

SMALL BUSINESS TOOLKIT FOR PROBATE AND ESTATE PLANNING ATTORNEYS

by Andrew A. Lewis*

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I. INTRODUCTION

The Small Business Administration (SBA) “defines a small business . . . as one that is independently owned and operated, is organized for profit, and is not dominant in its field.”¹ According to the SBA, there are 23 million small businesses in America.² Thus, there is currently one American small business for nearly every fourteen Americans.³ Since the 1970s, American small businesses have not only provided fifty-five percent of all jobs in America but also have also produced sixty-six percent of all net new jobs for Americans, and to date, they account for fifty-four percent of all sales in the United States.⁴ Additionally, since 1982, the number of American small businesses has increased forty-nine percent.⁵ Also, since 1990, small businesses have created 8 million new jobs; big businesses, on the other hand, have actually eliminated over 4 million jobs.⁶ The Fox Small Business Center recently released a poll of the top cities in America for small business growth, and based on the several criteria, Houston was ranked number one.⁷ Accordingly, those practicing law

1. See *What is SBA’s Definition of a Small Business Concern?*, SBA.GOV, <http://www.sba.gov/content/what-sbas-definition-small-business-concern> (last visited May 15, 2014) (“Depending on the industry, size standard eligibility is based on the average number of employees for the preceding twelve months or on sales volume averaged over a three-year period.”).

2. See *Small Business Trends*, SBA.GOV, <http://www.sba.gov/content/small-business-trends> (last visited May 15, 2014) [hereinafter *Small Business Trends*].

3. As of May 15, 2014, the population of the United States was approximately 318.1 million. See *Population Clock: U.S. Population*, CENSUS.GOV (May 15, 2014, 1:31 PM), <http://www.census.gov> (noting that the Population Clock, which is located on the Census Bureau homepage, is constantly changing to reflect changes in the population). When you divide the U.S. population, 318.1 million, by the number of American small businesses, 23 million, the result is 13.83, meaning that for every small business, there are approximately fourteen Americans.

4. *Small Business Trends*, *supra* note 2.

5. *Id.*

6. *Id.*

7. See Rohit Arora, *Top U.S. Cities for Small Business Growth in 2013*, FOX SMALL BUS. CTR. (May 7, 2013), <http://smallbusiness.foxbusiness.com/finance-accounting/2013/05/07/top-us-cities-for-small-business-growth>.

in the Houston area will likely deal with small business owners at one point or another.

One of the enjoyable aspects of working with small businesses is the energy and enthusiasm that entrepreneurs bring to their work. However, sometimes it is our job, as attorneys, to remind business owners that they must plan an exit strategy. This is especially true for estate planning attorneys because they earn a living by counseling their clients about personal exit strategies. Estate planning attorneys should be mindful of business exit strategies because, while human life eventually ends, statistics indicate that the survival rates of small businesses are not particularly promising.⁸ The Bureau of Labor Statistics, a division within the Department of Labor, reported that approximately one-third of small businesses terminate within the first two years of operation, and only about forty-four percent of small businesses successfully make it past year four.⁹ As true with any type of business, the person who starts the business will, at some point, no longer run it. This could be because of welcomed circumstances—the company may be wildly successful and get bought out or could merge with another company; the owners of the company may have accomplished all their goals and decide to retire; or perhaps the company is so well established that it can handle the transition from one generation to the next—or it could be for less welcomed reasons—the company may go out of business; the original owners may have a falling out; or the majority owner of the company may die or become incapacitated. While the statistics regarding the chance of failure are puzzling, these numbers have seemingly done very little to deter millions of Americans from starting new businesses each year.¹⁰ It is incumbent upon attorneys to remind clients that planning for succession and having a business exit strategy is just as important as having a well-run business.

A. Limited Scope of Paper

This paper is not meant to be a treatise on how to generally advise small businesses; rather, it is intended to give estate planning and probate attorneys a simple resource to access relevant law and to create simple documents, as they become necessary. Also, because most small businesses existing as entities (as opposed to sole proprietorships) are organized as limited partnerships, limited liability corporations (LLCs), or S Corporations, the focus of this paper will be centered around those three types of entities.¹¹ While some of the concepts

8. See e.g., Amy E. Knaup, *Survival and Longevity in the Business Employment Dynamics Data*, MONTHLY LAB. REV. (Feb. 16, 2007), <http://www.nbcnews.com/id/16872553/#.U4kHllyGlg1>; see also *Frequently Asked Questions about Small Business*, SBA.GOV (Mar. 2014), http://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf.

9. See Knaup, *supra* note 8.

10. See *Small Business Trends*, *supra* note 2.

11. A relatively new and very useful type of LLC is a series LLC, which is a unique form of LLC in that different series within the LLC can have assets which are shielded from the liabilities of other series in the

discussed might be applicable to other types of business entities, readers should refrain from making this assumption. Finally, most of the forms referenced in this paper assume that relevant stakeholders are cooperative and easy to contact.¹²

II. SOURCES OF LAW

A. *The Texas Business Organizations Code*

Prior to the enactment of the Texas Business Organizations Code (TBOC), which became effective on January 1, 2006, under Texas law, business entities were subject to the Texas business statutes under which they were formed.¹³ Corporations were subject to the Texas Business Corporations Act (TBCA).¹⁴ Limited partnerships were subject to the Texas Revised Limited Partnership Act (TRLPA).¹⁵ General Partnerships were subject to the Texas Revised Partnership Act (TRPA).¹⁶ LLCs were subject to the Texas Limited Liability Company Act (TLLCA).¹⁷

The Texas Business Organizations Code [TBOC] . . . replaced the following statutes:

