renewal must include the goods and/or services recited in the current registration on or in connection with which the mark is still in use in Texas. If the renewal application covers less than all the goods and/or services in the current registration, a list of the particular goods and/or services to be renewed must be included.

If either the mark or the classification of the goods or services has substantially changed from the previous registration, a new registration for the altered mark or new classification must be made.

If the renewal application is refused, the application may be amended in response to the refusal, but a response must be received during the period provided for response and before the current term of registration expires. If the renewal application cannot be filed before the registration term expires, a new application for registration must be made.

Instructions for Renewal Application

Type or print in black ink in English, subject to the provisions of 1 Texas Administrative Code Chapter 93. Use of the renewal application form is recommended, but not mandatory. Submit your renewal application along with at least one (1) specimen supporting use of the mark in each class.

- Item 1:** Only the registrant of record may file a renewal. If ownership of the mark has been assigned or transferred, or the name of the registrant has changed, the assignment, transfer, or change must be filed with the renewal application. Please see Forms 903 and 904.
- Item 2:** Provide the business address of the registrant.
- Item 3:** In the space provided for the description of the mark, describe the mark exactly as it appears in the specimens of use. The mark must be the same mark as was previously registered. The registration number, original date of registration, class numbers, and dates of first use may be obtained from the original Certificate of Registration.
- Item 4:** If the registrant is a corporation, limited liability company, limited partnership, general partnership, or other business entity, identify the type of business organization and the state under whose laws the entity was incorporated or organized.

Item 5: If the registrant is organized as a general or limited partnership, provide the names of all general partners.

Specimen: A registration cannot be renewed if the mark is no longer in use in Texas commerce. A specimen supporting use of the mark in each class must be included. In Item 7, check the box for each type of specimen included. A drawing sheet is not an acceptable specimen.

Appropriate Specimens (samples of use)

Trademarks: Acceptable specimens include actual labels or tags affixed to, or containers used with, the goods. A photograph of an actual display that appears in immediate proximity to the goods ("point-of-sale" display) is also an acceptable specimen. Brochures that advertise the product are not sufficient.

Service marks: Acceptable specimens include actual materials used in selling or advertising the services, such as menus, newspaper advertisements, coupons and the like. To serve as specimens, advertising materials must contain some understandable reference to the services described in the application.

Fee: The renewal fee (\$25 per class) may be paid by personal check, money order, LegalEase debit card, cashier's check, or American Express, Discover, MasterCard, or Visa credit card. Checks or money orders must be payable through a U.S. bank or financial institution and made payable to the secretary of state. Fees paid by credit card are subject to a statutorily authorized convenience fee of 2.7 percent of the total fees.

Signature: The registrant named in Item 1 must sign and date the application. A renewal made by a business entity must be signed by an authorized person. The renewal must be signed and verified before a notary public or other person authorized to administer oaths.

Before signing, carefully review the application. An application or registration procured by fraud is subject to cancellation pursuant to Chapter 16, Business & Commerce Code.

Submission: Submit your renewal application and filing fee of \$25:

- by mail to the Secretary of State, PO Box 13697, Austin, Texas 78711-3697;
- by fax with credit card information (Form 807) to (512) 463-5709; or
- by delivery to the James Earl Rudder Office Building, 1019 Brazos, Austin, Texas 78701.

On filing, we will return to the remitter a Certificate of Registration for the new term of registration. The secretary of state will send correspondence regarding the renewal to the submitter address provided in the cover letter, envelope, or enclosed check.

This is a sample form and is promulgated by the secretary of state to obtain the minimum information required for a renewal application. It is advisable to seek the assistance of legal counsel in preparing any legal document. *The secretary of state makes no warranties, express or implied, regarding the use of this form.*

Revised 09/13

Form 902 (Revised 09/13) Submit to: Secretary of State PO Box 13697 Austin, TX 78711-3697 512 463-9760 FAX: 512 463-5709 Fee: \$25 per class	This space reserved for office use.  Renewal Application of a Trade or Service Mark
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1. Name of Registrant (owner of mark—individual, corporation, or other entity renewing registration): _____			
2. Business Address of Registrant: _____			
City: _____	State: _____	Zip Code: _____	Country: _____
3. Description of the Mark (include <i>complete description of the mark</i> as it appears in the attached specimen of use, including any design elements): _____ _____ Registration No: _____ Original Date of Registration: _____ Class Numbers: _____ Date of First Use Anywhere: _____; Date of First Use in Texas: _____			
4. Business Structure of Registrant (must check one and complete state of formation)			
<input type="checkbox"/> Corporation (State of Incorporation): _____		<input type="checkbox"/> General Partnership (State of Organization): _____	
<input type="checkbox"/> Limited Liability Company (State of Organization): _____		<input type="checkbox"/> Sole Proprietor	
<input type="checkbox"/> Limited Partnership (State of Organization): _____		<input type="checkbox"/> Other (Describe): _____	
5. Names of General Partners if Registrant is a Partnership (attach additional sheet if necessary) _____ _____ _____			
6. The Following Must Be Included With Your Renewal:			
		<input type="checkbox"/> Specimen(s) (see item 7)	<input type="checkbox"/> Fee (\$25 per class)
7. Specimens: (Check the applicable box below and enclose one (1) original specimen for each class supporting the goods/services for which the renewal of registration is sought). _____			

<p>For Trademarks Only</p> <p><input type="checkbox"/> Actual Labels</p> <p><input type="checkbox"/> Actual Tags</p> <p><input type="checkbox"/> Photographs of Goods/Containers Showing the Mark</p> <p><input type="checkbox"/> Front Panels of a Paper Container Bearing the Mark</p> <p><input type="checkbox"/> Other: _____</p>	<p>For Service Marks Only</p> <p><input type="checkbox"/> Advertising Leaflets</p> <p><input type="checkbox"/> Advertising Brochures</p> <p><input type="checkbox"/> Menus Showing the Mark</p> <p><input type="checkbox"/> Business Cards that Reference Services</p> <p><input type="checkbox"/> Other: _____</p>
<p>The mark has been and is still in use within the State of Texas by the registrant in the form and manner specified in the present application. I certify under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct.</p>	
<p>Signature and Verification</p> <p>_____</p> <p>Date _____</p>	
<p>Signature of Authorized Person</p> <p>_____</p>	<p>Type or Print Name and Title of Officer, Partner, or Other Authorized Person</p> <p>_____</p>
<p>TO BE COMPLETED BY A NOTARY PUBLIC:</p> <p>STATE OF _____)</p> <p>COUNTY OF _____)</p> <p>On _____, _____ personally appeared before me, and being first duly sworn declared that he/she signed this application in the capacity designated, if any, and further stated that he/she has read the above application and the statements therein are true and correct.</p> <p>(seal)</p> <p>_____</p> <p style="text-align: center;">NOTARY PUBLIC SIGNATURE</p>	

Form 1-15**Form 903—Instructions
(Assignment of a Trade or Service Mark)**

The attached form is designed to meet minimal statutory filing requirements pursuant to the relevant code provisions. The form and the information provided are not substitutes for the advice and services of an attorney.

General Information

A trademark or service mark registered in Texas is assignable with the goodwill of the business in which the mark is used, or with that part of the goodwill of the business connected with the use of, and symbolized by, the mark. The assignment of registered marks is accomplished under the authority of section 16.061, Texas Business and Commerce Code. An assignment may be made only by a duly executed written instrument.

Assignment Void if not Recorded. The assignment of a registered mark registered is void against a purchaser who purchases the mark for valuable consideration after the assignment is made and without notice of it unless the assignment is recorded by the secretary of state:

- (1) not later than the 90th day after the date of the assignment; or
- (2) before the mark is purchased.

Effect of Assignment. When an assignment is properly filed, the secretary of state will issue a certificate of registration in the assignee's name for the remainder of the mark's registration period or last renewal. *If the assignment cannot be filed before the registration term expires, a new application for registration must be made.*

Instructions for Assignment Form

Type or print in black ink in English, subject to the provisions of 1 Texas Administrative Code Chapter 93. Use of the assignment form is recommended, but not mandatory.

- Item 1:** *Name of Assignor.* The assignor should be the registrant of record. If the assignor is not the registrant of record, additional filings may be required before the assignment may be recorded and filed.
- Item 2:** *Business Address.* Provide the business address of the assignor.
- Item 3:** The description of the mark, registration number, and original date of registration may be obtained from the original Certificate of Registration.
- Item 4:** *Name of Assignee.* The assignee should be the person to whom the assignor will assign all right, title and interest in and to the mark and its registration, together with the goodwill of the business with which the mark is used, or that part of the goodwill connected with the use of, and symbolized by, the mark. If the assignee is an individual sole proprietor doing business under an assumed name ("d/b/a"), provide the individual's name, followed by the assumed name of the business. If the assignee is a general partnership or joint venture, provide the name of the partnership or joint venture. If the assignee is an organized entity, such as a corporation, limited liability company, or limited partnership, provide the legal name of the organized entity as shown in its formation document (e.g., ABC Business Company, Inc.).

- Item 5:** *Business Address.* Provide the business address of the assignee.
- Item 6:** If the assignee named in Item 4 is a corporation, limited liability company, limited partnership, general partnership, or other business entity, identify the type of business organization and the state under whose laws the entity was incorporated or organized.
- Item 7:** If the assignee is organized as a general or limited partnership, provide the names of all general partners.
- Signature** The assignor named in Item 1 must sign and date the application. An application made by a business entity must be signed by an authorized person. The application must be signed and acknowledged before a notary public or other person authorized to administer oaths.
- Fee:** The assignment fee (\$25) may be paid by personal check, money order, LegalEase debit card, cashier's check, or American Express, Discover, MasterCard, or Visa credit card. Checks or money orders must be payable through a U.S. bank or financial institution and made payable to the secretary of state. Fees paid by credit card are subject to a statutorily authorized convenience fee of 2.7 percent of the total fees.
- Submission:** Submit your assignment and filing fee of \$25:
- by mail to the Secretary of State, PO Box 13697, Austin, Texas 78711-3697;
 - by fax with credit card information (Form 807) to (512) 463-5709; or
 - by delivery to the James Earl Rudder Office Building, 1019 Brazos, Austin, Texas 78701.

On filing, we will return a Certificate of Registration for the remainder of the term of registration. The secretary of state will send correspondence regarding the assignment to the submitter address provided in the cover letter, envelope, or enclosed check.

This is a sample form and is promulgated by the secretary of state to obtain the minimum information required for recording an assignment. No such "standard form" can meet the requirements of all transactions. A copy of an originally executed assignment document may be submitted for recording. The information required for recordation may be provided in a cover letter. It is advisable to seek the assistance of legal counsel in preparing any legal document. *The secretary of state makes no warranties, express or implied, regarding the use of this form.*

Revised 09/12

Form 903 (Revised 09/12)
 Submit to:
 Secretary of State
 PO Box 13697
 Austin, TX 78711-3697
 512 463-9760
 FAX: 512 463-5709
Assignment Fee: \$25



This space reserved for office use.

Assignment of a Trade or Service Mark

1. Assignor:			
2. Business Address of Assignor:			
City:	State:	Zip Code:	Country:
3. Mark:			
Registration No: _____		Original Date of Registration: _____	
4. Assignee:			
5. Business Address of Assignee:			
City:	State:	Zip Code:	Country:
6. Business Structure of Assignee (check one and complete)			
<input type="checkbox"/> Corporation (State of Incorporation): _____		<input type="checkbox"/> General Partnership (State of Organization): _____	
<input type="checkbox"/> Limited Liability Company (State of Organization): _____		<input type="checkbox"/> Sole Proprietor	
<input type="checkbox"/> Limited Partnership (State of Organization): _____		<input type="checkbox"/> Other (Describe): _____	
7. Names of General Partners if Assignee is a Partnership (attach additional sheet if necessary)			

Assignor assigns to Assignee all right, title and interest in and to the above referenced mark and its registration, together with the goodwill of the business with which the mark is used, or that part of the goodwill connected with the use of, and symbolized by, the mark.

SIGNATURE AND ACKNOWLEDGEMENT

Date

Signature of Assignor

Name and Title of Officer, Partner or
Other Authorized Person

TO BE COMPLETED BY A NOTARY PUBLIC:

STATE OF _____)

COUNTY OF _____)

Before me, _____, on this day personally appeared
(insert the name and title of the officer)
_____, known to me (or proved to me on oath of _____

or through _____) to be the person whose name is subscribed to
(description of identity card or other document)
the foregoing instrument and acknowledged to me that he/she executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this _____ day of _____, _____
(year)

(seal)

NOTARY PUBLIC SIGNATURE

Form 1-16



Office of the Secretary of State
Corporations Section
P.O. Box 13697
Austin, Texas 78711-3697

TRANSFER OF TRADEMARK OWNERSHIP/
CHANGE OF REGISTRANT'S NAME
AND REQUEST FOR NEW CERTIFICATE OF
TRADEMARK REGISTRATION

- 1. Applicant is the owner of the following trademark or service mark that is registered with the Secretary of State.

Description of the mark: _____

Registration Number: _____

Date of Registration: _____

Name of Registrant of Record: _____

Address of Registrant of Record: _____

- 2. Check the appropriate item below.

[] Ownership of the registered mark has been transferred to

[] The name of the registrant has been changed to

Name: _____

Address: _____

- 3. The instrument identified below that transferred ownership of the mark or changed the registrant's name was filed on the date shown with the filing office indicated. A certified copy of the instrument is attached hereto.

Document: _____

Date of Filing: _____

Filing Office: _____

or

A certified copy of the instrument is not attached because:

[] The instrument is not required to be filed or recorded.

[] The instrument is on file with the Secretary of State of Texas.

- 4. Registrant requests that a new certificate of registration be issued for the remainder of the term of registration.

[] Yes (Additional fee required) [] No

(Signature on reverse of form)

Signed on this _____ day of _____, _____

Current Registrant (Typed or Printed Name)

Signature of Current Registrant

INSTRUCTIONS

1. This form is to be used when ownership of a registered trademark or service mark is transferred, or when a registrant's name is changed during the period of registration. Upon request, a new certificate of registration will be issued in the name of the transferee or in the new name of the registrant. The new certificate will be for the remainder of the unexpired term of the mark's registration.
2. The fee for filing this form is \$10.00. If the registrant requests a new certificate of registration by checking "yes" in item 4, an additional fee of \$10.00 must be submitted.
3. This form and a certified copy of the instrument effecting the change of ownership or change of name should be submitted along with the required filing fee to: Secretary of State, Corporations Section, Attn: Trademark Examiner, P.O. Box 13697, Austin, Texas 78711. The delivery address is 1019 Brazos, Austin, Texas 78701.
4. If the document effecting the change is not required to be filed or recorded but it is the type of document which would be filed in the records of the Secretary of State if the registrant was a corporation, a copy of the document should be submitted along with this form.
5. A corporation or other business entity which has filed the document effecting the change with the Secretary of State of Texas must identify the document filed and the date of its filing with the Secretary of State, and need not attach a certified copy of the document.

Form No. 904
Revised 8/99

Form 1-17

SOS fees are subject to change. The attorney should verify the currency of this form by visiting the secretary of state's website at www.sos.state.tx.us/corp/forms_boc.shtml or by calling (512) 463-5555.