- Texas Business Corporations Act

same LLC; series LLCs can only be formed in the following jurisdictions: Delaware, District of Columbia, Illinois, Iowa, Kansas, Minnesota, Nevada, North Dakota, Oklahoma, Tennessee, Texas, Utah, and Wisconsin. DEL. CODE ANN. tit. 6, § 18-215 (West 2013); D.C. CODE § 29-802.06 (Supp. 2012); 805 ILL. COMP. STAT. 180/37-40 (Supp. 2013); IOWA CODE § 498.1201 (2013); KAN. STAT. ANN. § 17-76.143 (Supp. 2012); MINN. STAT. ANN. § 322B.03, subdiv. 6 (West 2013) (allowing the formation of a series of ownership interests, but not providing for a liability shield between the different series); NEV. REV. STAT. § 86.286 (2009); N.D. CENT. CODE § 10-32-17 (West 2013) (allowing the formation of a series of ownership interests, but not providing for a liability shield between the different series); OKLA. STAT. tit. 18, § 2054.4 (2012); TENN. CODE ANN. § 48-249-309 (2012); TEX. BUS. ORGS. CODE ANN. §§ 101.601–.622 (West 2012 & Supp. 2013); UTAH CODE ANN. § 48-2c-606 (LexisNexis 2010); WIS. STAT. ANN. § 183.0504 (West 2013) (allowing the formation of a series of ownership interests, but not providing for a liability shield between the different series). In Texas, series LLCs are formed and governed much like LLCs. See TEX. BUS. ORGS. CODE ANN. tit. 3 (containing the provisions that apply to LLCs and series LLCs). While series LLCs are addressed at various points, a more detailed treatment of this type of entity is beyond the scope of this paper.

12. For this reason, most meeting minutes are drafted as unanimous consents, which eliminates the need for notice or a waiver of notice; however, if this approach is impractical or impossible, then notice may be sent. See TEX. BUS. ORGS. CODE ANN. § 6.052 (West 2012).

13. See *Business Organizations Code FAQs*, TEX. SECRETARY ST., <http://www.sos.state.tx.us/corp/bocfaqs.shtml> (last visited May 15, 2014); see also *Information on the Texas Business Organizations Code*, TEX. SECRETARY ST., <http://www.sos.state.tx.us/corp/boc.shtml> (last visited May 15, 2014) (listing the various Texas business statutes that were replaced by the TBOC).

14. Act of April 15, 1955, 54th Leg., R.S., ch. 64, 1955 Tex. Gen. Laws 239, *repealed by* Act of May 29, 2003, 78th Leg., R.S., ch. 182, 2003 Tex. Gen. Laws 267.

15. Act of April 30, 1987, 70th Leg. R.S., ch. 49, 1987 Tex. Gen. Laws 92, *repealed by* Act of May 29, 2003, 78th Leg., R.S., ch. 182, 2003 Tex. Gen. Laws 267.

16. Act of June 19, 1993, 73d Leg. R.S., ch. 917, 1993 Tex. Gen. Laws 3887, *repealed by* Act of May 29, 2003, 78th Leg., R.S., ch. 182, 2003 Tex. Gen. Laws 267.

- Texas Non-Profit Corporation Act
- Texas Professional Corporation Act
- Texas Professional Association Act
- Texas Miscellaneous Corporation Laws Act
- Texas Revised Partnership Act
- Texas Revised Limited Partnership Act
- Texas Limited Liability Company Act
- Texas Real Estate Investment Trust Act
- Texas Cooperative Association Act [and]
- Texas Uniform Unincorporated Nonprofit Association Act.¹⁸

The TBOC provided for a transition period before mandatory application of the TBOC to pre-existing entities, so when it took effect, it only governed those business entities formed on or after January 1, 2006; eventually, the other Texas business statutes were repealed, and since January 1, 2010, all business entities have been subject to the TBOC, even though some may have not formally adopted it.¹⁹

The TBOC is organized in a “hub and spoke” format, whereby it compiles provisions common to most types of entities into one title (the hub) and places provisions that only applied to a specific type of entity into a separate title (the spoke).²⁰ Title 1, General Provisions, is the hub of the TBOC.²¹ It contains general provisions that apply to most entities, unless specifically provided otherwise.²² Title 1 contains twelve chapters that provide a broad range of necessary knowledge for all entities.²³ Chapter 1 provides definitions and explains the purpose of the code, describes code construction, and discusses how to determine the applicable law.²⁴ Chapter 2 contains the purposes and powers of Domestic entities.²⁵ Chapter 3 provides information about entity formation and governance.²⁶ Chapter 4 details the filing process and procedures.²⁷ Chapter 5 includes information on entity names and registered agents and offices.²⁸ Chapter 6 applies to domestic entities, describing the

17. Act of June 16, 1991, 72d Leg. R.S., ch. 901, 1991 Tex. Gen. Laws 3161, *repealed by* Act of May 29, 2003, 78th Leg., R.S., ch. 182, 2003 Tex. Gen. Laws 267.

18. *Information on the Texas Business Organizations Code*, *supra* note 13.

19. *See Business Organizations Code FAQs*, *supra* note 13.

20. *See* Lorna Wassdorf & Carmen Flores, *Business Organizations Code: A View From the Trenches*, ST. B. TEX., ADVANCED BUSINESS LAW COURSE (Oct. 26–27, 2006), <http://www.sos.state.tx.us/corp/forms/boc/4thbusiness.pdf>.

21. *See id.*

22. *See id.*

23. *See generally* TEX. BUS. ORGS. CODE ANN. tit. 1 (general provisions) (West 2012); *see also infra* notes 24–35 and accompanying text.

24. *See* TEX. BUS. ORGS. CODE ANN. ch. 1 (definitions and other general provisions).

25. *See id.* ch. 2 (purposes and power of domestic entity).

26. *See id.* ch. 3 (formation and governance).

27. *See id.* ch. 4 (filings).

28. *See id.* ch. 5 (names of entities; registered agents and registered offices).

meeting and voting procedures for these types of entities.²⁹ Chapter 7 explains entity liability.³⁰ Chapter 8 contains provisions about indemnification and insurance.³¹ Chapter 9 applies to foreign entities, discussing registration requirements, as well as the rights and obligations of these entities.³² Chapter 10 contains details related to mergers, exchanges of interests, conversions, property transfers, bankruptcy reorganizations, and rights of dissenting owners.³³ Chapter 11 describes procedures to wind up and terminate domestic entities.³⁴ Lastly, Chapter 12 details various administrative powers of entities.³⁵ Title 2 is comprised of four chapters, each of which contains information related to corporations.³⁶ Title 3 consists of one chapter, which governs limited liability companies.³⁷ Title 4 is made up of four different chapters, and these chapters contain information about partnerships, both general and limited.³⁸ Title 5, which only has one chapter, includes provisions related to real estate investment trusts.³⁹ Title 6 contains two chapters, with one addressing cooperative associations and the other addressing unincorporated nonprofit associations.⁴⁰ Title 7 is comprised of four different chapters, each of which contains information related to different types of professional businesses—entities, associations, corporations, LLCs.⁴¹ Title 8, which has two chapters, contains various miscellaneous provisions and transitional provisions.⁴² This paper focuses on the relevant sections of Titles 1 through 4.⁴³

B. Federal Income Tax Law—A Quick Reflection

For federal tax purposes, corporations are only classified as corporations.⁴⁴ However, corporations that qualify for S Corporation status can avoid double taxation—first at the business level and again at the individual level—if they elect to be taxed as an S Corporation.⁴⁵ Currently, to qualify as an S Corporation, a corporation must meet the following requirements: it must be a

29. *See id.* ch. 6 (meetings and voting for domestic entities).

30. *See id.* ch. 7 (liability).

31. *See id.* ch. 8 (indemnification and insurance).

32. *See id.* ch. 9 (foreign entities).

33. *See id.* ch. 10 (mergers, interest exchanges, conversions, and sales of assets).

34. *See id.* ch. 11 (winding up and termination of domestic entity).

35. *See id.* ch. 12 (administrative powers).

36. *See generally id.* tit. 2, chs. 20–23 (containing provisions applicable to corporations).

37. *See generally id.* tit. 3, ch. 101 (containing provisions applicable to LLCs).

38. *See generally id.* tit. 4, chs. 151–54 (containing provisions applicable to partnerships).

39. *See generally id.* tit. 5, ch. 200 (containing provisions applicable to real estate investment trusts).

40. *See generally id.* tit. 6, chs. 251–52 (containing provisions applicable to associations).

41. *See generally id.* tit. 7, chs. 301–04 (containing provisions applicable to provisional entities).

42. *See generally id.* tit. 8, chs. 401–02 (containing miscellaneous and transition provisions).

43. *See infra* Parts III–V.

44. *See* William J. Rands, *Organizations Classified as Corporations for Federal Tax Purposes*, 59 ST. JOHN'S L. REV. 657, 663 (1985); *see also* *Tax Information for Corporations*, IRS.GOV, <http://www.irs.gov/Businesses/Corporations> (last updated June 7, 2014).

45. *See Tax Information for Corporations*, *supra* note 44.

domestic corporation; it must only have allowable shareholders—individuals, certain trusts, and estates are allowable shareholders, but partnerships, corporations, and non-resident alien shareholders are not; it cannot have more than one hundred shareholders; it cannot have more than one class of stock, though voting and non-voting shares are allowed; and it cannot be an ineligible corporation, which includes “certain financial institutions, insurance companies, and domestic international sales corporations.”⁴⁶ If these specific criteria are met, a corporation can file Form 2553 and elect to be treated as an S Corporation.⁴⁷ However, if a corporation does not meet the requirements, it will be treated as a C Corporation and will be taxed at the corporate level.⁴⁸ There are advantages and disadvantages to each type of treatment.⁴⁹ If a corporation has, or will have, an accountant, the accountant should be consulted prior to making an election.⁵⁰ Generally, to report annual income, a C Corporation files Form 1120, and an S Corporation files Form 1120S.⁵¹

Prior to the “check-the-box” regulations, which were issued in 1996 and became effective in 1997, in forming partnerships and LLCs, planners had to be especially careful not to make them too similar to corporations because if either entity looked too corporate-like, it risked being taxed as a corporation.⁵² Now, partnerships and LLCs can elect how they are treated, simply by checking a box on a tax form indicating their election.⁵³ Generally, if a partnership or an LLC only has one member, it will be disregarded as a separate entity from its owner for income tax purposes, unless it affirmatively elects a different business entity classification on Form 8832.⁵⁴ If disregarded, the owner of the entity must

46. *S Corporations*, IRS.GOV, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/S-Corporations> (last updated Nov. 19, 2013).

47. *See id.*; *see also* INTERNAL REVENUE SERV., U.S. DEP’T OF THE TREASURY, CAT. NO. 49978N, INSTRUCTIONS FOR FORM 2553, at 1 (rev. Dec. 2013), *available at* <http://www.irs.gov/pub/irs-pdf/i2553.pdf> (laying out the specific criteria necessary for a corporation to elect to be taxed as an S Corporation, as well as detailed instructions for completing and filing Form 2553).

48. *See Corporations*, IRS.GOV, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Corporations> (last updated Mar. 4, 2014).

49. *See, e.g., Choose Your Business Structure: Corporation*, SBA.GOV, <http://www.sba.gov/content/corporation> (last visited May 15, 2014); *Choose Your Business Structure: S Corporation*, SBA.GOV, <http://www.sba.gov/content/s-corporation> (last visited May 15, 2014).