**Business Filings & Trademarks Fee Schedule
(SOS Form 806)**

Form 1-17

Form 806
(Revised 09/15)Credit Cards Accepted:
American Express, Discover,
MasterCard, & VisaSecretary of State
P.O. Box 13697
Austin, TX 78711-3697
512 463-5555
FAX: 512/463-5709**Business Filings & Trademarks**
Fee Schedule

Information Requests, Copies & Certificates	Fee
Certificate of Fact (including Certificate of Existence or Status)	\$15
Long Form Certificate of Existence (Status plus list of filings)	\$25
Certified Copies	\$1 per page plus \$15 per certificate
Plain (Uncertified) Copies	\$0.10 per page
Apostille Related to a Business Entity Filing	\$15
SOSDirect Search	\$1 per search*
* \$1 search fee is not charged when an order or filing is placed on the search results	
Business Organizations & Nonprofits	Fee
Any instrument for which no express fee is provided (except nonprofit corporation or cooperative association)	\$15
Any instrument for which no express fee is provided for a nonprofit corporation or cooperative association	\$5
Formation & Registration	
Certificate of formation for a Texas entity (except nonprofit corporation, cooperative association, PA or LP) (Forms 201, 203, 205, 206)	\$300
Certificate of formation for a Texas professional association or limited partnership (Forms 204, 207)	\$750
Certificate of formation for a Texas nonprofit corporation (Form 202) or cooperative association	\$25
Registration or renewal as a Texas limited liability partnership or LLLP (Forms 701, 703)	\$200 per partner
Foreign entity application for registration (except nonprofit corporation, LLP, cooperative association or credit union) (Forms 301, 303, 304, 305, 306, 309, 311, 312, 313)	\$750*
* A foreign entity that has transacted business in Texas for more than ninety days without registering is subject to a late filing fee. The late filing fee is equal to the registration fee for each full or partial calendar year that the foreign entity transacted business in Texas without being registered.	
Foreign nonprofit corporation, cooperative association, or credit union application for registration (Forms 302, 309)	\$25*
* A foreign entity that has transacted business in Texas for more than ninety days without registering is subject to a late filing fee. The late filing fee is equal to the registration fee for each full or partial calendar year that the foreign entity transacted business in Texas without being registered.	
Foreign limited liability partnership application for registration or renewal (Forms 307, 308)	\$200 per partner in Texas, but not less than \$200 nor more than \$750*
* A foreign entity that has transacted business in Texas for more than ninety days without registering is subject to a late filing fee. The late filing fee is equal to the registration fee for each full or partial calendar year that the foreign entity transacted business in Texas without being registered.	
Name registration or renewal for foreign entity not qualified to transact business in Texas (Forms 502, 505)	\$40
Withdrawal of name registration of foreign entity not qualified to transact business in Texas (Form 508)	\$15

Correction or Abandonment of Filings, Delayed Effective Date	
Certificate of correction (Form 403)	\$15
Certificate of abandonment of a filing instrument that has not taken effect (except nonprofit corporation or cooperative association) (Form 427)	\$15
Certificate of abandonment of a filing instrument that has not taken effect for nonprofit corporation or cooperative association (Form 427)	\$5
Statement of event or fact required to effect a filing instrument delayed on the occurrence of a future event or fact (except nonprofit corporation or cooperative association) (Form 805)	\$15
Statement of event or fact required to effect a filing instrument delayed on the occurrence of a future event or fact for nonprofit corporation or cooperative association (Form 805)	\$5
Amendment, Merger & Conversion	
Certificate of amendment for Texas entity (except nonprofit corporation or cooperative association) (Form 424)	\$150
Certificate of amendment for Texas nonprofit corporation or cooperative association (Form 424)	\$25
Amendment to registration as a Texas limited liability partnership or LLLP (Form 722)	\$10 plus \$200 per partner added by amendment
Restated certificate of formation for a Texas entity (except nonprofit corporation or cooperative association) (Forms 414, 415)	\$300
Restated certificate of formation for a Texas nonprofit corporation or cooperative association (Forms 414, 415)	\$50
Texas for-profit corporation restriction on the transfer of shares (Form 425)	\$15
Texas for-profit corporation resolution relating to a series of shares (Form 426)	\$15
Foreign entity amendment to registration (except nonprofit corporation, LLP, cooperative association or credit union) (Forms 406, 411, 412)	\$150
Foreign nonprofit corporation, cooperative association or credit union amendment to registration (Forms 406, 411)	\$25
Foreign limited liability partnership amendment to registration (Form 407)	\$10 plus \$200 per partner added not to exceed \$750
Foreign entity transfer of registration to successor entity after merger or conversion (except nonprofit corporation or cooperative association) (Form 422)	\$150
Foreign nonprofit corporation or cooperative association transfer of registration to successor entity after merger or conversion (Form 422)	\$25
Certificate of merger (except nonprofit corporation or cooperative association) (Forms 621, 622, 623, 624)	\$300*
* Fees must include filing fee for the formation of any Texas filing entity created by the transaction.	
Certificate of merger for nonprofit corporation or cooperative association (Forms 621, 622, 623, 624)	\$50*
* Fees must include filing fee for the formation of any Texas filing entity created by the transaction.	
Certificate of conversion (except nonprofit corporation or cooperative association) (Forms 631, 632, 633, 634, 635, 636, 637, 638, 641, 642, 643, 644)	\$300*
* Fees must include filing fee for the formation of any Texas filing entity created by the transaction.	
Certificate of conversion where converting entity is nonprofit corporation or cooperative association (Forms 631, 632, 633, 634, 635, 636, 637, 638, 641, 642, 643, 644)	\$50*
* Fees must include filing fee for the formation of any Texas filing entity created by the transaction.	

Conversion & continuance (except nonprofit corporation or cooperative association) <small>* Fees must include filing fee for the formation of any Texas filing entity created by the transaction.</small>	\$300*
Conversion & continuance where converting entity is nonprofit corporation or cooperative association <small>* Fees must include filing fee for the formation of any Texas filing entity created by the transaction.</small>	\$50*
Certificate of exchange	\$300
Registered Agent Filings	
Change of registered agent and/or registered office by entity (except nonprofit corporation or cooperative association) (Form 401)	\$15
Change of registered agent and/or registered office by nonprofit corporation or cooperative association (Form 401)	\$5
Consent of registered agent to appointment (except nonprofit corporation or cooperative association) (Form 401-A)	\$15
Consent of registered agent to appointment for nonprofit corporation or cooperative association, (Form 401-A)	\$5
Rejection of appointment by registered agent (Form 428)	\$0
Change of registered office by registered agent (Form 408) <small>* For changes to multiple entities, the fee is the number of entities of a certain type times the filing fee, up to a maximum fee identified below for each entity type: For-profit corporations \$750 Limited liability companies \$750 Limited partnerships \$750 Professional corporations \$750 Professional associations \$750</small>	\$15 per entity*
<small>Nonprofit corporations and cooperative associations \$250</small>	
Resignation of registered agent (Form 402)	\$0
Termination and Withdrawal, Reinstatement	
Certificate of termination for a Texas entity (except nonprofit corporation or cooperative association) (Form 651)	\$40
Certificate of termination for a Texas nonprofit corporation or cooperative association (Form 652)	\$5
Withdrawal of registration as a Texas limited liability partnership or limited liability limited partnership (Form 704)	\$15
Withdrawal or termination of registration to transact business in Texas (except nonprofit corporation or credit union) (Forms 608, 609, 612)	\$15
Withdrawal or termination of registration to transact business in Texas for nonprofit corporation or credit union (Forms 608, 612)	\$5
Application for reinstatement and request to set aside tax forfeiture (except nonprofit corporation or cooperative association) (Form 801)	\$75
Application for reinstatement and request to set aside tax forfeiture for nonprofit corporation or cooperative association (Form 801)	\$0
Application for reinstatement after voluntary termination (except nonprofit corporation or cooperative association) (Form 811)	\$15
Application for reinstatement after voluntary termination of nonprofit corporation or cooperative association (Form 811)	\$5
Application for reinstatement after involuntary termination or revocation (except nonprofit corporation or cooperative association) (Form 811)	\$75
Application for reinstatement after involuntary termination or revocation of nonprofit corporation or cooperative association (Form 811)	\$5

Reports	
Nonprofit corporation periodic report (Form 802) * Periodic Report after forfeiture of right to do business: \$5 plus late fee Periodic report late fee is the greater of \$5 or \$1 for each month that the report remains unfiled, not to exceed \$25. Periodic Report after involuntary termination: \$25	\$5*
Annual statement of a professional association (Form 803)	\$35
Limited partnership periodic report (Form 804) * Periodic Report after forfeiture of right to do business: \$50 plus late fee Periodic Report Late Fee: \$25/month, not to exceed \$100 Periodic Report after involuntary termination/revocation: \$225	\$50*
Close Corporations	
Statement of operation as a close corporation (Form 812)	\$15
Termination of close corporation status (Form 813)	\$15
Name Reservations and Assumed Name Certificates	
Name reservation (120 days) or renewal (Form 501)	\$40
Assumed name certificate (Form 503)	\$25
Abandonment of assumed name (Form 504)	\$10
Transfer of name reservation (Form 506)	\$15
Withdrawal of name reservation (Form 507)	\$0
Appointment of Agent by Financial Institution, Unincorporated Association, or Foreign Corporate Fiduciary	
Texas financial institution appointment of statutory agent (Form 706)	\$25
Texas financial institution amendment to appointment of statutory agent (Form 707)	\$15
Texas financial institution cancellation of appointment of statutory agent (Form 709)	\$15
Unincorporated nonprofit association appointment of statutory agent (Form 706)	\$25
Unincorporated nonprofit association amendment to or cancellation of appointment of statutory agent (Forms 707, 709)	\$5
Defense base development authority appointment of, amendment to, or cancellation of appointment of statutory agent (Forms 706, 707, 709)	\$0
Resignation of statutory agent for a Texas financial institution, unincorporated nonprofit association, or defense base development authority (Form 708)	\$0
Foreign corporate fiduciary filing to comply with § 105A, Texas Probate Code (Form 908)	\$0
Expedite & Preclearance Services	
Expedited processing of a document submitted for filing	\$25
Expedited Processing of a request for a certified copy or certificate of status or fact	\$10
Preclearance of any filing instrument	\$50
Bulk Orders (Business Entity Bulk Data Purchases)	
Previous Master Unload	\$1,350
Previous Master Unload By Entity Description	\$175
New Master Unload	\$1,750
Master Unload By Entity Description	\$200

List by Entity Description (comma-delimited format)	\$200
Daily Filing Update/Replacement (Subscription)	\$60
Daily Filing Update/Replacement (One-Time Request)	\$65
Weekly Filing Update/Replacement (Subscription)	\$20
Weekly Filing Update/Replacement (One-Time Request)	\$22
Weekly Subscription New Filings (Sunday through Saturday, comma-delimited format)	\$20
Trademarks	Fee
Application for Registration (Form 901)	\$50 per class
Renewal of Registration (Form 902)	\$25 per class
Assignment of Registration (Form 903)	\$25
Transfer of Ownership/Change in Registrant Name (Form 904)	\$10
Change of Registrant Address	\$0
Voluntary Cancellation of Registration	\$0

Chapter 2

Organization

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	§ 2.4:1 Effect of Failure to File Periodic Report	2-2
	§ 2.4:2 Reinstatement	2-2

Forms

Form 2-1	Certificate of Formation—For-Profit Corporation (SOS Form 201).....	2-1-1 to 2-1-8
Form 2-2	Application for Registration of a Foreign For-Profit Corporation (SOS Form 301).....	2-2-1 to 2-2-8
Form 2-3	Certificate of Amendment (SOS Form 424)	2-3-1 to 2-3-10
Form 2-4	Restated Certificate of Formation with New Amendments (SOS Form 414)	2-4-1 to 2-4-8
Form 2-5	Restated Certificate of Formation without Further Amendments (SOS Form 415).....	2-5-1 to 2-5-6
Form 2-6	Application for Reservation or Renewal of Reservation of an Entity Name (SOS Form 501).....	2-6-1 to 2-6-4
Form 2-7	Application for Registration of an Entity Name (SOS Form 502).....	2-7-1 to 2-7-4
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Form 2-10	Supplemental Provisions for Certificate of Formation	2-10-1 to 2-10-2
	Clause 2-10-1 “Blank-Check” Authorization (More Than One Class of Stock with Board Authorization to Create Series)	2-10-1
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	Clause 2-10-4 Limitation of Liability of Directors	2-10-2
Form 2-11	Bylaws of [name of corporation] (A Texas Corporation)	2-11-3 to 2-11-28
Form 2-12	Unanimous Written Consent of the Directors of [name of corporation]	2-12-1 to 2-12-6

Caution: Before using any SOS forms, the attorney should verify their currency by visiting the secretary of state's website at www.sos.state.tx.us or by calling (512) 463-5555. Note that many of these forms may also be filed online through SOSDirect.

Form 2-1

Effective June 1, 2018, the name a filing entity seeks to use must be “distinguishable in the records of the secretary of state” from names used by existing entities. *See* Tex. Bus. Orgs. Code § 5.053; Acts 2017, 85th Leg., R.S., ch. 503, § 3 (H.B. 2856), eff. June 1, 2018. Instructions that accompany secretary of state forms have not been updated to reflect this new standard as of the publication date of the latest supplement of this manual. See section 1.1:2 in this manual for more information on entity name availability.

**Certificate of Formation—For-Profit Corporation
(SOS Form 201)**

Form 2-1

**Form 201—General Information
(Certificate of Formation – For-Profit Corporation)**

The attached form is drafted to meet minimal statutory filing requirements pursuant to the relevant code provisions. This form and the information provided are not substitutes for the advice and services of an attorney and tax specialist.

Commentary

A for-profit corporation is governed by titles 1 and 2 of the Texas Business Organizations Code (BOC). Title 1, chapter 3, subchapter A, of the BOC governs the formation of a for-profit corporation and sets forth the provisions required or permitted to be contained in the certificate of formation.

Taxes: Corporations are subject to a state franchise tax. Contact the Texas Comptroller of Public Accounts, Tax Assistance Section, Austin, Texas, 78774-0100, (512) 463-4600 or (800) 252-1381 for franchise tax information. For information relating to federal employer identification numbers, federal income tax filing requirements, tax publications and forms call (800) 829-3676 or visit the Internal Revenue Service web site at www.irs.gov.

Instructions for Form

- **Article 1—Entity Name and Type:** Provide a corporate name and organizational designation. Under section 5.053 of the BOC, if the name chosen is the same as, deceptively similar to, or similar to the name of any existing domestic or foreign filing entity, or any name reservation or registration filed with the secretary of state, the document cannot be filed. The administrative rules adopted for determining entity name availability (Texas Administrative Code, title 1, part 4, chapter 79, subchapter C) may be viewed at www.sos.state.tx.us/tac/index.shtml. If you wish the secretary of state to provide a preliminary determination on name availability, you may call (512) 463-5555, dial 7-1-1 for relay services, or e-mail your name inquiry to corpinfo@sos.state.tx.us. A final determination cannot be made until the document is received and processed by the secretary of state. Do not make financial expenditures or execute documents based on a preliminary clearance. Also note that the preclearance of a name or the issuance of a certificate of formation under a name does not authorize the use of a name in violation of another person's rights to the name.
- **Article 2—Registered Agent and Registered Office:** The registered agent can be either (option A) a domestic entity or a foreign entity that is registered to do business in Texas or (option B) an individual resident of the state. The corporation cannot act as its own registered agent; do not enter the corporate name as the name of the registered agent.

Consent: Effective January 1, 2010, a person designated as the registered agent of an entity must have consented, either in a written or electronic form, to serve as the registered agent of the entity. Although consent is required, a copy of the person's written or electronic consent need not be submitted with the certificate of formation. *The liabilities and penalties imposed by sections 4.007 and 4.008 of the BOC apply with respect to a false statement in a filing instrument that names a person as the registered agent of an entity without that person's consent.* (BOC § 5.207)

Office Address Requirements: The registered office address must be located at a street address where service of process may be personally served on the entity's registered agent during normal business hours. Although the registered office is not required to be the entity's principal place of

Form 2-2

Effective June 1, 2018, the name a filing entity seeks to use must be “distinguishable in the records of the secretary of state” from names used by existing entities. *See* Tex. Bus. Orgs. Code § 5.053; Acts 2017, 85th Leg., R.S., ch. 503, § 3 (H.B. 2856), eff. June 1, 2018. Instructions that accompany secretary of state forms have not been updated to reflect this new standard as of the publication date of the latest supplement of this manual. See section 1.1:2 in this manual for more information on entity name availability.

**Application for Registration of a Foreign For-Profit Corporation
(SOS Form 301)**

Form 2-2

**Form 301—General Information
(Application for Registration of a Foreign For-Profit Corporation)**

The attached form is drafted to meet minimal statutory filing requirements pursuant to the relevant code provisions. This form and the information provided are not substitutes for the advice and services of an attorney and tax specialist.

Commentary

To transact business in Texas, a foreign entity must register with the secretary of state under chapter 9 of the Texas Business Organizations Code (BOC). The registration requirement applies to a foreign corporation, foreign limited partnership, foreign limited liability company, foreign business trust, foreign real estate investment trust, foreign cooperative, foreign public or private limited company, or another foreign entity, the formation of which, if formed in Texas, would require the filing of a certificate of formation with the secretary of state. Also, a foreign entity that affords limited liability for any owner or member under the laws of its jurisdiction of formation is required to register.

Failure to Register: A foreign entity may engage in certain limited activities in the state without being required to register (BOC § 9.251). However, a foreign entity that fails to register when required to do so 1) may be enjoined from transacting business in Texas on application by the attorney general, 2) may not maintain an action, suit, or proceeding in a court of this state until registered, and 3) is subject to a civil penalty in an amount equal to all fees and taxes that would have been imposed if the entity had registered when first required.

Penalty for Late Filing: A foreign entity that has transacted business in the state for more than ninety (90) days is also subject to a late filing fee. The secretary of state may condition the filing of the registration on the payment of a late filing fee that is equal to the registration fee for each year, or part of a year, that the entity transacted business in the state without being registered.

Taxes: Corporations are subject to a state franchise tax. Contact the Texas Comptroller of Public Accounts, Tax Assistance Section, Austin, Texas, 78774-0100, (512) 463-4600 or (800) 252-1381 for franchise tax information. For information relating to federal employer identification numbers, federal income tax filing requirements, tax publications and forms call (800) 829-3676 or visit the Internal Revenue Service web site at www.irs.gov.

Instructions for Form

- **Item 1—Entity Name and Type:** Provide the full legal name of the foreign entity as stated in the entity's formation document. The name of the foreign entity must comply with chapter 5 of the BOC. Chapter 5 requires that:
 - (1) the entity name contain a recognized term of organization for the entity type as listed in section 5.054 of the BOC;
 - (2) the entity name not contain any word or phrase that indicates or implies that the entity is engaged in a business that the entity is not authorized to pursue (BOC § 5.052); and
 - (3) the entity name not be the same as, deceptively similar to, or similar to the name of any existing domestic or foreign filing entity, or any name reservation or registration filed with the secretary of state (BOC § 5.053).

If the entity name does not comply with chapter 5, the document cannot be filed. The administrative rules adopted for determining entity name availability (Texas Administrative Code, title 1, part 4,

Form 2-3

Effective June 1, 2018, the name a filing entity seeks to use must be “distinguishable in the records of the secretary of state” from names used by existing entities. *See* Tex. Bus. Orgs. Code § 5.053; Acts 2017, 85th Leg., R.S., ch. 503, § 3 (H.B. 2856), eff. June 1, 2018. Instructions that accompany secretary of state forms have not been updated to reflect this new standard as of the publication date of the latest supplement of this manual. See section 1.1:2 in this manual for more information on entity name availability.

**Certificate of Amendment
(SOS Form 424)**

Form 2-3

Form 424—General Information
(Certificate of Amendment)

The attached form is drafted to meet minimal statutory filing requirements pursuant to the relevant code provisions. This form and the information provided are not substitutes for the advice and services of an attorney and tax specialist.

Commentary

Sections 3.051 to 3.056 of the Texas Business Organizations Code (BOC) govern amendments to the certificate of formation of a Texas filing entity. A filing entity may amend its certificate of formation at any time and in as many respects as may be desired, *as long as the certificate as amended contains only such provisions as could have been included in the original certificate of formation.* Amendments may be adopted to change the language of an existing provision, to add a new provision, or to delete an existing provision. If extensive amendments are proposed, the entity should consider filing a restated certificate of formation pursuant to section 3.059 of the BOC (Form 414).