50. *See* Caron Beesley, *Startup Cost Tax Deductions – How to Write Off the Expense of Starting Your Business*, SBA.GOV, <http://www.sba.gov/community/blogs/community-blogs/small-business-cents/startup-cost-tax-deductions—how-write-expense> (last updated Jan. 9, 2013, 9:20 AM).

51. *See Corporations*, *supra* note 48; *S Corporations*, *supra* note 46.

52. Treas. Reg. § 301.7701-1 to -3 (as amended by T.D. 8697, 1997-1 C.B. 215).

53. *See id.*; *see also* INTERNAL REVENUE SERV., U.S. DEP’T OF THE TREASURY, OMB. NO. 1545-1516, FORM 8832: ENTITY CLASSIFICATION ELECTION (rev. Dec. 2013) [hereinafter FORM 8832], *available at* <http://www.irs.gov/pub/irs-pdf/f8832.pdf>.

54. *See* FORM 8832, *supra* note 53; *see also LLC Filing as a Corporation or Partnership*, IRS.GOV, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/LLC-Filing-as-a-Corporation-or-Partnership> (last updated Apr. 28, 2014); *Single Member Limited Liability Companies*, IRS.GOV, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Single-Member-Limited-Liability-Companies> (last updated Feb. 19, 2014) [hereinafter *Single Member LLCs*].

report the entity's income on Form 1040.⁵⁵ If a partnership or an LLC has more than one member, it will be as a partnership for income tax purposes, unless it affirmatively elects a different business entity classification on Form 8832; if no election is made, the owner of the entity must report the entity's income on Form 1065.⁵⁶ Additionally, if a business is taxed as an S Corporation or a partnership, the owner's share of the entity's income will generally be reported on Schedule K-1.⁵⁷ Finally, owners of C Corporations report their shares of the entity's income on Form 1099-DIV.⁵⁸

Prior to the check-the-box regulations, planners often avoided giving partnerships perpetual existence.⁵⁹ Also, in an effort to avoid limited liability and to prevent appearing too similar to corporations, limited partnerships frequently had general partners with substantial assets.⁶⁰ Now that these types of things are no longer issues for federal taxation purposes, planners dealing with older limited partnerships might consider giving them perpetual existence and replacing individual, general partners with LLCs.⁶¹

C. The Texas Franchise Tax—Requirements, Forfeiture and Termination

1. The Basics of the Texas Franchise Tax

Texas franchise tax provisions are located in Title 2, Subtitle F, Chapter 171 of the Texas Tax Code (TTC).⁶² The franchise tax is basically a margin tax, taxing businesses on the amount of profit they earn each year.⁶³ Various business entities are subject to the franchise tax, including partnerships, corporations, LLCs, joint ventures, and other legal entities.⁶⁴ Businesses that are not subject to the franchise tax include “sole proprietorships . . . general partnerships directly and solely owned by natural persons . . . entities exempt under Subchapter B of Chapter 171 [of the TTC] . . . passive entities (as

55. See *Single Member LLCs*, *supra* note 54 (“[T]he [entity]’s activities should be reflected on its owner’s federal tax return.”).

56. See *LLC Filing as a Corporation or Partnership*, *supra* note 54; see also INTERNAL REVENUE SERV., U.S. DEP’T OF THE TREASURY, CAT. NO. 11392V, INSTRUCTIONS FOR FORM 1065 (Feb. 12, 2014), available at <http://www.irs.gov/pub/irs-pdf/i1065.pdf>.

57. See *S Corporations*, *supra* note 46; see also INTERNAL REVENUE SERV., U.S. DEP’T OF THE TREASURY, CAT. NO. 11521O, SHAREHOLDER’S INSTRUCTIONS FOR SCHEDULE K-1 (FORM 1120S) (Jan. 23, 2014), available at <http://www.irs.gov/pub/irs-pdf/i1120ssk.pdf>; INTERNAL REVENUE SERV., U.S. DEP’T OF THE TREASURY, CAT. NO. 11396N, PARTNER’S INSTRUCTIONS FOR SCHEDULE K-1 (FORM 1065) (Jan. 17, 2014), available at <http://www.irs.gov/pub/irs-pdf/i1065sk1.pdf>.

58. See INTERNAL REVENUE SERV., U.S. DEP’T OF THE TREASURY, CAT. NO. 27978B, INSTRUCTIONS FOR FORM 1099-DIV (Aug. 15, 2013), available at <http://www.irs.gov/pub/irs-pdf/i1099div.pdf>.

59. See Byron F. Egan, *Choice of Entity Decision Tree After Margin Tax and Texas Business Organizations Code*, 42 TEX. J. BUS. L. 71, 87–88 (2007).

60. See *id.* at 88.

61. See *id.* at 127.

62. TEX. TAX CODE ANN. tit. 2, sub. F, ch. 171 (West 2012).

63. *Id.* §§ 171.001–.002.

64. *Id.* § 171.0002 (listing the entities subject to the franchise tax).

defined under TTC [§] 171.0003) [and] . . . unincorporated political committees.”⁶⁵ This is a change from prior law; under the old rules, family limited partnerships were not subject to the franchise tax, which frequently drove the decision to form as a limited partnership, rather than another entity form.⁶⁶ Importantly, rental income is not considered passive income for franchise tax purposes.⁶⁷ Also, although LLCs are taxed as partnerships for federal tax purposes, they will not be considered passive entities for purposes of the Texas franchise tax.⁶⁸

2. Franchise Tax Reports

While most businesses must file an annual franchise tax report, if businesses have less than \$1,080,000 in annual receipts from January 1, 2014 to January 1, 2015, they will not have to pay the franchise tax.⁶⁹ Thus, these businesses may file the No Tax Due Information Report (Form 05-163).⁷⁰ If businesses have over \$1,080,000 in total annual revenue, but less than \$10 million in annual revenue, they can elect to use the E-Z Computation Report (Form 05-169).⁷¹ Under E-Z Computation, an entity “may elect to pay the franchise tax by multiplying total revenue times the apportionment factor times a tax rate of 0.575%.”⁷² If businesses do not elect to use the E-Z Computation Report, however, then the tax is based on the business’s margin, using the lowest of the following three calculations: (1) “total revenue minus cost of goods sold”; (2) “total revenue minus compensation”; or (3) “total revenue times 70 percent.”⁷³ Entities with annual revenues in excess of \$10 million

65. *Franchise Tax Frequently Asked Questions: Taxable Entities*, TEX. COMPTROLLER PUB. ACCTS., http://www.window.state.tx.us/taxinfo/franchise/faq_tax_ent.html (last visited May 15, 2014).

66. *See generally id.* (explaining that family limited partnerships are taxable entities, subjected to the franchise tax).

67. *See* TEX. TAX CODE ANN. § 171.0003(b). For planning purposes, if a partnership has rental income, consider forming a new entity to receive rental income, so the original partnership can continue to qualify as a passive entity. *See id.*

68. *See id.* § 171.0003(a)(1); *see also Franchise Tax Frequently Asked Questions: Passive Entities*, TEX. COMPTROLLER PUB. ACCTS., http://www.window.state.tx.us/taxinfo/franchise/faq_pass_ent.html (last visited May 15, 2014).

69. *See Franchise Tax Frequently Asked Questions: Reports and Payments*, TEX. COMPTROLLER PUB. ACCTS., http://www.window.state.tx.us/taxinfo/franchise/faq_rpt_pay.html (last visited May 15, 2014) [hereinafter *Reports and Payments*] (“The no-tax-due threshold of [\$1 million] has been adjusted for the increase in the Consumer Price Index (CPI) as required by TTC [§] 171.006.”) (noting that the no-tax-due threshold amount for 2014 and 2015 reports is \$1,080,000).

70. *See id.*; *see also* TEX. COMPTROLLER PUB. ACCTS., FORM 05-163: TEXAS FRANCHISE TAX NO TAX DUE INFORMATION REPORT (rev. 2013), *available at* <http://www.window.state.tx.us/taxinfo/taxforms/05-163-f-14.pdf> (containing Form 05-163, Texas Franchise Tax No Tax Due Information Report).

71. *See Reports and Payments*, *supra* note 69; *see also* TEX. COMPTROLLER PUB. ACCTS., FORM 05-169: TEXAS FRANCHISE TAX EZ COMPUTATION REPORT (rev. 2013), *available at* <http://www.window.state.tx.us/taxinfo/taxforms/05-169-f-14.pdf> (containing Form 05-169, Texas Franchise Tax EZ Computation Report).

72. *Reports and Payments*, *supra* note 69.

73. *Id.*

must report their franchise tax on the Long Form of the Texas Franchise Tax Report (Forms 05-158-A and 05-158-B).⁷⁴

Each year, annual franchise tax reports are due on May 15.⁷⁵ “For entities that became subject to franchise tax in the previous year, the first report due is an annual report.”⁷⁶ Business entities must file their final franchise tax report during the year they plan to terminate, merge, or withdraw with the Texas Secretary of State’s Office, while out-of-state entities must file their final reports within sixty days after they cease their operations in Texas.⁷⁷

3. Late Penalties

If entities fail to pay the franchise tax or fail to file their franchise tax report by the due date, the state imposes a 5% penalty on the amount of franchise tax due.⁷⁸ “If [any part of] the tax is not paid or the report is not filed within [thirty] days after the due date,” the state imposes an additional 5% penalty on the amount of unpaid tax.⁷⁹ Delinquent taxes accrue interest beginning sixty days after they are due.⁸⁰ For example, if a taxpayer pays the tax sixty-one days after it is due, the taxpayer will be charged a day’s worth of interest.⁸¹ “For . . . taxes due on or after Jan[uary] 1, 2000, the interest rate varies annually.”⁸²

4. The Public Information Report and the Ownership Information Report

All businesses required to “file a franchise tax report must also file an information report ([Form] 05-102 or 05-167). Corporations, LLCs, and financial institutions must file Form 05-102, the Public Information Report

74. See *Texas Franchise Tax – Which Forms Should I File?*, TEX. COMPTROLLER PUB. ACCTS., <http://www.window.state.tx.us/taxinfo/franchise/whichforms.html> (last visited May 15, 2014) [hereinafter *Which Forms Should I File?*]; see also TEX. COMPTROLLER PUB. ACCTS., FORM 05-158-A: TEXAS FRANCHISE TAX REPORT – PAGE 1 (rev. 2013), available at <http://window.state.tx.us/taxinfo/taxforms/05-158-f-11.pdf> (containing Form 05-158-A, Texas Franchise Tax Report – Page 1); TEX. COMPTROLLER PUB. ACCTS., FORM 05-158-B: TEXAS FRANCHISE TAX REPORT – PAGE 2 (rev. 2013), available at <http://window.state.tx.us/taxinfo/taxforms/05-158-f-11.pdf> (containing Form 05-158-B, Texas Franchise Tax Report – Page 2).

75. *Texas Franchise Tax Due Dates*, TEX. COMPTROLLER PUB. ACCTS., <http://www.window.state.tx.us/taxinfo/franchise/duedates.html> (last visited May 15, 2014).

76. *Id.*

77. See *id.*

78. See TEX. TAX CODE ANN. § 171.362(a) (West 2012).

79. *Id.* § 171.362(b).