Procedural Information by Entity Type

Please note that a document on file with the secretary of state is a public record that is subject to public access and disclosure. Do not include confidential information, such as social security numbers. If amending information relating to directors or governing persons, use a business or post office box address rather than a residence address if privacy concerns are an issue.

For-profit or Professional Corporation

Sections 21.052 to 21.055 of the BOC set forth the procedures for amending the certificate of formation for a for-profit corporation or professional corporation. The board of directors adopts a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of the shareholders. Written or printed notice setting forth the proposed amendment is given to each shareholder of record entitled to vote not later than the 10th day and not earlier than the 60th day before the date of the meeting, either personally, by electronic transmission, or by mail (BOC § 21.353). (Please refer to chapters 6 and 21 of the BOC for further information.)

Pursuant to section 21.364 of the BOC, the proposed amendment is adopted on receiving the affirmative vote of two-thirds of the outstanding shares entitled to vote. If any class or series of shares is entitled to vote as a class, the amendment must also receive the affirmative vote of two-thirds of the shares within each class or series that is entitled to vote as a class. Any number of amendments may be submitted to the shareholders and voted on at one meeting. Alternatively, amendments may be adopted by unanimous written consent of the shareholders.

If no shares have been issued, the amendment is adopted by a resolution of the board of directors and the provisions for adoption by shareholders do not apply.

An officer must sign the certificate of amendment. If no shares have been issued and the amendment was adopted by the board of directors, a majority of the directors may sign the certificate of amendment.

Professional Association

The provisions of chapters 20 and 21 of the BOC apply to a professional association, unless there is a conflict with a specific provision in title 7. A professional association may amend its certificate of formation by following the procedures set forth in its certificate of formation. If the certificate of

Chapter 5

Conversion

Form 5-1	Certificate of Conversion of a Corporation Converting to a Limited Liability Company (SOS Form 632).....	5-1-1 to 5-1-6
Form 5-2	Plan of Conversion [Corporation to Limited Liability Company]	5-2-1 to 5-2-4
Form 5-3	Certificate of Conversion of a Corporation Converting to a Limited Partnership (SOS Form 633).....	5-3-1 to 5-3-6
Form 5-4	Plan of Conversion [Corporation to Limited Partnership]	5-4-1 to 5-4-4
Form 5-5	Certificate of Conversion of a Corporation Converting to a General Partnership (SOS Form 631).....	5-5-1 to 5-5-6
Form 5-6	Plan of Conversion [Corporation to General Partnership]	5-6-1 to 5-6-4
Form 5-7	Certificate of Conversion of a Corporation Converting to a Real Estate Investment Trust (SOS Form 634)	5-7-1 to 5-7-6
Form 5-8	Plan of Conversion [Corporation to Real Estate Investment Trust]	5-8-1 to 5-8-4

Caution: Before using any SOS forms, the attorney should verify their currency by visiting the secretary of state's website at www.sos.state.tx.us or by calling (512) 463-5555. Note that many of these forms may also be filed online through SOSDirect.

[Reserved]

Form 5-1

Effective June 1, 2018, the name a filing entity seeks to use must be “distinguishable in the records of the secretary of state” from names used by existing entities. *See* Tex. Bus. Orgs. Code § 5.053; Acts 2017, 85th Leg., R.S., ch. 503, § 3 (H.B. 2856), eff. June 1, 2018. Instructions that accompany secretary of state forms have not been updated to reflect this new standard as of the publication date of the latest supplement of this manual. See section 1.1:2 in this manual for more information on entity name availability.

**Certificate of Conversion of a Corporation Converting to a
Limited Liability Company
(SOS Form 632)**

Form 5-1
Form 632—General Information
(Certificate of Conversion of a Corporation Converting to a Limited Liability Company)

The attached form is designed to meet minimal statutory filing requirements pursuant to the relevant code provisions. This form and the information provided are not substitutes for the advice and services of an attorney and tax specialist.

Commentary

A corporation may convert into a limited liability company by adopting a plan of conversion in accordance with section 10.101 of the Texas Business Organizations Code (BOC) and filing a certificate of conversion with the secretary of state in accordance with sections 10.154 and 10.155 of the BOC. As defined in section 1.002 of the BOC, conversion means the continuance of a Texas entity as a foreign entity of any type, the continuance of a foreign entity as a Texas entity of any type, or the continuance of a Texas entity of one type as a Texas entity of another type. As used in the BOC and in this form, “converting entity” means the entity that existed before the conversion; “converted entity” means the entity resulting from a conversion. This form should be used when a corporation is the converting entity and the converted entity is a limited liability company.

Instructions for Form

- **Converting Entity Information:** The certificate of conversion is filed by the converting entity and should set forth the legal name of the converting entity and its jurisdiction of organization as part of the certificate. It is recommended that the date of formation and file number, if any, assigned by the secretary of state be provided to facilitate processing of the document.
- **Plan of Conversion/Alternative Statements:** A plan of conversion conforming to the requirements of section 10.103 of the BOC should be attached to the certificate of conversion. As an alternative to attaching the complete plan of conversion, the converting entity may opt to certify and complete the alternative statements in the form.
- **Converted Entity Name:** If the converted entity is a Texas filing entity, the name of the converted entity will be checked for availability in accordance with section 5.053 of the BOC. If the converted entity name is the same as, deceptively similar to, or similar to the name of an existing domestic or foreign filing entity, or any name reservation or name registration filed with the secretary of state, the document cannot be filed. However, if the conflicting entity name is the name of the converting entity and the converting entity is currently in existence with the secretary of state, the converted entity name will be accepted irrespective of the conflict with the entity name in use by the converting entity.
- **Certificate of Formation for the Converted Entity:** The certificate of formation of the converted entity must be filed with the certificate of conversion if the converted entity is a Texas filing entity. If the plan of conversion is attached to the certificate of conversion, the certificate of formation should be included as part of the plan of conversion or as an exhibit to the plan. If the converting entity opts to set forth the alternative statements in lieu of providing the complete plan of conversion, the certificate of formation for the limited liability company must be attached to the certificate of conversion.
 - The certificate of formation of a limited liability company formed under a plan of conversion must include a statement to that effect. In addition, the certificate of formation must provide the

Form 5-3

Effective June 1, 2018, the name a filing entity seeks to use must be “distinguishable in the records of the secretary of state” from names used by existing entities. *See* Tex. Bus. Orgs. Code § 5.053; Acts 2017, 85th Leg., R.S., ch. 503, § 3 (H.B. 2856), eff. June 1, 2018. Instructions that accompany secretary of state forms have not been updated to reflect this new standard as of the publication date of the latest supplement of this manual. See section 1.1:2 in this manual for more information on entity name availability.

**Certificate of Conversion of a Corporation Converting to a
Limited Partnership
(SOS Form 633)**

Form 5-3
Form 633—General Information
(Certificate of Conversion of a Corporation Converting to a Limited Partnership)

The attached form is designed to meet minimal statutory filing requirements pursuant to the relevant code provisions. This form and the information provided are not substitutes for the advice and services of an attorney and tax specialist.

Commentary

A corporation may convert into a limited partnership by adopting a plan of conversion in accordance with section 10.101 of the Texas Business Organizations Code (BOC) and filing a certificate of conversion with the secretary of state in accordance with sections 10.154 and 10.155 of the BOC. As defined in section 1.002 of the BOC, conversion means the continuance of a Texas entity as a foreign entity of any type, the continuance of a foreign entity as a Texas entity of any type, or the continuance of a Texas entity of one type as a Texas entity of another type. As used in the BOC and in this form, “converting entity” means the entity that existed before the conversion; “converted entity” means the entity resulting from a conversion. This form should be used when a for-profit or professional corporation is the converting entity and the converted entity is a limited partnership.

Registration as a Limited Liability Partnership: A Texas limited partnership created by conversion may file for registration to become a limited liability partnership by complying with sections 152.803 and 152.804 of the BOC and filing an application for registration with the secretary of state in accordance with section 152.802.

Instructions for Form

- **Converting Entity Information:** The certificate of conversion is filed by the converting entity and should set forth the legal name of the converting entity and its jurisdiction of organization as part of the certificate. It is recommended that the date of formation and file number, if any, assigned by the secretary of state be provided to facilitate processing of the document.
- **Converted Entity Information:** The entity following the conversion is the converted entity. The certificate of conversion should set forth the legal name of the converted entity and its jurisdiction of formation.
- **Converted Entity Name:** If the converted entity is a Texas filing entity, the name of the converted entity will be checked for availability in accordance with section 5.053 of the BOC. If the converted entity name is the same as, deceptively similar to, or similar to the name of an existing domestic or foreign filing entity, or any name reservation or name registration filed with the secretary of state, the document cannot be filed. However, if the conflicting entity name is the name of the converting entity and the converting entity is currently in existence with the secretary of state, the converted entity name will be accepted irrespective of the conflict with the entity name in use by the converting entity.
- **Plan of Conversion:** Unless the converting entity opts to complete the Alternative Statements section of this form, a plan of conversion conforming to the requirements of section 10.103 of the BOC should be attached to the certificate of conversion.
- **Alternative Statements in Lieu of Plan:** As an alternative to attaching the complete plan of conversion, the converting entity may opt to certify and complete the alternative statements in the form.

Chapter 6
Corporate Matters

Form 6-1	Notice of Meeting of Board of Directors	6-1-1 to 6-1-2
Form 6-2	Unanimous Consent of Directors in Lieu of Annual Meeting of Board of Directors	6-2-1 to 6-2-2
Form 6-3	Waiver of Notice of Meeting of Board of Directors.....	6-3-1 to 6-3-2
Form 6-4	Notice of [Annual/Special] Meeting of Shareholders.....	6-4-1 to 6-4-2
Form 6-5	Written Consent of Shareholders in Lieu of [Annual/Special] Meeting of Shareholders.....	6-5-1 to 6-5-2
Form 6-6	Waiver of Notice of Meeting of Shareholders	6-6-1 to 6-6-2
Form 6-7	Notice of Action Taken by Less-Than-Unanimous Consent	6-7-1 to 6-7-2
Form 6-8	Proxy.....	6-8-1 to 6-8-4
Form 6-9	Certificate of Mailing	6-9-1 to 6-9-2
Form 6-10	Statement of Resolution Establishing Series “A” Preferred Stock.....	6-10-1 to 6-10-26
Form 6-11	Periodic Report—Nonprofit Corporation (SOS Form 802)	6-11-1 to 6-11-6

Caution: Before using any SOS forms, the attorney should verify their currency by visiting the secretary of state’s website at www.sos.state.tx.us or by calling (512) 463-5555. Note that many of these forms may also be filed online through SOSDirect.

[Reserved]

Chapter 7

Reorganization

Form 7-1	Type A Reorganization—Agreement and Plan of Merger	7-1-1 to 7-1-8
Form 7-2	Type D Reorganization—Agreement and Plan of Corporate Separation (Spin-Off)	7-2-1 to 7-2-18
Form 7-3	Type D Reorganization—Agreement and Plan of Corporate Separation (Split-Off)	7-3-1 to 7-3-18
Form 7-4	Type D Reorganization—Agreement and Plan of Corporate Separation (Split-Up)	7-4-1 to 7-4-24
Form 7-5	Type E Reorganization—Agreement for Redemption of Shares and Recapitalization	7-5-1 to 7-5-10
Form 7-6	Articles of Merger of [name of subsidiary organization] into [name of parent organization]	7-6-1 to 7-6-2
Form 7-7	Articles of Merger of [name of parent organization] into [name of subsidiary organization]	7-7-1 to 7-7-2
Form 7-8	Certificate of Merger—Combination Merger (SOS Form 622)	7-8-1 to 7-8-10
Form 7-9	Parent-Subsidiary Certificate of Merger—Parent Survivor (SOS Form 623)	7-9-1 to 7-9-8
Form 7-10	Certificate of Merger—Domestic Entity Divisional Merger (SOS Form 621)	7-10-1 to 7-10-8
Form 7-11	Notice to Shareholders of Special Meeting to Consider Merger	7-11-1 to 7-11-2
Form 7-12	Certificate of Merger for Nonprofit Corporations (SOS Form 624)	7-12-1 to 7-12-8

Caution: Before using any SOS forms, the attorney should verify their currency by visiting the secretary of state's website at www.sos.state.tx.us or by calling (512) 463-5555. Note that many of these forms may also be filed online through SOSDirect.

[Reserved]

Chapter 8

Termination

Form 8-1 Certificate of Termination of a Domestic Entity (SOS Form 651) 8-1-1 to 8-1-6

Caution: Before using any SOS forms, the attorney should verify their currency by visiting the secretary of state's website at www.sos.state.tx.us or by calling (512) 463-5555. Note that many of these forms may also be filed online through SOSDirect.

[Reserved]

Chapter 21

Organizational Filings

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Forms

Form 21-1	Certificate of Formation—Limited Liability Company (SOS Form 205)	21-1-1 to 21-1-8
Form 21-2	Certificate of Amendment (SOS Form 424)	21-2-1 to 21-2-10
Form 21-3	Restated Certificate of Formation with New Amendments (SOS Form 414)	21-3-1 to 21-3-8
Form 21-4	Restated Certificate of Formation without Further Amendments (SOS Form 415)	21-4-1 to 21-4-6
Form 21-5	Application for Reservation or Renewal of Reservation of an Entity Name (SOS Form 501)	21-5-1 to 21-5-4
Form 21-6	Assumed Name Certificate (SOS Form 503)	21-6-1 to 21-6-6
Form 21-7	Additional Certificate of Formation Provisions for Establishing Series LLCs	21-7-1 to 21-7-2
Form 21-8	Application for Registration of a Foreign Limited Liability Company (SOS Form 304)	21-8-1 to 21-8-10
Form 21-9	Limited Liability Company Checklist	21-9-1 to 21-9-2
Form 21-10	Client Letter Regarding Post-Formation LLC Issues	21-10-1 to 21-10-6

Caution: Before using any SOS forms, the attorney should verify their currency by visiting the secretary of state's website at www.sos.state.tx.us or by calling (512) 463-5555. Note that many of these forms may also be filed online through SOSDirect.

Chapter 21

Organizational Filings

Note: The commentary in this chapter addresses filing and formation issues specific to limited liability companies. For information on business entity formation and organizational filing requirements generally, see the commentary in chapter 1 of this manual.

§ 21.1 Limited Liability Companies

§ 21.1:2 LLC Formation

§ 21.1:1 Limited Liability Company in General

Corporations are good choices for providing liability protection for investors, but that protection comes at a high cost, namely tremendous organizational formalities and “double taxation,” discussed at section 21.2 below. A limited liability company (LLC) is an entity that offers liability protection to its owners similar to a corporation while allowing owners to avoid some of the legal formalities and tax rules that apply to corporations. It is neither a corporation nor a partnership but has attributes of both. It is one of the most flexible and efficient ways to structure an entity.

The owners of the LLC are “members” who share equally in the company’s profits and losses unless otherwise agreed to by the members. *See* Tex. Bus. Orgs. Code §§ 101.052(c), 101.101–104, 101.201. Members may be individuals, partnerships, corporations, or any other legal entity. *See* Tex. Bus. Orgs. Code §§ 1.002(69–b), 101.102(a). Limited liability companies may have any number of members. *See* Tex. Bus. Orgs. Code § 101.101(a). In a member-managed LLC, all members are responsible for managing the business. *See* Tex. Bus. Orgs. Code § 101.251(2). In a manager-managed LLC, the business is managed by managers who may be, but are not required to be, members of the LLC. *See* Tex. Bus. Orgs. Code §§ 101.251(1), 101.302.

To form an LLC, a certificate of formation must be filed with the Texas Secretary of State. The company must have a company agreement if the members do not wish to subject themselves to statutory default provisions. *See* Tex. Bus. Orgs. Code §§ 3.001, 101.052. A company agreement has the added benefit of providing protection against an argument that the LLC was the alter ego of its members in a veil-piercing claim by showing that the members maintained the separate existence of the entity. *See Doyle v. Contemporary Builders, Inc.*, 370 S.W.3d 448, 458 (Tex. App.—Dallas 2012, pet. denied). The certificate of formation has minimal requirements and can be drafted from scratch or completed using secretary of state Form 205 (form 21-1 in this chapter). The filing fee for a certificate of formation is \$300 plus a 2.7 percent fee for payments made by credit card. Current filing fees are listed at the secretary of state’s SOSDirect website, <https://direct.sos.state.tx.us>.

The certificate of formation must state the name of the LLC, which must include the phrase “limited liability company,” “limited company,” or an abbreviation of one of those phrases. Tex. Bus. Orgs. Code § 5.056. The name of a filing entity or the name under which a foreign filing entity registers to transact business in Texas must also be distinguishable in the records of the secretary of state from the name of another existing filing entity or an entity name that is reserved or registered with the secretary. *See* Tex. Bus. Orgs. Code § 5.053(a). *See* section

1.1:2 in this manual for more information on entity name availability.

The certificate of formation must state the street address of the initial registered office of the LLC and the name of the registered agent. Tex. Bus. Orgs. Code § 3.005(a)(5). The registered agent can be an entity registered to do business in Texas or an individual who resides in the state. The person or entity designated as registered agent must give consent to be the registered agent. Tex. Bus. Orgs. Code § 5.201(b). The best practice is to maintain a copy of the agent's written consent in the LLC records. Secretary of State Form 401-A (form 1-2 in this manual) may be used to document a registered agent's acceptance of appointment. An LLC cannot act as its own registered agent. *See* Tex. Bus. Orgs. Code § 5.201.

The certificate of formation must also state the name and physical address of each organizer. Tex. Bus. Orgs. Code § 3.005(a)(6). Unless the entity is formed under a plan of conversion or merger, at least one organizer is required, who must be a natural person eighteen years of age or older or a legal entity. *See* Tex. Bus. Orgs. Code §§ 1.002(69-b), 3.004(a), 3.005(a)(6)(A).

The certificate of formation must state whether the company will be manager-managed or member-managed. If the LLC will have managers, the company must provide the names and addresses of each initial manager. If the LLC will not have managers, the company must provide the names and addresses of each initial member. Tex. Bus. Orgs. Code § 3.010.

The certificate of formation must state the purpose for which the LLC is formed, which may be or include any lawful purpose for that type of entity. Tex. Bus. Orgs. Code § 3.005(a)(3).

Texas LLCs exist in perpetuity unless declared otherwise on the certificate of formation. *See* Tex. Bus. Orgs. Code § 3.005(a)(4).

A certificate of formation becomes effective when filed with the secretary of state; however, organizers may choose to delay the effective date by up to ninety days from the date signed by stating the later date on the certificate. *See* Tex. Bus. Orgs. Code §§ 4.051-.053.

§ 21.2 LLC Taxation

Entity owners should consult tax counsel for advice concerning the advantages and disadvantages of the various tax elections to be made when forming an LLC. A thorough understanding of how the LLC will be taxed will help in properly drafting the company agreement.

Single-member LLCs are, by default, "pass-through" or "disregarded" entities for federal tax purposes. Although the Internal Revenue Service treats most entities, such as corporations, as distinct from their owners, the IRS does not consider a pass-through entity to be separate from the business owner. Treas. Reg. § 301.7701-2(c)(2)(i). All of the LLC's net income is considered the member's self-employment income and is reported on schedule C of the member's personal income tax return. *See* Treas. Reg. § 301.7701-2(c)(2)(iv)(D)(iii).

Multimember LLCs are taxed as partnerships unless they elect otherwise. *See* 26 U.S.C. § 1362(a). A multimember LLC must file an annual information return with the IRS and furnish its members with a copy of the schedule K from that return, along with the member's individual schedule K-1. 26 U.S.C. § 6031. *See also* Treas. Reg. § 301.6722-1(d)(2)(i).

An LLC can elect out of its default tax structure by choosing to be taxed as a corporation. An LLC can elect to be one of two types of corporation: a C corporation or an S corporation. *See* 26 U.S.C. § 1362(a); Treas. Reg. § 301.7701-3(a).

If an LLC opts to be taxed as a C corporation, it will pay federal income tax as an entity on the

net taxable income, and all distributions to its members are treated as dividends, which are further taxed at the individual member's federal income tax rate. 26 U.S.C. §§ 11, 301. Taxation of both corporate income and of the dividends paid to members is sometimes referred to as "double taxation." Historically, LLCs have not opted for this option because the highest corporate tax rate was 35 percent, but with the recent lowering of the rate to 21 percent, this may become more common. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13001, 131 Stat. 2054 (2017), 26 U.S.C. § 11. Dividends that are the result of a corporation's long-term capital gains may be considered "qualified dividends," which may be taxed at lower rates than the individual's tax bracket. *See* 26 U.S.C. § 1(h)(11).

An LLC may also opt to be taxed as an S corporation if certain requirements are met. 26 U.S.C. § 1362(a). The main requirements are that the LLC cannot have more than one hundred members, who must all be U.S. citizens. Also, the election requires the consent of each member and, for each member residing in a community-property state, the consent of the member's spouse. 26 U.S.C. §§ 1361(a), (b), 1362(a); Treas. Reg. § 1.1362-6(b)(2)(i). An S corporation election may offer distinct tax advantages, particularly with respect to self-employment tax, as the LLC is still treated as a pass-through entity. *See* 26 U.S.C. § 1363. The client should consult an accountant or tax attorney before making any election. Additionally, the client should get tax advice before setting salaries for entity members to ensure that the salaries are reasonable in relation to the services provided. *See* 26 U.S.C. § 707(a).

Texas LLCs are subject to the state franchise tax. *See* section 1.9 in this manual for more information about the Texas franchise tax.

§ 21.2:1 Tax Audits

Entities taxed as partnerships, including multi-member LLCs that make such an election, are subject to the Bipartisan Budget Act of 2015 § 1101 (amended 2018), 26 U.S.C. §§ 6221-6241 ("BBA"), which drastically changes audit and collection procedures for tax years beginning after December 31, 2017.

The BBA creates a new centralized regime, wherein the IRS audits and collects underpayments due from a partnership at the entity level instead of the partner (personal) level. This change shifts liability for underpaid taxes, interest, and penalties resulting from an audit from the partners who were in the partnership during the tax year in which the underpayments relate (the audited or "reviewed year") to the partners in the tax year in which the adjustments become final (the "adjustment year"). *See* 26 U.S.C. § 6225(a), (d). It is possible that the partners in the adjustment year are not the same as, or do not have the same percentage interests as, the partners in the reviewed year. This shift in liability may result in potential conflicts between partners, including a desire by adjustment-year partners to seek reimbursement from reviewed-year partners.

The BBA replaces the tax matters partner, a position formed by the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), with a "partnership representative." *See* 26 U.S.C. § 6223(a). It is not at all clear yet whether the IRS or courts will find that a partnership's tax matters partner can function as its partnership representative. Thus, entities in existence before January 1, 2018, should (1) retain or include language designating a tax matters partner in their operating agreements until the statute of limitations for audits expires for those tax years governed by TEFRA, limiting the tax matters partner's authority to tax years ending before January 1, 2018; and (2) appoint a partnership representative for tax years beginning on or after

January 1, 2018. Unlike a tax matters partner, a partnership representative can be anyone, including a sole individual or entity, and does not have to be a partner or member of the company. *See* 26 U.S.C. § 6223(a).

§ 21.2:2 Opting Out of New Audit Regime

Partnerships and multimember LLCs taxed as partnerships may opt out of the new audit regime and elect to be governed by the previous audit rules in a number of ways, including the following.

Election-Out: Partnerships that furnish no more than one hundred schedule K-1s for their partners are eligible to opt out of the new default audit rules if all the partners are eligible partners at all times during the taxable year and are individuals, domestic C corporations, certain foreign entities, deceased partners' estates, or S corporations. 26 U.S.C. § 6221(b)(1). A partnership is not eligible to elect out under section 6221 if any of its partners is a partnership, disregarded LLC, trust, foreign entity that would not be treated as a C corporation if it were domestic, estate of a nonpartner deceased individual, or person holding the partnership interest on behalf of another person. *Treas. Reg.* § 301.6221(b)-1(b)(3)(ii). Schedule K-1s issued by a partner that is an S corporation to its shareholders are counted for purposes of determining whether a partnership has furnished no more than one hundred schedule K-1s. 26 U.S.C. § 6221(b)(2). The partnership must make the election on a timely filed return each taxable year and notify the partners of the election. The return must also include information about the partners, such as names and taxpayer identification numbers. 26 U.S.C. § 6221(b)(1), (2).

The partnership agreement may contain provisions that (1) make this election mandatory, if qualified under the statute, and (2) prohibit the partnership or partners from allowing the trans-

fer of partnership interests or taking any other actions that would disqualify the partnership from making the election.

Push-Out Election: When a partnership receives a notice of final partnership adjustment, the partnership has forty-five days from the issuance of the notice to elect to push out the imputed underpayment to the reviewed-year partners by furnishing them an adjustment statement, similar to a schedule K-1. This election generally benefits partners in the adjustment year at the expense of partners from the reviewed year. The IRS may not permit the push-out election for tiered partnerships. 26 U.S.C. § 6226(a).

Again, the partnership agreement may include provisions that (1) require the partnership to make this election on a timely basis and in all audit situations and (2) prohibit the partnership or partners from taking any actions that would disqualify the partnership from making the election.

Tax Indemnification Provisions: Partnership agreements, partnership share purchase agreements, or other internal agreements can include tax indemnification provisions that allocate any liabilities arising from imputed underpayments according to the partners' interests in the reviewed year. Indemnification provisions should also provide that the indemnification is mandatory, rather than being subject to a partnership election or other decision. Agreements for the purchase of partnership interests by new partners from existing partners should include tax indemnity provisions to cover adjustments under the BBA audit regime. Note that any allocations resulting from these tax indemnity provisions must have substantial economic effect for the IRS to allow the agreement to ultimately control in the determination of the partners' distributive shares. *See* 26 U.S.C. § 704(b); *Treas. Reg.* § 1.704-1(b)(2).

See form 22-4 in this manual for optional provisions relating to partnership representatives and audit procedures to include in LLC agreements.

§ 21.2:3 Partnership Representative

The partnership representative is the sole authority who can act on behalf of the partnership in relation to the IRS, with the ability to bind both the partnership and the partners in administrative or judicial proceedings. Partners do not have the ability to appeal or challenge the decisions of the partnership representative. LLCs may want to include procedures in their operating agreements for preapproving decisions of the partnership representative made in connection with an audit and establish requirements for the partnership representative and members to provide information to each other on a timely basis. These limitations are not binding on the IRS but provide contractual protections to the partners.

If the LLC does not designate a partnership representative, the secretary of the treasury may designate any person to fill the role. *See* 26 U.S.C. § 6223(a). If for no other reason than simply to avoid this default provision, all LLC operating agreements should include provisions to require the LLC to designate the required partnership representative and to immediately replace the representative should the position become vacant.

See form 22-4 in this manual for optional provisions relating to partnership representatives and audit procedures to include in LLC agreements.

§ 21.3 Series LLC

§ 21.3:1 Series LLC in General

A series LLC is an LLC that provides in its governing documents for the establishment of a series of members, managers, membership interests, or assets that have separate rights,

obligations, and liabilities and business purposes from the general (“master”) LLC. Each individual series has the ability to sue and be sued, enter into contracts, hold title to assets, and grant liens or security interests in its assets; however, the individual series is not a separate domestic entity or organization. *See* Tex. Bus. Orgs. Code §§ 101.602(c), 101.605, 101.622. A series may also be a promoter, organizer, partner, owner, member, associate, or manager of an organization. Tex. Bus. Orgs. Code § 101.605(5). The provisions governing a domestic series LLC are in Tex. Bus. Orgs. Code §§ 101.601–.622.

The series of an LLC may be established in the company agreement. *See* Tex. Bus. Orgs. Code § 101.601. However, the debts, liabilities, obligations, and expenses of a series are enforceable against the LLC generally and against other series (and not just the subject series) *unless* the requirements of Tex. Bus. Orgs. Code § 101.602 are met. Therefore, to receive the full benefits of a series LLC regarding limitation of liability, separate records for the assets of each series must be maintained, the company agreement must contain a statement to the effect of the limitations provided by Business Organizations Code section 101.602(a), and the LLC’s certificate of formation must include a notice of the limitations provided by section 101.602(a). *See* Tex. Bus. Orgs. Code § 101.602(b).

The computer records of the secretary of state do not categorize or identify those LLCs that are authorized to establish series. Consequently, the only means of determining whether a particular LLC is authorized to establish a series is to review its company agreement and certificate of formation or any amendment to its certificate of formation for the notice of limitations required.

§ 21.3:2 Notice of Limitations

The notice of limitations does not need to make reference to a specific series. The notice con-

tained in the certificate of formation of a series LLC must state that—

1. the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to a particular series shall be enforceable against the assets of that series only and shall not be enforceable against the assets of the LLC generally or any other series; and
2. none of the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to the LLC generally, or any other series, shall be enforceable against the assets of a particular series.

Tex. Bus. Orgs. Code § 101.602.

PRACTICE TIP: The authorization to establish a series is an optional provision that would be included in the certificate of formation. Because the notice is not required for formation of the LLC, the secretary of state *does not* review the notice of limitations to determine whether the notice complies with Business Organizations Code section 101.602(a) or review the sufficiency of any language establishing a series. This means that the secretary of state will not reject a certificate of formation for correction if such language is missing, even when it appears that the submitting party might have intended to form a series LLC.

The secretary of state does not have a “form” for a domestic series LLC. If the practitioner decides to use the secretary of state’s general LLC form (SOS Form 205, form 21-1 in this chapter) to form a series LLC, the language suggested in form 21-7 may be included in the “Supplemental Provisions/Information” section.

§ 21.3:3 Other Series Issues

No further notice or filing is required when the LLC establishes a series. Nevertheless, the secretary of state will not reject a certificate of amendment that amends the certificate of forma-

tion of a series LLC to add provisions that relate to the establishment of specific series. However, as noted above, the secretary of state records will not reflect how many series have been established by a series LLC or whether the LLC has established a series under a particular name.

The name of a series established by a series LLC is an assumed name of the LLC. *See* Tex. Bus. & Com. Code § 71.002(2). The master or parent LLC would file an assumed name certificate with the secretary of state and with the appropriate county clerk in compliance with chapter 71 of the Texas Business and Commerce Code.

PRACTICE TIP: When completing SOS Form 503 (form 21-6 in this chapter), enter only the legal name of the master/parent LLC in item 2 of the form; do not include the name of the individual series. Inclusion of an individual series name (e.g., “Master Development, LLC Series A”) as the entity name of the assumed name registrant will result in a rejection of the assumed name certificate. If you want to include the name of the individual series associated with the assumed name within the assumed name certificate, you may draft your own assumed name certificate form and include that information in a separate numbered paragraph.

Only a small minority of states authorize a series LLC; consequently, a person forming a series LLC should contact the filing office and tax office in the state in which the LLC contemplates transacting business to determine how the jurisdiction treats series LLCs for purposes of registration and taxation.

§ 21.4 Nonprofit LLC

Titles 2 and 3 of the Texas Business Organizations Code do not restrict the purpose of an LLC to the rendition of a for-profit business, trade, or profession. Before the Business Organizations Code went into effect, it was the secretary of state’s position that the formation of a nonprofit

LLC was inconsistent with the provisions of the Texas Limited Liability Company Act (repealed) and the laws made applicable to an LLC—namely, the Texas Business Corporations Act (repealed) and the Texas Revised Limited Partnership Act (repealed). Because the Business Organizations Code does not restrict the purpose, an LLC may be formed to engage in a nonprofit purpose. Other state law regulating a particular activity may contain restrictions that would prohibit an LLC from engaging in the regulated activity.

An LLC may be organized solely for one or more nonprofit purposes specified by Business Organizations Code section 2.002. Nonprofit purposes include—

1. operating or managing professional, commercial, or trade associations;
2. serving charitable, benevolent, religious, fraternal, social, educational, athletic, patriotic, and civic purposes; and
3. operating on a nonprofit cooperative basis for the benefit of its neighbors.

See Tex. Bus. Orgs. Code § 2.002.

An LLC with a nonprofit purpose is distinct from a nonprofit corporation or other nonprofit association. *See* Tex. Bus. Orgs. Code § 1.002(58), (59). A Business Organizations Code provision that applies specifically to a nonprofit corporation does not apply to an LLC formed for a nonprofit purpose. *See* Tex. Bus. Orgs. Code § 1.002(58)–(60). For example, the default tax-exempt provisions found in Business Organizations Code section 2.107 apply to a nonprofit corporation but do not apply to a nonprofit LLC.

There is no statutory basis for distinguishing between an LLC formed for a for-profit purpose and an LLC formed for a nonprofit purpose. Filing fees established under Business Organizations Code sections 4.151 and 4.154 apply to all LLCs regardless of purpose.

Section 171.088 of the Texas Tax Code permits an entity that is not a corporation to qualify for a tax-exempt status if its activities would qualify it for a specific tax exemption were the entity formed as a corporation. *See* Tex. Tax Code § 171.088.

PRACTICE TIP: Many Texas secretary of state forms common to corporations and LLCs are located in chapter 1 of this manual.

[Reserved]

Form 21-1

Effective June 1, 2018, the name a filing entity seeks to use must be “distinguishable in the records of the secretary of state” from names used by existing entities. *See* Tex. Bus. Orgs. Code § 5.053; Acts 2017, 85th Leg., R.S., ch. 503, § 3 (H.B. 2856), eff. June 1, 2018. Instructions that accompany secretary of state forms have not been updated to reflect this new standard as of the publication date of the latest supplement of this manual. See section 1.1:2 in this manual for more information on entity name availability.

**Certificate of Formation—Limited Liability Company
(SOS Form 205)**

Form 21-1
Form 205—General Information
(Certificate of Formation—Limited Liability Company)

The attached form is designed to meet minimal statutory filing requirements pursuant to the relevant code provisions. This form and the information provided are not substitutes for the advice and services of an attorney and tax specialist.

Commentary

The limited liability company (hereinafter LLC) is neither a corporation nor a partnership; rather, it is a distinct type of entity. An LLC is governed by title 3, chapter 101 of the Texas Business Organizations Code (BOC). Title 1, chapter 3, subchapter A of the BOC governs the formation of an LLC and sets forth the provisions required or permitted to be contained in the certificate of formation.

The owners of an LLC are called “members.” An LLC may have one or more members. Members may be individuals, partnerships, corporations, and any other type of legal entity.

Taxes: LLCs are subject to a state franchise tax. Contact the Texas Comptroller of Public Accounts, Tax Assistance Section, Austin, Texas, 78774-0100, (512) 463-4600 or (800) 252-1381 for franchise tax information. For information relating to federal employer identification numbers, federal income tax filing requirements, tax publications, and forms call (800) 829-3676 or visit the Internal Revenue Service web site at www.irs.gov.