80. See *id.* § 111.060(c).

81. See *id.*; see also *Interest on Credits and Refunds and on Tax Due*, TEX. COMPTROLLER PUB. ACCTS., http://www.window.state.tx.us/taxinfo/int_rate.html (last visited May 15, 2014).

82. *Interest on Credits and Refunds and on Tax Due*, *supra* note 81.

(PIR). All other entity types, including professional associations, must file Form 05-167, the Ownership Information Report (OIR).⁸³

5. Forfeiture and Termination

In Texas, the comptroller shall forfeit the right of a taxable entity to do business in the State of Texas if it fails to file a franchise tax report or does not pay any taxes owed “within [forty-five] days after the date notice of forfeiture is mailed.”⁸⁴ Basically, if an entity fails to file its report within the forty-five day period, it cannot appear in court.⁸⁵ “The comptroller shall revive the corporate privileges of a corporation if the corporation, before the forfeiture of its charter or certificate of authority, pays any tax, penalty, or interest due.”⁸⁶ If an entity does not file its report or pay the amount of taxes due within 120 days of the notice of forfeiture, its certificate of registration may be forfeited.⁸⁷ This means that if the entity does not file its reports and pay its taxes within 120 days after it receives a notice of forfeiture, the entity may be terminated.⁸⁸ Texas requires its comptroller to certify the corporation’s name to the secretary of state and the attorney general “[a]fter the 120th day after the date that the corporate privileges of a corporation are forfeited.”⁸⁹ “The secretary of state may forfeit the charter, certificate, or registration of a taxable entity if: (1) the secretary receives the comptroller’s certification under [TTC §] 171.302; and (2) the taxable entity does not revive its forfeited privileges within 120 days after the date that the privileges were forfeited.”⁹⁰

6. Revival After Forfeiture for Tax Reasons

The State of Texas may revive an entity’s forfeited charter or forfeited certificate of authority if the entity files each required report and pays the imposed tax, penalty, and interest.⁹¹ If the state forfeits a company’s charter or certificate for tax reasons, then any of its stockholders, directors, or officers

83. *Which Forms Should I File?*, *supra* note 74; *see also* TEX. COMPTROLLER PUB. ACCTS., FORM 05-102: TEXAS FRANCHISE TAX PUBLIC INFORMATION REPORT (rev. 2013), *available at* <http://window.state.tx.us/taxinfo/taxforms/05-102-a-14.pdf> (containing Form 05-102, Texas Franchise Tax Public Information Report); TEX. COMPTROLLER PUB. ACCTS., FORM 05-167: TEXAS FRANCHISE TAX OWNERSHIP INFORMATION REPORT (rev. 2013), *available at* <http://window.state.tx.us/taxinfo/taxforms/05-167-a-14.pdf> (containing Form 05-167, Texas Franchise Tax Ownership Information Report);

84. TEX. TAX CODE ANN. § 171.251 (pertaining to corporations); *see also id.* § 171.2515 (pertaining to other entities).

85. *See id.* § 171.252.

86. *Id.* § 171.258.

87. *See id.* § 171.301 (pertaining to corporations); *see also id.* § 171.3015 (pertaining to other entities).

88. *See id.* §§ 171.301, .3015.

89. *Id.* § 171.302.

90. *Id.* § 171.309.

91. *See id.* §§ 171.312–.313.

may request that the state set aside the forfeiture.⁹² “If a request is made, the secretary of state shall determine if each delinquent report has been filed and any delinquent tax, penalty, or interest has been paid.”⁹³ The entity must also provide a tax clearance letter, issued by the comptroller, stating that it has satisfied all of its franchise tax liabilities and that it is ready for reinstatement.⁹⁴ If an entity meets all the necessary requirements—has filed each report and has paid off any tax, penalty, or interest due—the state requires the secretary of state to set aside the forfeiture.⁹⁵

D. State and Federal Securities Laws

Since ownership interests in business entities are generally considered securities, transfers and offers to transfer such interests may be subject to federal securities laws and state securities laws (blue sky laws).⁹⁶ Often, agreements among owners, or subscription agreements, will contain “safe harbor” language that qualifies the issuance of ownership interests for exemption from registration under federal and state securities laws.⁹⁷ A discussion of the registration and exemption requirements, however, is beyond the scope of this paper.

III. ORGANIZATION AND GOVERNING DOCUMENTS

A. Organization and Governing Documents Generally

1. Certificates of Formation

To create a business entity in Texas, an organization must file a certificate of formation with the secretary of state.⁹⁸ The TBOC sets forth the requirements for the content of such certificates.⁹⁹ Acknowledgment of the filing is conclusive evidence of the formation of the business and the authority to transact business in Texas.¹⁰⁰ Gone are the days of filing articles of incorporation or articles of organization and receiving a certificate of

92. *Id.* § 171.313(a); *see also* TEX. SECRETARY ST., FORM 801: APPLICATION FOR REINSTATEMENT AND REQUEST TO SET ASIDE TAX FORFEITURE (rev. May 2011), *available at* <http://www.sos.state.tx.us/corp/forms/801.pdf> (containing Form 801, Application for Reinstatement and Request to Set Aside Tax Forfeiture).

93. TEX. TAX CODE ANN. § 171.313(b).

94. *See Tax Requirements for Filings with the Secretary of State*, TEX. COMPTROLLER PUB. ACCTS., http://www.window.state.tx.us/taxinfo/franchise/tax_req_sos.html (last visited May 15, 2014).

95. TEX. TAX CODE ANN. § 171.313(b).

96. *See Egan, supra* note 59, at 126–27.

97. *See id.* at 88–89.

98. TEX. BUS. ORGS. CODE ANN. §§ 3.001(a), 4.001(a)(2) (West 2012).

99. *Id.* § 3.005.