Instructions for Form

- **Article 1—Entity Name and Type:** Provide a company name and organizational designation. Under section 5.053 of the BOC, if the name chosen is the same as, deceptively similar to, or similar to the name of any existing domestic or foreign filing entity, or any name reservation or registration filed with the secretary of state, the document cannot be filed. The administrative rules adopted for determining entity name availability (Texas Administrative Code, title 1, part 4, chapter 79, subchapter C) may be viewed at www.sos.state.tx.us/tac/index.shtml. If you wish the secretary of state to provide a preliminary determination on name availability, you may call (512) 463-5555, dial 7-1-1 for relay services, or e-mail your name inquiry to corpinfo@sos.state.tx.us. A final determination cannot be made until the document is received and processed by the secretary of state. Do not make financial expenditures or execute documents based on a preliminary clearance. Also note that the preclearance of a name or the issuance of a certificate of formation under a name does not authorize the use of a name in violation of another person’s rights to the name.
- **Article 2—Registered Agent and Registered Office:** The registered agent can be either (option A) a domestic entity or a foreign entity that is registered to do business in Texas or (option B) an individual resident of the state. The limited liability company cannot act as its own registered agent; do not enter the limited liability company name as the name of the registered agent.

Consent: Effective January 1, 2010, a person designated as the registered agent of an entity must have consented, either in a written or electronic form, to serve as the registered agent of the entity. Although consent is required, a copy of the person’s written or electronic consent need not be submitted with the certificate of formation. *The liabilities and penalties imposed by sections 4.007 and 4.008 of the BOC apply with respect to a false statement in a filing instrument that names a person as the registered agent of an entity without that person’s consent.* (BOC § 5.207)

Form 21-2

Effective June 1, 2018, the name a filing entity seeks to use must be “distinguishable in the records of the secretary of state” from names used by existing entities. *See* Tex. Bus. Orgs. Code § 5.053; Acts 2017, 85th Leg., R.S., ch. 503, § 3 (H.B. 2856), eff. June 1, 2018. Instructions that accompany secretary of state forms have not been updated to reflect this new standard as of the publication date of the latest supplement of this manual. See section 1.1:2 in this manual for more information on entity name availability.

**Certificate of Amendment
(SOS Form 424)**

Form 21-2
Form 424—General Information
(Certificate of Amendment)

The attached form is drafted to meet minimal statutory filing requirements pursuant to the relevant code provisions. This form and the information provided are not substitutes for the advice and services of an attorney and tax specialist.

Commentary

Sections 3.051 to 3.056 of the Texas Business Organizations Code (BOC) govern amendments to the certificate of formation of a Texas filing entity. A filing entity may amend its certificate of formation at any time and in as many respects as may be desired, *as long as the certificate as amended contains only such provisions as could have been included in the original certificate of formation.* Amendments may be adopted to change the language of an existing provision, to add a new provision, or to delete an existing provision. If extensive amendments are proposed, the entity should consider filing a restated certificate of formation pursuant to section 3.059 of the BOC (Form 414).

Procedural Information by Entity Type

Please note that a document on file with the secretary of state is a public record that is subject to public access and disclosure. Do not include confidential information, such as social security numbers. If amending information relating to directors or governing persons, use a business or post office box address rather than a residence address if privacy concerns are an issue.

For-profit or Professional Corporation

Sections 21.052 to 21.055 of the BOC set forth the procedures for amending the certificate of formation for a for-profit corporation or professional corporation. The board of directors adopts a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of the shareholders. Written or printed notice setting forth the proposed amendment is given to each shareholder of record entitled to vote not later than the 10th day and not earlier than the 60th day before the date of the meeting, either personally, by electronic transmission, or by mail (BOC § 21.353). (Please refer to chapters 6 and 21 of the BOC for further information.)

Pursuant to section 21.364 of the BOC, the proposed amendment is adopted on receiving the affirmative vote of two-thirds of the outstanding shares entitled to vote. If any class or series of shares is entitled to vote as a class, the amendment must also receive the affirmative vote of two-thirds of the shares within each class or series that is entitled to vote as a class. Any number of amendments may be submitted to the shareholders and voted on at one meeting. Alternatively, amendments may be adopted by unanimous written consent of the shareholders.

If no shares have been issued, the amendment is adopted by a resolution of the board of directors and the provisions for adoption by shareholders do not apply.

An officer must sign the certificate of amendment. If no shares have been issued and the amendment was adopted by the board of directors, a majority of the directors may sign the certificate of amendment.

Professional Association

The provisions of chapters 20 and 21 of the BOC apply to a professional association, unless there is a conflict with a specific provision in title 7. A professional association may amend its certificate of formation by following the procedures set forth in its certificate of formation. If the certificate of

Form 21-3

Form 414—General Information (Restated Certificate of Formation with New Amendments)

The attached form is drafted to meet minimal statutory filing requirements pursuant to the relevant code provisions. *This form and the information provided are not substitutes for the advice and services of an attorney and tax specialist.*

Commentary

Sections 3.057 to 3.063 of the Texas Business Organizations Code (BOC) govern a restated certificate of formation of a Texas filing entity. A filing entity may restate its certificate of formation to:

- (1) state the text of the certificate of formation (as amended, corrected, or restated) to include all previous amendments carried forward; or
- (2) state the text of the certificate of formation to include all previous amendments and each new amendment to the certificate being restated.

An amendment effected by a restated certificate of formation must comply with the provisions and procedures governing certificates of amendment in title 1, chapter 3 of the BOC and in the title governing the specific entity.

This form is designed to accompany the restated certificate of formation described in statement 2 shown above. *If the restated certificate of formation does not effect any new amendments to the certificate of formation, use Form 415 rather than this form.*

The text of the restated certificate of formation, which is to be attached as an exhibit, may omit the name and address of each organizer. In the case of a limited partnership the restated certificate must include *the name and address of each general partner*. The restated certificate of formation may also omit any other information that may be omitted under the provisions of the BOC applicable to the filing entity.

Procedural Information by Entity Type

Please note that a document on file with the secretary of state is a public record that is subject to public access and disclosure. Do not include confidential information, such as social security numbers. If updating information for directors or governing persons, use a business or post office box address rather than a residence address if privacy concerns are an issue.

For-profit or Professional Corporation

Sections 21.052 to 21.055 of the BOC set forth the procedures for amending the certificate of formation for a for-profit corporation or professional corporation. The board of directors adopts a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of the shareholders. Written or printed notice setting forth the proposed amendment is given to each shareholder of record entitled to vote not later than the 10th day and not earlier than the 60th day before the date of the meeting, either personally, by electronic transmission, or by mail. (Please refer to chapters 6 and 21 of the BOC for further information.)

Pursuant to section 21.364, the proposed amendment is adopted on receiving the affirmative vote of two-thirds of the outstanding shares entitled to vote. If any class or series of shares is entitled to vote as a class, the amendment must also receive the affirmative vote of two-thirds of the shares within each class or series that is entitled to vote as a class. Any number of amendments may be submitted to the

shareholders and voted on at one meeting. Alternatively, amendments may be adopted by unanimous written consent of the shareholders.

If no shares have been issued, the amendment is adopted by a resolution of the board of directors and the provisions for adoption by shareholders do not apply.

In addition to the provisions authorized or required by section 3.059 of the BOC, a restated certificate of formation may update the current number of directors and the names and addresses of the persons serving as directors.

An officer must sign the restated certificate of formation. If no shares have been issued and the amendment was adopted by the board of directors, a majority of the directors may sign the restated certificate of formation.

Professional Association

The provisions of chapters 20 and 21 of the BOC apply to a professional association, unless there is a conflict with a specific provision in title 7. A professional association may amend its certificate of formation by following the procedures set forth in its certificate of formation. If the certificate of formation does not provide a procedure for amending the certificate, the certificate of formation is amended by a two-thirds vote of its members.

In addition to the provisions authorized or required by section 3.059 of the BOC, a restated certificate of formation may update the current number of directors or executive committee members and the names and addresses of each person serving on the board or committee.

An officer must sign the restated certificate of formation.

Nonprofit Corporation

Sections 22.105 to 22.108 of the BOC set forth the procedures for amending the certificate of formation for a nonprofit corporation. If the corporation has members with voting rights, the board of directors adopts a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of the members, which may be either an annual or special meeting. The proposed amendment is adopted on receiving two-thirds of the votes that members present, in person or by proxy, were entitled to cast (BOC § 22.164). Any number of amendments may be submitted to the members and voted on at one meeting. Alternatively, the amendment may be adopted without a meeting if a written consent, setting forth the action to be taken, is signed by all the members entitled to vote. (Please refer to chapters 6 and 22 of the BOC for further information.)

In addition to the provisions authorized or required by section 3.059, a restated certificate of formation may update the current number of directors and the names and addresses of the persons serving as directors. A nonprofit corporation that is a church in which management is vested in its members under section 22.202 of the BOC must contain a statement to that effect in any restated certificate of formation if the original certificate of formation was not required to contain such statement.

If the corporation has no members or no members with voting rights, an amendment is adopted by a majority vote of the board of directors (BOC § 22.107).

An officer of the nonprofit corporation must sign the restated certificate of formation.

Cooperative Association

Section 251.052 of the BOC sets forth the procedure for amending the certificate of formation of a cooperative association. The board of directors may propose an amendment to the certificate of formation by a two-thirds vote of the board members. Notice of the meeting to consider the proposed amendment must be provided to the members no later than the 31st day before the date of the meeting. To be approved, an amendment must be adopted by the affirmative vote of two-thirds of the members voting on the amendment. The cooperative association must file a certificate of amendment with the secretary of state within thirty (30) days after its adoption by the members.

An officer of the cooperative association must sign the restated certificate of formation.

Limited Liability Company or Professional Limited Liability Company

Chapter 101 of the BOC governs limited liability companies. Pursuant to section 101.356(d), an amendment to the certificate of formation must be approved by the affirmative vote of all of the company's members. If the company has managers, but has yet to admit its initial member, the amendment would be approved by the affirmative vote of the majority of all the company's managers as permitted by section 101.356(e).

If the limited liability company has managers, an authorized manager must sign the restated certificate of formation. If the company does not have managers and is managed by its members, an authorized managing-member must sign the restated certificate of formation.

Limited Partnership

Chapter 153 of the BOC governs limited partnerships. A certificate of limited partnership may be amended at any time for any proper purpose determined by the general partners. However, section 153.051 requires a certificate of amendment when there is:

- (1) a change of name of the partnership;
- (2) an admission of a new general partner; or
- (3) the withdrawal of a general partner.

A restated certificate of formation would be approved in the same manner as an amendment to the certificate of formation. The name and address of each general partner must be included in the restated certificate of formation.

Pursuant to section 153.553, at least one general partner must sign the restated certificate of formation. In addition, each general partner designated as a new general partner also must sign the restated certificate of formation. A withdrawing general partner need not sign. The execution of a certificate by a general partner is an oath or affirmation, under a penalty of perjury, that to the best of the executing party's knowledge and belief, the facts contained in the certificate are true and correct (BOC § 153.553(c)).

Instructions for Form

- **Entity Information:** The restated certificate of formation must contain the legal name of the entity. *If the restated certificate of formation effects further amendments that change the name of the entity, the name as it currently appears on the records of the secretary of state should be stated.* It is recommended that the entity type, date of formation and file number assigned by the secretary of state be provided to facilitate processing of the document.

- **Amendments to Certificate of Formation:** A filing entity may amend its certificate of formation in as many respects as may be desired, *as long as the certificate as amended contains only such provisions as could have been included in the original certificate of formation.* The full text of the provisions as added or altered need not be stated on Form 414. The full text of the amended and altered provisions will be contained in the Restated Certificate of Formation attached to this form as an exhibit.

Amendment to Entity Name: If the restated certificate of formation changes the name of the entity, the new entity name will be checked for availability upon submission. If the new name of the entity is the same as, deceptively similar to, or similar to the name of an existing domestic or foreign filing entity, or any name reservation or name registration filed with the secretary of state, the document cannot be filed. The administrative rules adopted for determining entity name availability (Texas Administrative Code, title 1, part 4, chapter 79, subchapter C) may be viewed at www.sos.state.tx.us/tac/index.shtml. If you wish the secretary of state to provide a preliminary determination on name availability, you may call (512) 463-5555, dial 7-1-1 for relay services, or e-mail your name inquiry to corpinfo@sos.texas.gov. A final determination cannot be made until the document is received and processed by the secretary of state. Do not make financial expenditures or execute documents based on a preliminary clearance. Also note that the preclearance of a name or the issuance of a certificate under a name does not authorize the use of a name in violation of another person's rights to the name.

Amendment to Registered Agent: A person designated as the registered agent of an entity must have consented, either in a written or electronic form, to serve as the registered agent of the entity. Although the consent of the person designated as registered agent is required, a copy of the written or electronic consent need not be submitted with a restated certificate of formation that changes the name of the registered agent. *The liabilities and penalties imposed by sections 4.007 and 4.008 of the BOC apply with respect to a false statement in a filing instrument that names a person as the registered agent of an entity without that person's consent.* (BOC § 5.207)

Amendment to Registered Office: The registered office address must be located at a street address where service of process may be personally served on the entity's registered agent during normal business hours. Although the registered office is not required to be the entity's principal place of business, the registered office may not be solely a mailbox service or telephone answering service (BOC § 5.201).

- **Statement of Approval:** As required by section 3.059 of the BOC, the form includes a statement regarding the approval of the amendments made to the certificate of formation. In general, amendments are adopted and approved in the manner set forth in the title of the BOC governing the entity. General procedural information relevant to each filing entity that may use this form precedes the instructions for completing the form.
- **Required Statements:** This form is designed to provide the statements that are to accompany a restated certificate of formation that makes new amendments to the certificate of formation (BOC § 3.059(d)). The text of the restated certificate of formation, which should be attached as an exhibit to this form, should be identified as "Restated Certificate of Formation of [Name of Entity]."
- **Effectiveness of Filing:** A restated certificate of formation becomes effective when filed by the secretary of state (option A). However, pursuant to sections 4.052 and 4.053 of the BOC the effectiveness of the instrument may be delayed to a date not more than ninety (90) days from the

date the instrument is signed (option B). The effectiveness of the instrument also may be delayed on the occurrence of a future event or fact, other than the passage of time (option C). If option C is selected, you must state the manner in which the event or fact will cause the instrument to take effect and the date of the 90th day after the date the instrument is signed. In order for the certificate to take effect under option C, the entity must, within ninety (90) days of the filing of the certificate, file a statement with the secretary of state regarding the event or fact pursuant to section 4.055 of the BOC.

On the filing of a document with a delayed effective date or condition, the computer records of the secretary of state will be changed to show the filing of the document, the date of the filing, and the future date on which the document will be effective or evidence that the effectiveness was conditioned on the occurrence of a future event or fact.

- **Execution:** Pursuant to section 4.001 of the BOC, the restated certificate of formation must be signed by a person authorized by the BOC to act on behalf of the entity in regard to the filing instrument. Generally, a governing person or managerial official of the entity signs a filing instrument. Please refer to the procedural information relating to the specific entity type for further information on execution requirements.

The name of the entity that is restating its certificate of formation should appear on the "name of entity" line unless the governing person or managerial official signing the document is organized as an entity. In this case, the name of the legal entity that is the authorized person should appear on the "name of entity" line.


The restated certificate of formation need not be notarized. However, before signing, please read the statements on this form carefully. The designation or appointment of a person as the registered agent by a managerial official is an affirmation by that official that the person named in the instrument has consented to serve as registered agent. (BOC § 5.2011)

A person commits an offense under section 4.008 of the BOC if the person signs or directs the filing of a filing instrument the person knows is materially false with the intent that the instrument be delivered to the secretary of state for filing. The offense is a Class A misdemeanor unless the person's intent is to harm or defraud another, in which case the offense is a state jail felony.

- **Payment and Delivery Instructions:** The filing fee for a restated certificate of formation is **\$300**, unless the filing entity is a nonprofit corporation or a cooperative association. The filing fee for a restated certificate of formation for a nonprofit corporation or a cooperative association is **\$50**. Fees may be paid by personal checks, money orders, LegalEase debit cards, or American Express, Discover, MasterCard, and Visa credit cards. Checks or money orders must be payable through a U.S. bank or financial institution and made payable to the secretary of state. Fees paid by credit card are subject to a statutorily authorized convenience fee of 2.7 percent of the total fees.

Submit the completed form in duplicate along with the filing fee. The form may be mailed to P.O. Box 13697, Austin, Texas 78711-3697; faxed to (512) 463-5709; or delivered to the James Earl Rudder Office Building, 1019 Brazos, Austin, Texas 78701. If a document is transmitted by fax, credit card information must accompany the transmission (Form 807). On filing the document, the secretary of state will return the appropriate evidence of filing to the submitter together with a file-stamped copy of the document, if a duplicate copy was provided as instructed.

Revised 09/13

<p>Form 414 (Revised 09/13)</p> <p>Submit in duplicate to: Secretary of State P.O. Box 13697 Austin, TX 78711-3697 512 463-5555 FAX: 512/463-5709 Filing Fee: See instructions</p>	 <p>Restated Certificate of Formation With New Amendments</p>	<p>This space reserved for office use.</p>
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Entity Information

The name of the filing entity is:

State the name of the entity as currently shown in the records of the secretary of state. If the amendment changes the name of the entity, state the old name and not the new name.

The filing entity is a: (Select the appropriate entity type below.)

- | | |
|--|---|
| <input type="checkbox"/> For-profit Corporation | <input type="checkbox"/> Professional Corporation |
| <input type="checkbox"/> Nonprofit Corporation | <input type="checkbox"/> Professional Limited Liability Company |
| <input type="checkbox"/> Cooperative Association | <input type="checkbox"/> Professional Association |
| <input type="checkbox"/> Limited Liability Company | <input type="checkbox"/> Limited Partnership |

The file number issued to the filing entity by the secretary of state is: _____

The date of formation of the filing entity is: _____

Statement of Approval

Each new amendment has been made in accordance with the provisions of the Texas Business Organizations Code. The amendments to the certificate of formation and the restated certificate of formation have been approved in the manner required by the Code and by the governing documents of the entity.

Required Statements

The restated certificate of formation, which is attached to this form, accurately states the text of the certificate of formation being restated and each amendment to the certificate of formation being restated that is in effect, and as further amended by the restated certificate of formation. The attached restated certificate of formation does not contain any other change in the certificate of formation being restated except for the information permitted to be omitted by the provisions of the Texas Business Organizations Code applicable to the filing entity.

Effectiveness of Filing (Select either A, B, or C.)

- A. This document becomes effective when the document is filed by the secretary of state.
- B. This document becomes effective at a later date, which is not more than ninety (90) days from the date of signing. The delayed effective date is: _____
- C. This document takes effect upon the occurrence of the future event or fact, other than the passage of time. The 90th day after the date of signing is: _____

The following event or fact will cause the document to take effect in the manner described below:

Execution

The undersigned affirms that the person designated as registered agent in the restated certificate of formation has consented to the appointment. The undersigned signs this document subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument and certifies under penalty of perjury that the undersigned is authorized under the provisions of law governing the entity to execute the filing instrument.

Date: _____

Name of entity (see Execution instructions)

Signature of authorized individual (see instructions)

Printed or typed name of authorized individual

Attach the text of the amended and restated certificate of formation to the completed statement form. Identify the attachment as "Restated Certificate of Formation of [Name of Entity]."

[Reserved]

Form 21-8

Effective June 1, 2018, the name a filing entity seeks to use must be “distinguishable in the records of the secretary of state” from names used by existing entities. *See* Tex. Bus. Orgs. Code § 5.053; Acts 2017, 85th Leg., R.S., ch. 503, § 3 (H.B. 2856), eff. June 1, 2018. Instructions that accompany secretary of state forms have not been updated to reflect this new standard as of the publication date of the latest supplement of this manual. See section 1.1:2 in this manual for more information on entity name availability.

**Application for Registration of a Foreign Limited
Liability Company
(SOS Form 304)**

Form 21-8

Form 304—General Information
(Application for Registration of a Foreign Limited Liability Company)

The attached form is drafted to meet minimal statutory filing requirements pursuant to the relevant code provisions. This form and the information provided are not substitutes for the advice and services of an attorney and tax specialist.

Commentary

To transact business in Texas, a foreign entity must register with the secretary of state under chapter 9 of the Texas Business Organizations Code (BOC). The registration requirement applies to a foreign corporation, foreign limited partnership, foreign limited liability company, foreign business trust, foreign real estate investment trust, foreign cooperative, foreign public or private limited company, or another foreign entity, the formation of which, if formed in Texas, would require the filing of a certificate of formation with the secretary of state. Also, a foreign entity that affords limited liability for any owner or member under the laws of its jurisdiction of formation is required to register.

Failure to Register: A foreign entity may engage in certain limited activities in the state without being required to register (BOC § 9.251). However, a foreign entity that fails to register when required to do so 1) may be enjoined from transacting business in Texas on application by the attorney general, 2) may not maintain an action, suit, or proceeding in a court of this state until registered, and 3) is subject to a civil penalty in an amount equal to all fees and taxes that would have been imposed if the entity had registered when first required.

Penalty for Late Filing: A foreign entity that has transacted business in the state for more than ninety (90) days is also subject to a late filing fee. The secretary of state may condition the filing of the registration on the payment of a late filing fee that is equal to the registration fee for each year, or part of a year, that the entity transacted business in the state without being registered.

Taxes: Corporations are subject to a state franchise tax. Contact the Texas Comptroller of Public Accounts, Tax Assistance Section, Austin, Texas, 78774-0100, (512) 463-4600 or (800) 252-1381 for franchise tax information. For information relating to federal employer identification numbers, federal income tax filing requirements, tax publications and forms call (800) 829-3676 or visit the Internal Revenue Service web site at www.irs.gov.

This form is not designed for the registration of a foreign limited liability company that is governed by a company agreement that establishes or provides for the establishment of a designated series of members, managers, membership interests, or assets. If the entity is a series limited liability company, use **Form 313**. Alternatively, refer to section 9.005(b) of the BOC for the additional required statements and include the information in the Supplemental Provisions/Information section of this form.

Instructions for Form

- **Item 1—Entity Name and Type:** Provide the full legal name of the foreign entity as stated in the entity's formation document. The name of the foreign entity must comply with chapter 5 of the BOC. Chapter 5 requires that:

Chapter 22
Company Agreements

Form 22-1	Single-Member Company Agreement	22-1-1 to 22-1-8
Form 22-2	Member-Managed Company Agreement [Short Form]	22-2-1 to 22-2-16
Form 22-3	Manager-Managed Company Agreement [Short Form]	22-3-1 to 22-3-20
Form 22-4	Optional Provisions for Naming Partnership Representative	22-4-1 to 22-4-6
Form 22-5	Member-Managed Company Agreement [Long Form]	22-5-1 to 22-5-52
Form 22-6	Manager-Managed Company Agreement [Long Form]	22-6-1 to 22-6-56
Form 22-7	Company Agreement of [name of limited liability company] [For Series LLC]	22-7-1 to 22-7-24
Form 22-8	Certificate Representing Ownership Interest	22-8-1 to 22-8-2
Form 22-9	Membership Interest Transfer Authorization and Consent	22-9-1 to 22-9-2
Form 22-10	Notice of Meeting of Members to Be Held [date]	22-10-1 to 22-10-2
Form 22-11	Notice of Meeting of Managers to Be Held [date]	22-11-1 to 22-11-2
Form 22-12	Unanimous Consent of Members in Lieu of Meeting of Members of [name of LLC]	22-12-1 to 22-12-2
Form 22-13	Unanimous Consent of Managers in Lieu of Meeting of Managers of [name of LLC]	22-13-1 to 22-13-2
Form 22-14	Bill of Sale	22-14-1 to 22-14-2
Form 22-15	Lease Agreement	22-15-1 to 22-15-4

[Reserved]

Form 22-1

The Texas Business Organizations Code authorizes the creation of an LLC that has only one member. *See* Tex. Bus. Orgs. Code § 101.101(a). The Code further provides that a company agreement is enforceable despite having only one person (the single member) as a party to the agreement. *See* Tex. Bus. Orgs. Code § 101.001(1).

This single-member company agreement is based on chapter 101 of the Code. *See* Tex. Bus. Orgs. Code §§ 101.001–621. The chapter provides general guidelines and, as such, the member has significant freedom in structuring the company agreement according to his or her particular situation. This form, therefore, can be significantly modified and adapted to address the member’s requirements.

Company Agreement of [name of single-member limited liability company]

This Company Agreement (“Agreement”) of [name of limited liability company], a Texas limited liability company (“Company”), is entered into effective [date] (“Effective Date”), by and between [name of member] (the “Member”) and the Company.

Article 1**Formation**

1.1 *Formation.* Subject to the provisions of this Agreement, the Member has organized the Company pursuant to the provisions of the Texas Business Organizations Code (“Code”) by filing a certificate of formation (“Certificate”) with the Texas secretary of state on the Effective Date.

1.2 *Purpose.* The purpose and business of the Company shall be to [list company’s purpose] and all related activities and the transaction of any other business or activity allowed under the Code as determined by the Member. The Company shall have the authority to do all

things necessary or convenient to accomplish its purpose and operate its business as described in this section 1.2.

1.3 *Term.* The Company shall continue in existence perpetually or until the termination of the Company in accordance with the provisions of section 6.1 of this Agreement or the Code.

1.4 *Registered Agent and Office.* The registered agent for the service of process is [name], and the address is [address]. The principal office of the Company shall be located at [address]. The Company may have other offices and places of business at such locations, both within and without the state of Texas, as the Member may from time to time determine or as the business and affairs of the Company may require.

1.5 *Membership Interest.* The Member has a one hundred percent (100%) membership interest (“Membership Interest”) in the Company. The Membership Interest includes all of the rights of the Member, such as the right to share in profits, losses, and distributions, and the right to participate in the management in the Company.

Article 2

Capital Contributions

2.1 *Capital Contributions.* The Member has contributed to the Company the property listed on Schedule 1. Additional capital contributions may be made by the Member. The Member shall not be obligated to make any additional contributions.

2.2 *Ownership of Assets.* All assets and property of the Company shall be owned by the Company, subject to the terms and provisions of this Agreement, and Member, individually, shall not have any ownership of such assets or property. Legal title to all assets and property of the Company shall be held and conveyed in the name of the Company.

Article 3

Financial Matters

3.1 *Distributions.* The Company shall make distributions as determined by the Member from time to time in accordance with this Agreement and the Code.

3.2 *Taxes.* The Member may make any tax elections for the Company allowed under the Internal Revenue Code of 1986, as amended from time to time, or the tax laws of any state or other jurisdiction having taxing authority over the Company that he may deem appropriate and in the best interests of the Company and the Member.

Article 4

Management

4.1 *Management Authority.* Management of the Company shall be completely vested in the Member, including, without limitation, the right to borrow money; make leases, deeds, notes, or mortgages; or otherwise take action in respect to the property of the Company. The Member is expressly authorized on behalf of the Company to make all decisions with respect to the Company's business and to take all actions necessary to carry out such decisions. The Member, acting alone, may by his signature, on behalf of the Company, bind the Company on any deed, mortgage, lease, contract, checking account, note, or other instrument, agreement, or document to which the Company is a party, and any person may rely thereon without the necessity of inquiring into the authority of the signatory.

4.2 *Appointment of Agents.* The Company shall have the authority to appoint an agent or agents to perform any and all acts of management on behalf of the Company, including, but not limited to, the authority to open bank accounts; withdraw funds therefrom; borrow money; make leases, deeds, notes, or mortgages; or do any other designated acts of management for the Company.

4.3 *Liability of Member.* The Member shall not be liable as a Member for the liabilities of the Company. The failure of the Company to observe any formalities or requirements relating to the exercise of its powers or management of its business or affairs under this Agreement or the Code shall not be grounds for imposing personal liability on the Member for liabilities of the Company.

Article 5

Transfers

5.1 *Additional Members.* Additional members shall not be admitted to the Company without the prior written consent of the Member.

5.2 *Dispositions.* The Member may dispose of all or a portion of the Member's Membership Interest. Upon the transfer of the Member's Membership Interest, the transferee shall be admitted as a Member of the Company at the time the transfer is complete.

Tex. Bus. Orgs. Code § 11.056 provides that if there are no longer any members of the LLC, the LLC must be wound up unless the legal representative of the member agrees to continue the company. Since this is an optional election by the legal representative, the inclusion of the following section 5.3 will ensure that the company is not inadvertently wound up.

5.3 *Death of Member.* Notwithstanding the foregoing, upon the death of the Member, the transferee or transferees of the Member shall automatically be admitted as a Member or the Members, as the case may be, of the Company effective as of the date of death of the Member.

Article 6

Dissolution and Winding Up

6.1 *Dissolution.* The Company shall be dissolved upon (a) an election to dissolve the Company by the Member or (b) any other event that would cause its dissolution under the Code.

6.2 *Liquidation.* Upon the dissolution of the Company, a liquidator shall be selected by the Member. The liquidator shall liquidate the assets of the Company and apply and distribute the proceeds of such liquidation in the following order or priority: (a) to the payment of the expenses of the terminating transactions including, without limitation, brokerage commission, legal fees, accounting fees, and closing costs; (b) to the payment of creditors of the Company, including the Member, in order of priority provided by law; (c) to the Member. The distribution to the Member shall be in cash or in-kind assets of the Company or both, as determined by the Member.

6.3 *Articles of Dissolution.* Upon the completion of the distribution of the Company property provided in this Article 6, the Company shall be terminated and the liquidator shall cause the cancellation of the Certificate and any other filings made by the Company and shall take such other actions as may be necessary to terminate the Company.

Article 7

General Provisions

7.1 *Binding Effect.* This Agreement shall be binding upon and inure to the benefit of the parties hereto and their heirs, executors, administrators, successors, legal representatives, and permitted assigns.

7.2 *Governing Law.* This Agreement is governed by and shall be construed in accordance with the laws of the state of Texas.

7.3 *Enforceability against Company.* This Agreement is enforceable by or against the Company regardless of whether the Company has signed or otherwise expressly adopted this Agreement.

Refer to Tex. Bus. Orgs. Code § 101.052(f).

IN WITNESS WHEREOF, the parties hereto have executed this Company Agreement of [name of limited liability company] as of the Effective Date.

[Name of company]

By _____
[Name of member]

Schedule 1

Member of [name of limited liability company]

Member's Name and Address	Class	Initial Capital Contribution	Membership Interest and Percentage Interest

[Reserved]

Form 22-2

This member-managed company agreement is best used for LLCs with fairly straightforward business operations and few members (and no classes of members), such as a husband and wife or parties that have known or done business with each other in the past. The aim is the creation of a concise agreement that covers the most important provisions without being burdensome to understand or implement by your client. For more complex business arrangements, see the long-form member-managed company agreement at form 22-5 in this chapter.

The agreement is based on chapter 101 of the Texas Business Organizations Code. *See* Tex. Bus. Orgs. Code §§ 101.001–.621. Chapter 101 provides general guidelines and, as such, parties have significant freedom in structuring the company agreement according to their particular situation. This form, therefore, can be significantly modified and adapted to address each party’s requirements.

This form can be modified to include any provision related to the regulation and management of the company as long as the provision is not inconsistent with law or the certificate of formation of the company. *See* Tex. Bus. Orgs. Code § 101.052(d). To the extent the company agreement does not otherwise provide, the Code will govern the internal affairs and management of the business of the company. *See* Tex. Bus. Orgs. Code §§ 101.052(b), 101.252. Conversely, the agreement may waive or modify the Code provisions. In the case of those items listed in section 101.054, a waiver or modification requires that the company agreement contain a provision that the item is intended to be waived or modified and who must approve the waiver or modification.

References to the Code are included following certain sections of this form to allow the practitioner to consider alternative language that might be appropriate for inclusion and to provide additional guidance on areas that should be addressed in the agreement.

**Company Agreement of [name of member-managed limited liability
company]
[Short Form]**

This Company Agreement (“Agreement”) of [name of limited liability company], a Texas limited liability company (“Company”), is entered into effective [date] (“Effective Date”), by and between [names of members] (collectively referred to herein as the “Members” and individually as a “Member”).

Article 1

Formation

1.1 *Formation.* Subject to the provisions of this Agreement, the Members have organized the Company pursuant to the provisions of the Texas Business Organizations Code

(“Code”) by filing a certificate of formation (“Certificate”) with the Texas secretary of state on the Effective Date.

Provisions that would normally be included in a company agreement may be contained in the certificate of formation. See Tex. Bus. Orgs. Code §§ 3.005(b), 101.051. Therefore, when issues arise regarding the governance or operation of the LLC, review the certificate of formation as well as the company agreement.

Note: The governing authority of an LLC must be set forth in the certificate of formation as either managers or members. See Tex. Bus. Orgs. Code § 101.251.

1.2 *Purpose.* The purpose and business of the Company shall be to [list company's purpose] and all related activities and the transaction of any other business or activity allowed under the Code as unanimously determined by the Members. The Company shall have the authority to do all things necessary or convenient to accomplish its purpose and operate its business as described in this section 1.2.

Refer to Tex. Bus. Orgs. Code §§ 2.003, 2.005.

1.3 *Term.* The Company shall continue in existence perpetually or until the termination of the Company in accordance with the provisions of section 6.1 of this Agreement or the Code.

1.4 *Registered Agent and Office.* The registered agent for the service of process is [name], and the address is [address]. The principal office of the Company shall be located at [address]. The Company may have other offices and places of business at locations, both within and without the state of Texas, as the Members may from time to time determine or as the business and affairs of the Company may require.

1.5 *Members.* As of the Effective Date, the Members of the Company have the following membership interests (“Membership Interests”) in the Company:

[name of member]

[percent]%

[name of member]

[percent]%

Repeat as necessary.

100%

The Member's Membership Interest is that Member's right (a) to an allocable share of the profits, losses, deductions, distributions, and credits of the Company; (b) to a distributive share of the assets of the Company; and (c) to vote on those matters described in this Agreement and the Code and to participate in the management and operation of the Company as set forth in this Agreement.

The membership interest as used herein contains all economic, noneconomic, and management rights. Often, a membership interest would include only the rights set forth in 1.5(a) and 1.5(b) above, which are the economic rights. If it is anticipated that a membership interest should not include management and voting rights, the practitioner should refer to and incorporate the provisions of the long-form member-managed company agreement at form 22-5 in this chapter.

1.6 *No State-Law Partnership.* The Members intend that the Company not be a partnership (including a limited partnership) or joint venture, and that no Member be a partner or joint venturer of any other Member, for any purposes other than applicable tax laws, and this Agreement may not be construed to suggest otherwise.

Article 2

Capital Contributions

2.1 *Initial Capital Contributions.* The Members have contributed to the Company the property listed on Schedule 1.

Note: A member may promise to make a contribution in the future if the promise is in writing and signed by that member. The writing and signature requirements cannot be waived by the company agreement unless the agreement provides specifically for a waiver. See Tex. Bus. Orgs. Code §§ 101.054, 101.151. However, as a practical matter, if future contributions are contemplated, whether as an initial contribution or an additional contribution, specific provisions regarding such should be included in the agreement as set forth below.

Include the following if a member will make a contribution in the future.

[Name of member] promises and agrees to make a contribution of [specify property or amount of cash] to the Company on or before [date of deadline]. The Member is obligated to make the contribution without regard to the death, disability, or other change in circumstances of the Member.

Refer to Tex. Bus. Orgs. Code § 101.152.

Repeat as necessary.

Continue with the following.

Additional capital contributions may be made only if unanimously agreed to by all Members.

2.2 *Capital Accounts.* The Company shall maintain for each Member a separate capital account in accordance with this section 2.2, which shall control the division of assets upon liquidation of the Company as provided in this Agreement. The capital account shall be increased by the cash amount or fair market value of all capital contributions made by that Member to the Company pursuant to this Agreement and by that Member's allocable share of profits. The capital account shall be decreased by the cash amount or fair market value of any

Refer to Tex. Bus. Orgs. Code § 101.052(f).