100. *See id.* § 3.001(d).

incorporation or certificate of organization from the secretary of states.¹⁰¹ Practitioners may still see these types of documents with older entities, and some may continue to receive requests for these from various entities located inside and outside of Texas; however, these documents are no longer available for organizations formed on or after January 1, 2006.¹⁰² Additionally, business entities now exist perpetually, unless the state terminates an entity according to its governing documents, the TBOC, or the TTC.¹⁰³

2. *Agreements Among Owners*

Generally, it is advisable for business owners to enter into an agreement among themselves—a shareholder agreement for corporations, a company agreement or an operating agreement for LLCs, or a partnership agreement for partnerships.¹⁰⁴ At a minimum, these types of agreements typically set forth the following: the names of owners to the agreement; the owners' respective percentages of ownership; the required contributions; the term of the business, if not perpetual; the management of the business; provisions related to transfers and buy/sell provisions; and provisions outlining the voting rights.¹⁰⁵ These should be signed by each owner, and if transfer restrictions apply to community property, then also by the owners' spouses.¹⁰⁶ If businesses do not have an agreement among their owners in place, then the default provisions of the TBOC prevail.¹⁰⁷ Agreements may alter most default provisions of the TBOC; generally, a more tailored approach is preferable to the default provisions.¹⁰⁸ As with most agreements, the best time to construct them is when the company is new, before conflicts arise.¹⁰⁹ Often, having well defined rights and obligations that are reached by agreement on the front end can stave off disputes that might arise later.¹¹⁰ Partnership agreements and LLC company

101. See *id.* § 1.002(6); see also Egan, *supra* note 59, at 81 n.40 (explaining that, before the TBOC, each entity's formation document had a different name).

102. See TEX. BUS. ORGS. CODE ANN. § 1.002(6); see also Egan, *supra* note 59, at 82.

103. TEX. BUS. ORGS. CODE ANN. § 3.003.

104. See Elio Palacios, Jr., *Founding Owners' Agreements*, OF INT. TO ENTREPRENEURS & STARTUPS (Apr. 27, 2014), <http://ofintereststartups.wordpress.com/2014/04/27/founding-owners-agreements>; see also generally Egan, *supra* note 59 (explaining the different types of agreements between owners, based on the type of entity).

105. See, e.g., Jean Murray, *Shareholder Agreement*, ABOUT.COM, <http://biztaxlaw.about.com/od/glossarys/g/Shareholder-Agreement.htm> (last visited May 15, 2014); Jean Murray, *Operating Agreement*, ABOUT.COM, <http://biztaxlaw.about.com/od/glossaryo/g/operatingagree.htm> (last visited May 15, 2014); Jean Murray, *What Should be Included in a Partnership Agreement*, ABOUT.COM, <http://biztaxlaw.about.com/od/startingapartnership/f/partneragree.htm> (last visited May 15, 2014).

106. See generally Egan, *supra* note 59, at 126, 137, 152 (discussing the transferability of ownership interests).

107. See generally *id.* (explaining that the TBOC's default provisions prevail in the absence of an agreement among owners).

108. See *id.* at 79.

109. See Palacios, Jr., *supra* note 104.

110. See *id.*

agreements may either be oral or written.¹¹¹ Of course, if an agreement is not in writing, it can only be of limited utility in efficiently resolving future conflicts and managing the business.¹¹² Therefore, it is always best put these agreements in writing, early on.¹¹³

Many partnership agreements, company agreements, and shareholder agreements will contain safe harbor language which qualifies the issuance of ownership interests to new owners for exemption from registration under federal and state securities laws.¹¹⁴ If there is no agreement, or if an agreement is in place but lacks such safe harbor provisions, a subscription agreement should be considered.¹¹⁵

B. Organization and Governing Documents of Partnerships

1. Certificate of Formation

Partnerships must file a certificate of formation with the secretary of state.¹¹⁶ The TBOC sets forth the requirements for the content of such certificates.¹¹⁷ Acknowledgment of the filing is conclusive evidence of the formation of the business and the authority to transact business in Texas.¹¹⁸ “A certificate of formation for a limited partnership must include the address of the principal office of the partnership . . . where records are to be kept.”¹¹⁹

2. Required Amendment to Certificate of Formation if New General Partner

“A general partner shall file a certificate of amendment reflecting . . . the admission of a new general partner . . . [or] the withdrawal of a general partner” within thirty days of the admission or the withdrawal.¹²⁰

3. Partnership Agreements

Partnership agreements may be oral or written.¹²¹ Section 153.004 of the TBOC sets forth the provisions of limited partnership agreements that cannot be waived.¹²²

111. See TEX. BUS. ORGS. CODE ANN. §§ 101.001(1), 151.001(5) (West 2012).

112. See Palacios, Jr., *supra* note 104.

113. See *id.*

114. See Egan, *supra* note 59, at 88–89.

115. See *id.* at 88–89, 165 n.537. A more in depth discussion of the registration requirements and safe harbor provisions is beyond the scope of this paper.

116. TEX. BUS. ORGS. CODE ANN. §§ 3.001(a), 4.001(a)(2); see also TEX. SECRETARY ST., FORM 207: CERTIFICATE OF FORMATION, LIMITED PARTNERSHIP (rev. May 2011), available at http://www.sos.state.tx.us/corp/forms/207_boc.pdf (containing Form 207, Certificate of Formation, Limited Partnership).

117. TEX. BUS. ORGS. CODE ANN. § 3.005.

118. See *id.* § 3.001(d).

119. *Id.* § 3.011(c).

120. *Id.* § 153.051; see also *id.* § 153.052 (providing basis for discretionary amendments).