7.8 *Entire Agreement.* This Agreement embodies the entire understanding and agreement between the parties concerning the Company and supersedes all prior negotiations, understandings, or agreements in regard thereto.

IN WITNESS WHEREOF, the parties hereto have executed this Company Agreement of [name of limited liability company] as of the Effective Date.

[Name of company]

By _____

[Name of member]

Repeat signature lines for all members.

Note: A signature includes a digital signature, an electronic signature, and a facsimile of a signature. See Tex. Bus. Orgs. Code §§ 1.002(82), 1.007.

Schedule 1

Members of [name of limited liability company]

Members' Names and Addresses	Class	Initial Capital Contribution	Membership Interest and Percentage Interest

Form 22-3

This manager-managed company agreement is best used for LLCs with fairly straightforward business operations and few members (and no classes of members), such as a husband and wife or parties that have known or done business with each other in the past. The aim is the creation of a concise agreement that covers the most important provisions without being burdensome to understand or implement by your client. For more complex business arrangements, see the long-form manager-managed company agreement at form 22-6 in this chapter.

The agreement is based on chapter 101 of the Texas Business Organizations Code. *See* Tex. Bus. Orgs. Code §§ 101.001–621. Chapter 101 provides general guidelines and, as such, parties have significant freedom in structuring the company agreement according to their particular situation. This form, therefore, can be significantly modified and adapted to address each party’s requirements.

This form can be modified to include any provision related to the regulation and management of the company as long as the provision is not inconsistent with law or the certificate of formation of the company. *See* Tex. Bus. Orgs. Code § 101.052(d). To the extent the company agreement does not otherwise provide, the Code will govern the internal affairs and management of the business of the company. *See* Tex. Bus. Orgs. Code §§ 101.052(b), 101.252. Conversely, the agreement may waive or modify the Code provisions. In the case of those items listed in section 101.054, a waiver or modification requires that the company agreement contain a provision that the item is intended to be waived or modified and who must approve the waiver or modification.

References to the Code are included following certain sections of this form to allow the practitioner to consider alternative language that might be appropriate for inclusion and to provide additional guidance on areas that should be addressed in the agreement.

**Company Agreement of [name of manager-managed limited liability
company]
[Short Form]**

This Company Agreement (“Agreement”) of [name of limited liability company], a Texas limited liability company (“Company”), is entered into effective [date] (“Effective Date”), by and between [names of members] (collectively referred to herein as the “Members” and individually as a “Member”) and [name of manager] (“Manager”).

Article 1

Formation

1.1 *Formation.* The Company was organized pursuant to the provisions of the Texas Business Organizations Code (“Code”) by filing a certificate of formation (“Certificate”) with the Texas secretary of state on the Effective Date.

Provisions that would normally be included in a company agreement may be contained in the certificate of formation. See Tex. Bus. Orgs. Code §§ 3.005(b), 101.051. Therefore, when issues arise regarding the governance or operation of the LLC, review the certificate of formation as well as the company agreement.

Note: The governing authority of an LLC must be set forth in the certificate of formation as either managers or members. See Tex. Bus. Orgs. Code § 101.251.

1.2 *Purpose.* The purpose and business of the Company shall be to [list company’s purpose] and all related activities incidental thereto and the transaction of any other business or activity allowed under the Code that is approved by the unanimous consent of the Members. The Company shall have the authority to do all things necessary or convenient to accomplish its purpose and operate its business as described in this section 1.2.

Refer to Tex. Bus. Orgs. Code §§ 2.003, 2.005. The scope of the authority of the manager of the company can be defined by the purpose. Consider, therefore, limiting the purpose by requiring the members to approve additional purposes (as done above) or narrowly describing the purpose and deleting the language “and the transaction of any other business or activity allowed under the Code that is approved by the unanimous consent of the Members.”

1.3 *Term.* The Company shall continue in existence perpetually or until the termination of the Company in accordance with the provisions of section 7.1 of this Agreement or the Code.

1.4 *Registered Agent and Office.* The registered agent for the service of process is [name], and the address is [address]. The principal office of the Company shall be located at [address]. The Company may have other offices and places of business at locations, both

within and without the state of Texas, as the Manager may from time to time determine or as the business and affairs of the Company may require.

1.5 *Members.* As of the Effective Date, the Members of the Company have the following membership interests (“Membership Interests”) in the Company:

[name of member] [percent]%

[name of member] [percent]%

Repeat as necessary.

100%

The Member’s Membership Interest is that Member’s right (a) to an allocable share of the profits, losses, deductions, distributions, and credits of the Company; (b) to a distributive share of the assets of the Company; and (c) to vote on those matters described in this Agreement and the Code and to participate in the management and operation of the Company as set forth in this Agreement.

The membership interest as used herein contains all economic, noneconomic, and management rights. Often, a membership interest would include only the rights set forth in 1.5(a) and 1.5(b) above, which are the economic rights. If it is anticipated that a membership interest should not include management and voting rights, the practitioner should refer to and incorporate the provisions of the long-form manager-managed company agreement at form 22-6 in this chapter.

1.6 *No State-Law Partnership.* The Members intend that the Company not be a partnership (including a limited partnership) or joint venture, and that no Member be a partner or joint venturer of any other Member, for any purposes other than applicable tax laws, and this Agreement may not be construed to suggest otherwise.

Article 2

Capital Contributions

2.1 *Initial Capital Contributions.* The Members have contributed to the Company the property listed on Schedule 1.

Note: A member may promise to make a contribution in the future if the promise is in writing and signed by that member. The writing and signature requirements cannot be waived by the company agreement unless the agreement provides specifically for a waiver. See Tex. Bus. Orgs. Code §§ 101.054, 101.151. However, as a practical matter, if future contributions are contemplated, whether as an initial contribution or an additional contribution, specific provisions regarding such should be included in the agreement as set forth below.

Include the following if a member will make a contribution in the future.

[Name of member] promises and agrees to make a contribution of [specify property or amount of cash] to the Company on or before [date of deadline]. The Member is obligated to make the contribution without regard to the death, disability, or other change in circumstances of the Member.

Refer to Tex. Bus. Orgs. Code § 101.152.

Repeat as necessary.

Continue with the following.

Additional capital contributions may be made only if unanimously agreed to by all Members.

2.2 *Capital Accounts.* The Company shall maintain for each Member a separate capital account in accordance with this section 2.2, which shall control the division of assets upon liquidation of the Company as provided in this Agreement. The capital account shall be increased by the cash amount or fair market value of all capital contributions made by that Member to the Company pursuant to this Agreement and by that Member's allocable share of

Note: A signature includes a digital signature, an electronic signature, and a facsimile of a signature. See Tex. Bus. Orgs. Code §§ 1.002(82), 1.007.

Schedule 1

Members of [name of limited liability company]

Members' Names and Addresses	Class	Initial Capital Contribution	Membership Interest and Percentage Interest

Form 22-4

Limited liability companies taxed as partnerships may wish to include in their company agreements provisions for naming a partnership representative, as provided in 26 U.S.C. § 6223(a), to work with the Internal Revenue Service in the event of an audit. Form 22-4 contains basic provisions to designate a partnership representative, as well as optional language mandating certain tax elections. The form does not address issues such as resignation, removal, and replacement of the partnership representative or other matters, which the practitioner should consider addressing in the company agreement when appropriate.

The provisions in this form contemplate that the LLC will designate one person or entity as the “Partnership Representative” to handle all tax matters, not just those relating to audits. *See* 26 U.S.C. § 6223(a). However, the partnership representative provided for in the audit procedures of the Internal Revenue Code, 26 U.S.C. §§ 6221–6241, does not necessarily have to be the same person or entity that handles other tax matters, such as filing returns and making non-audit-related elections. For sample language designating a tax matters partner for non-audit tax responsibilities, see section 10.3 in form 22-5 and section 10.3 in form 22-6 in this chapter.

See sections 21.2:1 and 21.2:2 in this manual for further discussion of tax audits, partnership representatives, tax matter partners, and various tax elections available to a partnership.

Optional Provisions for Naming Partnership Representative

Include the following article in the desired location in the company agreement and renumber accordingly any articles below that insertion point and any references within the general text of the agreement to those articles and their subsections.

Article [article number]**Tax Matters and Partnership Representative**

[article number].1 *Definitions.* In this Article, “Code” means the Internal Revenue Code of 1986 and any successor statute, as amended from time to time. “Section” or “sections” means sections of the Code. “Consolidated audit rules” means the partnership auditing procedures enacted by the Bipartisan Budget Act of 2015 and encoded at Code sections 6221–6241, as amended from time to time, including any treasury regulations promulgated thereunder.

[article number].2 *Designation of Partnership Representative.* With respect to tax years beginning after December 31, 2017, the partnership representative (“Partnership Representa-

tive”) of the Company, defined in Code section 6223(a), shall be [name of manager, member, or previous tax matters partner], or any Manager, Member, or other person with a substantial presence in the United States designated by the [manager/members] in the manner prescribed by the Internal Revenue Service (IRS). The Partnership Representative shall have the authority to act on behalf of the Company for all tax matters.

[article number].3 *Tax Audits.* In the event the Company is the subject of a tax audit by any federal, state, or local authority, to the extent the Company is treated as an entity for purposes of the audit, including administrative settlement and judicial review, [the Partnership Representative shall have sole authority to act for, and the Partnership Representative’s decision shall be final and binding on, the Company and each Member thereof/before the Partnership Representative takes any actions contemplated by Code sections 6222–6232, the Partnership Representative must obtain the consent of a Simple Majority of all Members. No Member (including the Partnership Representative) shall take any action left to the determination of an individual Member under Code sections 6222–6232 without the consent of a Simple Majority of all Members].

[article number].4 *Obligations between Partnership Representative and Members.* The Partnership Representative shall provide to each Member a copy of any notice, document, or other written communication received from any tax authority as soon as practicable after the Partnership Representative has received such notice, document, or communication. Each Member shall reasonably cooperate with the Partnership Representative in connection with any tax audits or other tax matters.

[article number].5 *Electing Out of Consolidated Audit Rules.* For each tax year in which the Company is eligible to elect out of the consolidated audit rules, pursuant to Code section 6221(b) and Treasury Regulation 301.6221(b)-1, the Company shall do so. The Partnership Representative shall timely comply with all IRS procedures for making such an election.

[article number].6 *Transfer Restrictions.* Any transfer of a Membership Interest that would make the Company ineligible for electing out of the consolidated audit rules is void and shall be treated as if the transfer had never been made.

The following optional section directs the company and partnership representative to make the push-out election provided for in 26 U.S.C. § 6226. See section 21.2:2 in this manual.

[article number].7 *Push-Out Election.* For any tax year in which the Company is ineligible or unable to elect out of the consolidated audit rules, the Company shall make the push-out election described in Code section 6226. The Partnership Representative shall timely comply with all IRS procedures for making the election. The Partnership Representative shall take any other such action as is reasonably necessary or appropriate to ensure that the allocation among the parties responsible for taxes (including any interest and penalties associated with taxes) imposed with respect to the income of the Company is, to the greatest extent reasonably feasible, consistent with what the responsibility for taxes (including any interest and penalties associated with taxes) would have been if the Company had been eligible to elect out, and had elected out, of the consolidated audit rules. The Partnership Representative shall equitably apportion among current and former Members the cost of contesting any adjustments asserted by the IRS with respect to the Company's income.

The following optional section directs the company and partnership representative to allocate imputed underpayments and other adjustments among current and former members in accordance with the procedures set forth in 26 U.S.C. § 6225(c)(1). See section 21.2:2 in this manual.

[article number].8 *Partnership Adjustments.* In the event the IRS finally determines a partnership adjustment with respect to the Company, Members shall fully cooperate as reasonably requested by the Partnership Representative in efforts to reduce any imputed underpayments, including by (a) promptly providing any information requested by the Partnership Representative and (b) timely filing amended tax returns and timely paying any tax due in accordance

with Code section 6225(c)(2). Any imputed underpayment or other partnership adjustment shall be apportioned among the Members in such a way that, to the maximum extent possible, the tax and economic consequences of the partnership adjustment and any associated interest and penalties are borne by the Members based on their interests in the Company for the “reviewed year” (as defined in Code section 6225(d)(1)). This apportionment shall be made even if it results in a shifting of tax and economic consequences and any associated interest and penalties from adjustment-year Members to reviewed-year Members. The apportionment shall be made during the Company’s fiscal year in which the adjustment is finally determined by the IRS.

Continue with the following. Renumber section numbers according to which of the above optional sections were included, if any.

[article number].9 *Indemnification.* The Company shall bear all expenses incurred in connection with any tax authority audit, investigation, settlement, or review. The Company and the Members agree to defend, indemnify, and hold the Partnership Representative, or whoever is from time to time appointed or acting as Partnership Representative, harmless from all reasonable claims, costs, and expenses, including fees of attorneys, accountants, and experts, incurred in acting as Partnership Representative during or after the existence of the Partnership. The Company and Members further agree to execute such powers of attorney and other forms and authorizations as may be necessary or required for the Partnership Representative to perform his duties.

[article number].10 *Survival of Membership Obligations.* The obligations of each Member under this Article shall survive the transfer or redemption of all or any portion of the Member’s interest in the Company, the termination of this Agreement, and any dissolution or termination of the Company.

[article number].11 *Intention to Comply with Bipartisan Budget Act of 2015.* The Members intend the provisions of this Article to comply with Code sections enacted pursuant to the Bipartisan Budget Act of 2015, as amended from time to time, and any treasury regulations promulgated thereunder. This Article shall be interpreted consistent with such Code sections and regulations. To the extent that the provisions of this Article conflict with any other provisions of this Agreement, this Article will control.

[Reserved]

10.2 *Tax Elections.* The Company shall make the following elections on the appropriate tax returns:

- a. to adopt the calendar year as the Company's fiscal year;
- b. to adopt the cash method of accounting for keeping the Company's books and records;
- c. if a distribution of Company property as described in section 734 of the Internal Revenue Code occurs or if a transfer of a Membership Interest as described in section 743 of the Internal Revenue Code occurs, on written request of any Member, to elect, pursuant to section 754 of the Internal Revenue Code, to adjust the basis of Company properties;
- d. to elect to amortize the organizational expenses of the Company and the start-up expenditures of the Company under section 195 of the Internal Revenue Code ratably over a period of sixty (60) months as permitted by section 709(b) of the Internal Revenue Code; and
- e. any other election the Members may deem appropriate and in the best interest of the Members.

Neither the Company nor any Member may make an election for the Company to be excluded from the application of the provisions of subchapter K of chapter 1, subtitle A, of the Internal Revenue Code or any similar provisions of applicable state law, and no provision of this Agreement shall be construed to sanction or approve such an election.

10.3 *"Tax Matters Partner."* The Members shall designate one of the Members to be the "tax matters partner" of the Company. Any Member who is designated tax matters partner shall inform each other Member of all significant matters that may come to his attention in his capacity as tax matters partner by giving notice thereof on or before the fifth Business Day

after becoming aware thereof and, within that time, shall forward to each other Member copies of all significant written communications he may receive in that capacity. Any Member who is designated tax matters partner may not take action contemplated by the Internal Revenue Code without the consent of a Simple Majority of the Members, but this sentence does not authorize the Member to take any action left to the determination of an individual Member under the Internal Revenue Code.

For a discussion of tax audits, partnership representatives, and the various tax elections available to an LLC taxed as a partnership, see sections 21.2:1 and 21.2:2 in this manual. For optional provisions for naming a partnership representative, see form 22-4.

Article 11

Books, Records, Reports, and Bank Accounts

11.1 *Maintenance of Books.* The Company shall keep at its principal office (a) books and records of accounts; (b) minutes of the proceedings of its Members and each committee of the Members; (c) a current record of the name, mailing address, and Membership Interest and Percentage Interest of each Member of the Company; (d) a current record of the Members in each class, if any; (e) income tax returns for each of the six (6) preceding tax years along with state and local tax information; (f) a copy of the Certificate, including any amendments or restatements; and (g) a copy of this Agreement, including any amendments or restatements. The books of account for the Company shall be maintained on a cash basis in accordance with the terms of this Agreement, except that the Capital Accounts of the Members shall be maintained in accordance with Article 4 of this Agreement. The calendar year shall be the accounting year of the Company.

Refer to Tex. Bus. Orgs. Code §§ 3.151, 101.501.

in section 10.2 of this Agreement. Each Member shall furnish to the Managers all pertinent information in his possession relating to Company operations that is necessary to enable the Company's income tax returns to be prepared and filed.

10.2 *Tax Elections.* The Company shall make the following elections on the appropriate tax returns:

- a. to adopt the calendar year as the Company's fiscal year;
- b. to adopt the cash method of accounting for keeping the Company's books and records;
- c. if a distribution of Company property as described in section 734 of the Internal Revenue Code occurs or if a transfer of a Membership Interest as described in section 743 of the Internal Revenue Code occurs, on written request of any Member, to elect, pursuant to section 754 of the Internal Revenue Code, to adjust the basis of Company properties;
- d. to elect to amortize the organizational expenses of the Company and the start-up expenditures of the Company under section 195 of the Internal Revenue Code ratably over a period of sixty (60) months as permitted by section 709(b) of the Internal Revenue Code; and
- e. any other election the Members may deem appropriate and in the best interest of the Members.

Neither the Company nor any Manager or Member may make an election for the Company to be excluded from the application of the provisions of subchapter K of chapter 1, sub-

title A, of the Internal Revenue Code or any similar provisions of applicable state law, and no provision of this Agreement shall be construed to sanction or approve such an election.

10.3 *“Tax Matters Partner.”* The Managers shall designate one of the Managers to be the “tax matters partner” of the Company. Any Manager who is designated tax matters partner shall inform each Member of all significant matters that may come to his attention in his capacity as tax matters partner by giving notice thereof on or before the fifth Business Day after becoming aware thereof and, within that time, shall forward to each other Member copies of all significant written communications he may receive in that capacity. Any Manager who is designated tax matters partner may not take action contemplated by the Internal Revenue Code without the consent of a Simple Majority of the Members, but this sentence does not authorize the Manager (or any other Manager) to take any action left to the determination of an individual Member under the Internal Revenue Code.

For a discussion of tax audits, partnership representatives, and the various tax elections available to an LLC taxed as a partnership, see sections 21.2:1 and 21.2:2 in this manual. For optional provisions for naming a partnership representative, see form 22-4.

Article 11

Books, Records, Reports, and Bank Accounts

11.1 *Maintenance of Books.* The Company shall keep at its principal office (a) books and records of accounts; (b) minutes of the proceedings of its Members, the Managers, and each committee of the Managers; (c) a current record of the name, mailing address, and Membership Interest and Percentage Interest of each Member of the Company; (d) a current record of the Members in each class, if any; (e) income tax returns for each of the six (6) preceding tax years along with state and local tax information; (f) a copy of the Certificate, including any amendments or restatements; and (g) a copy of this Agreement, including any amendments or

Note: A signature includes a digital signature, an electronic signature, and a facsimile of a signature. See Tex. Bus. Orgs. Code §§ 1.002(82), 1.007.

Schedule 1

Members of [name of limited liability company]

Members' Names and Addresses	Class	Initial Capital Contribution	Membership Interest and Percentage Interest

Series Schedule 2

**to the Company Agreement of
[name of limited liability company], LLC**

Dated [date]

Name of Series	Purpose	Members	Capital Contributions, If Any, from Each Member

[Name of member]

Repeat signature lines for all members.

[Reserved]

Chapter 23

Conversion

Form 23-1	Certificate of Conversion of a Limited Liability Company Converting to a Corporation (SOS Form 636)	23-1-1 to 23-1-6
Form 23-2	Certificate of Conversion of a Limited Liability Company Converting to a Limited Partnership (SOS Form 637)	23-2-1 to 23-2-6
Form 23-3	Certificate of Conversion of a Limited Liability Company Converting to a General Partnership (SOS Form 635)	23-3-1 to 23-3-6
Form 23-4	Certificate of Conversion of a Limited Liability Company Converting to a Real Estate Investment Trust (SOS Form 638)	23-4-1 to 23-4-6

Caution: Before using any SOS forms, the attorney should verify their currency by visiting the secretary of state's website at www.sos.state.tx.us or by calling (512) 463-5555. Note that many of these forms may also be filed online through SOSDirect.

[Reserved]

Form 23-1

Effective June 1, 2018, the name a filing entity seeks to use must be “distinguishable in the records of the secretary of state” from names used by existing entities. *See* Tex. Bus. Orgs. Code § 5.053; Acts 2017, 85th Leg., R.S., ch. 503, § 3 (H.B. 2856), eff. June 1, 2018. Instructions that accompany secretary of state forms have not been updated to reflect this new standard as of the publication date of the latest supplement of this manual. See section 1.1:2 in this manual for more information on entity name availability.

**Certificate of Conversion of a Limited Liability Company
Converting to a Corporation
(SOS Form 636)**

Form 23-1

Form 636—General Information

(Certificate of Conversion of a Limited Liability Company Converting to a Corporation)

The attached form is designed to meet minimal statutory filing requirements pursuant to the relevant code provisions. This form and the information provided are not substitutes for the advice and services of an attorney and tax specialist.

Commentary

A limited liability company may convert into a corporation by adopting a plan of conversion in accordance with section 10.101 of the Texas Business Organizations Code (BOC) and filing a certificate of conversion with the secretary of state in accordance with sections 10.154 and 10.155 of the BOC. As defined in section 1.002 of the BOC, conversion means the continuance of a Texas entity as a foreign entity of any type, the continuance of a foreign entity as a Texas entity of any type, or the continuance of a Texas entity of one type as a Texas entity of another type. As used in the BOC and in this form, “converting entity” means the entity that existed before the conversion; “converted entity” means the entity resulting from a conversion. This form should be used when a limited liability company is the converting entity and the converted entity is a for-profit corporation, professional corporation or nonprofit corporation.

Instructions for Form

- **Converting Entity Information:** The certificate of conversion is filed by the converting entity and should set forth the legal name of the converting entity and its jurisdiction of organization as part of the certificate. It is recommended that the date of formation and file number, if any, assigned by the secretary of state be provided to facilitate processing of the document.
- **Plan of Conversion/Alternative Statements:** A plan of conversion conforming to the requirements of section 10.103 of the BOC should be attached to the certificate of conversion. As an alternative to attaching the complete plan of conversion, the converting entity may opt to certify and complete the alternative statements in the form.
- **Converted Entity Name:** If the converted entity is a Texas filing entity, the name of the converted entity will be checked for availability in accordance with section 5.053 of the BOC. If the converted entity name is the same as, deceptively similar to, or similar to the name of an existing domestic or foreign filing entity, or any name reservation or name registration filed with the secretary of state, the document cannot be filed. However, if the conflicting entity name is the name of the converting entity and the converting entity is currently in existence with the secretary of state, the converted entity name will be accepted irrespective of the conflict with the entity name in use by the converting entity.
- **Certificate of Formation for the Converted Entity:** The certificate of formation of the converted entity must be filed with the certificate of conversion if the converted entity is a Texas filing entity. If the plan of conversion is attached to the certificate of conversion, the certificate of formation should be included as part of the plan of conversion or as an exhibit to the plan. If the converting entity opts to set forth the alternative statements in lieu of providing the complete plan of conversion, the certificate of formation for the corporation must be attached to the certificate of conversion.
 - The certificate of formation of a corporation formed under a plan of conversion must include a statement to that effect. In addition, the certificate of formation must provide the name, address,

date of formation, prior form of organization and the jurisdiction of formation of the converting entity.

- If the certificate of formation of the Texas corporation fails to comply with the applicable provisions of chapter 3 of the BOC, the certificate of conversion cannot be filed.
- If the converted entity is a foreign corporation, the foreign entity must register as a foreign filing entity under chapter 9 of the BOC before the transaction of any business in Texas.
- **Approval of the Plan of Conversion:** The certificate of conversion must include a statement that the plan of conversion has been approved as required by (1) the laws of the jurisdiction of formation and (2) the governing documents of the converting entity.
 - Section 101.356(c) of the BOC sets forth the requirements for approval of the plan of conversion by a Texas limited liability company.
 - A foreign entity that is the converting entity must comply with the laws of the jurisdiction of its formation.
- **Effectiveness of Filing:** A certificate of conversion becomes effective when accepted and filed by the secretary of state (option A). However, pursuant to sections 4.052 and 4.053 of the BOC the effectiveness of the instrument may be delayed to a date not more than ninety (90) days from the date the instrument is signed (option B). The effectiveness of the instrument also may be delayed on the occurrence of a future event or fact, other than the passage of time (option C). If option C is selected, you must state the manner in which the event or fact will cause the instrument to take effect and the date of the 90th day after the date the instrument is signed. In order for the certificate to take effect under option C, the entity must, within ninety (90) days of the filing of the certificate, file a statement with the secretary of state regarding the event or fact pursuant to section 4.055 of the BOC.

On the filing of a document with a delayed effective date or condition, the computer records of the secretary of state will be changed to show the filing of the document, the date of the filing, and the future date on which the document will be effective or evidence that the effectiveness was conditioned on the occurrence of a future event or fact. In addition, at the time of such filing, the status of a converting Texas filing entity will be shown as "conversion" and the status of a converted Texas filing entity will be shown as "in existence" on the records of the secretary of state.

- **Tax Certificate:** When a Texas limited liability company, or a foreign limited liability company that has registered under chapter 9 of the BOC is the converting entity, the certificate of conversion must be accompanied by a certificate of account status from the Texas Comptroller of Public Accounts indicating that all taxes under title 2 of the Tax Code have been paid and that the entity is in good standing for the purpose of conversion. Please note that the Comptroller issues many different types of certificates of account status. *Do not attach a certificate or print-out obtained from the Comptroller's web site as this does not meet statutory requirements.* You need to attach form #05-305, which is obtained directly from a Comptroller of Public Accounts representative.

Requests for certificates or questions on tax status should be directed to the Tax Assistance Section, of the Texas Comptroller of Public Accounts, Austin, Texas 78774-0100; (512) 463-4600; toll-free (800) 252-1381; (TDD) (800) 248-4099. You also may contact tax.help@cpa.state.tx.us.

In lieu of the tax certificate, the certificate of conversion may provide that the converted entity is liable for the payment of the required franchise taxes.

- **Execution:** Pursuant to section 4.001 of the BOC, the certificate of conversion must be signed by a person authorized by the BOC to act on behalf of the converting entity in regard to the filing instrument. Generally, a governing person or managerial official of the entity signs a filing instrument.

A certificate of conversion filed by a limited liability company should be signed by an authorized manager if the company has managers. If the company does not have managers and is managed by its members, an authorized managing-member must sign the certificate of conversion.

The certificate of conversion need not be notarized. However, before signing, please read the statements on this form carefully. *A person commits an offense under section 4.008 of the BOC if the person signs or directs the filing of a filing instrument the person knows is materially false with the intent that the instrument be delivered to the secretary of state for filing. The offense is a Class A misdemeanor unless the person's intent is to harm or defraud another, in which case the offense is a state jail felony.*

- **Payment and Delivery Instructions:** The filing fee for a certificate of conversion is **\$300 plus the fee for filing the certificate of formation when the converted entity is a domestic filing entity.**
 - The fee for conversion of a Texas or foreign limited liability company to either a Texas for-profit corporation or to a professional corporation is **\$600** (\$300 for the certificate of conversion and \$300 for the certificate of formation for the corporation).
 - The fee for conversion of a Texas or foreign limited liability company to a Texas nonprofit corporation is **\$325** (\$300 for the certificate of conversion and \$25 for the certificate of formation for the nonprofit corporation).
 - The fee for conversion of a Texas limited liability company into a foreign corporation is **\$300** for the certificate of conversion. There is no certificate of formation filed on behalf of the foreign entity. However, if the foreign entity is a foreign filing entity transacting business in Texas and is required to register in Texas under chapter 9 of the BOC, the foreign filing entity must register and pay the applicable fee for registration under chapter 9.

Fees may be paid by personal checks, money orders, LegalEase debit cards, or American Express, Discover, MasterCard, and Visa credit cards. Checks or money orders must be payable through a U.S. bank or financial institution and made payable to the secretary of state. Fees paid by credit card are subject to a statutorily authorized convenience fee of 2.7 percent of the total fees.

Submit the completed form in duplicate along with the filing fee. The form may be mailed to P.O. Box 13697, Austin, Texas 78711-3697; faxed to (512) 463-5709; or delivered to the James Earl Rudder Office Building, 1019 Brazos, Austin, Texas 78701. If a document is transmitted by fax, credit card information must accompany the transmission (Form 807). On filing the document, the secretary of state will return the appropriate evidence of filing to the submitter together with a file-stamped copy of the document, if a duplicate copy was provided as instructed.

Revised 05/11

Form 636
(Revised 05/11)

Return in duplicate to:
Secretary of State
P.O. Box 13697
Austin, TX 78711-3697
512 463-5555
FAX: 512 463-5709

Filing Fee: See Instructions



This space reserved for office use.

Certificate of Conversion
of a
Limited Liability Company
Converting
to a
Corporation

Converting Entity Information

The name of the converting limited liability company is: _____

The jurisdiction of formation of the limited liability company is : _____

The date of formation of the limited liability company is: _____

The file number, if any, issued to the limited liability company by the secretary of state is: _____

Plan of Conversion—Alternative Statements

The limited liability company named above is converting to a: for-profit corporation
 professional corporation nonprofit corporation. The name of the corporation is: _____

The corporation will be formed under the laws of : _____

The plan of conversion is attached.

If the plan of conversion is not attached, the following statements must be completed.

Instead of attaching the plan of conversion, the limited liability company certifies to the following statements:

A signed plan of conversion is on file at the principal place of business of the limited liability company, the converting entity. The address of the principal place of business of the limited liability company is:

Street or Mailing Address *City* *State* *Country* *Zip Code*

A signed plan of conversion will be on file after the conversion at the principal place of business of the corporation, the converted entity. The address of the principal place of business of the corporation is:

Street or Mailing Address *City* *State* *Country* *Zip Code*

A copy of the plan of conversion will be furnished on written request without cost by the converting

entity before the conversion or by the converted entity after the conversion to any owner or member of the converting or converted entity.

Certificate of Formation for the Converted Entity

The converted entity is a Texas corporation. The certificate of formation of the Texas corporation is attached to this certificate either as an attachment or exhibit to the plan of conversion, or as an attachment or exhibit to this certificate of conversion if the plan has not been attached to the certificate of conversion.

Approval of the Plan of Conversion

The plan of conversion has been approved as required by the laws of the jurisdiction of formation and the governing documents of the converting entity.

Effectiveness of Filing (Select either A, B, or C.)

A. This document becomes effective when the document is accepted and filed by the secretary of state.

B. This document becomes effective at a later date, which is not more than ninety (90) days from the date of signing. The delayed effective date is: _____

C. This document takes effect upon the occurrence of the future event or fact, other than the passage of time. The 90th day after the date of signing is: _____

The following event or fact will cause the document to take effect in the manner described below:

Tax Certificate

Attached hereto is a certificate from the comptroller of public accounts that all taxes under title 2, Tax Code, have been paid by the limited liability company.

In lieu of providing the tax certificate, the corporation as the converted entity is liable for the payment of any franchise taxes.

Execution

The undersigned signs this document subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument.

Date: _____

Signature and title of authorized person on behalf of the converting entity

Form 23-2

Effective June 1, 2018, the name a filing entity seeks to use must be “distinguishable in the records of the secretary of state” from names used by existing entities. *See* Tex. Bus. Orgs. Code § 5.053; Acts 2017, 85th Leg., R.S., ch. 503, § 3 (H.B. 2856), eff. June 1, 2018. Instructions that accompany secretary of state forms have not been updated to reflect this new standard as of the publication date of the latest supplement of this manual. See section 1.1:2 in this manual for more information on entity name availability.

**Certificate of Conversion of a Limited Liability Company
Converting to a Limited Partnership
(SOS Form 637)**

Form 23-2**Form 637—General Information****(Certificate of Conversion of a Limited Liability Company Converting to a Limited Partnership)**

The attached form is designed to meet minimal statutory filing requirements pursuant to the relevant code provisions. This form and the information provided are not substitutes for the advice and services of an attorney and tax specialist.

Commentary

A limited liability company may convert into a limited partnership by adopting a plan of conversion in accordance with section 10.101 of the Texas Business Organizations Code (BOC) and filing a certificate of conversion with the secretary of state in accordance with sections 10.154 and 10.155 of the BOC. As defined in section 1.002 of the BOC, conversion means the continuance of a Texas entity as a foreign entity of any type, the continuance of a foreign entity as a Texas entity of any type, or the continuance of a Texas entity of one type as a Texas entity of another type. As used in the BOC and in this form, “converting entity” means the entity that existed before the conversion; “converted entity” means the entity resulting from a conversion. This form should be used when a limited liability company is the converting entity and the converted entity is a limited partnership.

Registration as a Limited Liability Partnership: A Texas limited partnership created by conversion may file for registration to become a limited liability partnership by complying with sections 152.803 and 152.804 of the BOC and filing an application for registration with the secretary of state in accordance with section 152.802 of the BOC.

Instructions for Form

- **Converting Entity Information:** The certificate of conversion is filed by the converting entity and should set forth the legal name of the converting entity and its jurisdiction of organization as part of the certificate. It is recommended that the date of formation and file number, if any, assigned by the secretary of state be provided to facilitate processing of the document.
- **Converted Entity Information:** The entity following the conversion is the converted entity. The certificate of conversion should set forth the legal name of the converted entity and its jurisdiction of formation.
- **Converted Entity Name:** If the converted entity is a Texas filing entity, the name of the converted entity will be checked for availability in accordance with section 5.053 of the BOC. If the converted entity name is the same as, deceptively similar to, or similar to the name of an existing domestic or foreign filing entity, or any name reservation or name registration filed with the secretary of state, the document cannot be filed. However, if the conflicting entity name is the name of the converting entity and the converting entity is currently in existence with the secretary of state, the converted entity name will be accepted irrespective of the conflict with the entity name in use by the converting entity.
- **Plan of Conversion:** Unless the converting entity opts to complete the Alternative Statements section of this form, a plan of conversion conforming to the requirements of section 10.103 of the BOC should be attached to the certificate of conversion.
- **Alternative Statements in Lieu of Plan:** As an alternative to attaching the complete plan of conversion, the converting entity may opt to certify and complete the alternative statements in the form.
- **Certificate of Formation for the Converted Entity:** The certificate of formation of the converted entity must be filed with the certificate of conversion if the converted entity is a Texas filing entity.

Chapter 24

Merger

Form 24-1	Certificate of Merger—Combination Merger (SOS Form 622).....	24-1-1 to 24-1-10
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Form 24-3	Certificate of Merger—Domestic Entity Divisional Merger (SOS Form 621)	24-3-1 to 24-3-8

Caution: Before using any SOS forms, the attorney should verify their currency by visiting the secretary of state's website at www.sos.state.tx.us or by calling (512) 463-5555. Note that many of these forms may also be filed online through SOSDirect.

[Reserved]

Chapter 25

Termination

Form 25-1 Certificate of Termination of a Domestic Entity (SOS Form 651) 25-1-1 to 25-1-6

Caution: Before using any SOS forms, the attorney should verify their currency by visiting the secretary of state's website at www.sos.state.tx.us or by calling (512) 463-5555. Note that many of these forms may also be filed online through SOSDirect.

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