C. Organization and Governing Documents of LLCs

1. Certificate of Formation

LLCs must file a certificate of formation with the secretary of state.¹²³ The TBOC sets forth the requirements for the content of such certificates.¹²⁴ Acknowledgment of the filing is conclusive evidence of the formation of the business and the authority to transact business in Texas.¹²⁵ For LLCs, the TBOC requires the certificate of formation to indicate whether the LLC will have managers.¹²⁶ If the LLC will have managers, the certificate of formation must include each initial manager's name and address.¹²⁷ If the LLC will not have managers, however, the certificate of formation must include each initial member's name and address.¹²⁸ If the certificate of formation provides for management by managers, then the managers have the right to manage the company.¹²⁹ Because LLCs may or may not have officers, the certificate of formation does not require that the LLC state whether officers exist.¹³⁰ The certificate of formation may also include provisions contained in a company agreement.¹³¹ If the LLC will be a series LLC, a notation must be made in the certificate of formation.¹³²

2. Company Agreements

A "[c]ompany agreement" [is] any agreement, written or oral, of the members concerning the affairs or the conduct of the business of a limited

121. *Id.* § 151.001(5).

122. *Id.* § 153.004 (providing that, among other things, a partnership agreement may not unreasonably restrict a partner's right of access to the company's books and records under § 153.552).

123. *Id.* §§ 3.001(a), 4.001(a)(2); *see also* TEX. SECRETARY ST., FORM 205: CERTIFICATE OF FORMATION, LIMITED LIABILITY COMPANY (rev. May 2011), *available at* http://www.sos.state.tx.us/corp/forms/205_boc.pdf (containing Form 205, Certificate of Formation, Limited Liability Company).

124. TEX. BUS. ORGS. CODE ANN. § 3.005.

125. *See id.* § 3.001(d).

126. *Id.* § 3.010(1).

127. *Id.* § 3.010(2).

128. *Id.* § 3.010(3).

129. *Id.* § 101.251(1).

130. *Id.* § 3.010; *see also id.* § 3.103.

131. *Id.* § 101.051(a).

132. *Id.* § 101.604. For example, a company that is establishing three different series—Series A, Series B, and Series C—may include the following provision in its certificate of formation:

[T]he 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 limited liability company generally or any other series; and . . . none of the debts, liabilities, obligations and expenses incurred, contracted for, or otherwise existing with respect to the limited liability company generally or any other series shall be enforceable against the assets of a particular series.

Id. § 101.602.

liability company.”¹³³ The company agreement governs the following: “(1) the relations among members, managers, and officers of the company, assignees of membership interests . . . and the company itself; and (2) other internal affairs of the company.”¹³⁴ Unless otherwise provided, amendments to LLC company agreements are only permitted “if each member of the company consents to the amendment.”¹³⁵ While LLC company agreements may be broad, there are certain statutory provisions that cannot be modified.¹³⁶ Among the provisions that cannot be waived are the following: the member requirement pursuant to TBOC § 101.101; the supplemental record keeping requirement pursuant to TBOC § 101.501; and the requirement that persons have reasonable access to those records.¹³⁷

3. *The Single Member LLC*

Note that single member LLCs are disregarded for federal income tax purposes, unless they elect another status—for federal tax purposes, a married couple is considered to be one person.¹³⁸ However, while single member LLCs are not disregarded under state law, their operating agreements are not enforceable because they do not have multiple parties contracting.¹³⁹

D. *Organization and Governing Documents of Corporations*

1. *Certificate of Formation*

Corporations must file a certificate of formation with the secretary of state.¹⁴⁰ The TBOC sets forth the requirements for the content of such certificates.¹⁴¹ Acknowledgment of the filing is conclusive evidence of the formation of the business and the authority to transact business in Texas.¹⁴² Generally, a corporation’s bylaws contain provisions for the regulation and management of the corporation’s affairs.¹⁴³ The corporation’s board of directors must adopt initial bylaws.¹⁴⁴ Unless the corporation’s certificate of

133. *Id.* § 101.001(1). These also may be referred to as regulations or operating agreements. *See* Egan, *supra* note 59, at 165.

134. TEX. BUS. ORGS. CODE ANN. § 101.052(a).

135. *Id.* § 101.053.

136. *See id.* § 101.054.

137. *See id.*

138. *See Single Member LLCs, supra* note 54.

139. TEX. BUS. ORGS. CODE ANN. § 101.001(1).

140. *Id.* §§ 3.001(a), 4.001(a)(2); *see also* TEX. SECRETARY ST., FORM 201: CERTIFICATE OF FORMATION, FOR-PROFIT CORPORATION (rev. May 2011), *available at* http://www.sos.state.tx.us/corp/forms/201_boc.pdf (containing Form 201, Certificate of Formation, For-Profit Corporation).

141. TEX. BUS. ORGS. CODE ANN. § 3.005.

142. *See id.* § 3.001(d).

143. *Id.* § 21.057(b).

144. *Id.* § 21.057(a).

formation, its shareholders, or the TBOC expressly provide otherwise, the board of directors may amend the bylaws.¹⁴⁵ Once a corporation files its certificate of formation, it must have an initial meeting to adopt bylaws, elect officers, and transact other business.¹⁴⁶ The TBOC requires for-profit corporations and professional corporations to include the following supplemental provisions in their certificates of formation: “(1) the aggregate number of shares the corporation is authorized to issue; (2) . . . the par value of each share or a statement that each share is without par value; (3) . . . the number of directors[,]” including their names and contact information; and if the corporation issues more than one class of shares, it must include additional information regarding the different classes of shares.¹⁴⁷ If a corporation’s class of shares has more than more series, additional information regarding each series is required.¹⁴⁸ Also, there are specific requirements for certificates of formation of close corporations.¹⁴⁹

2. Bylaws

Bylaws are unique to corporations because bylaws are a corporation’s primary governing documents.¹⁵⁰ Bylaws typically cover, among other things, the following topics: membership and selection of the board of directors; information about voting requirements and classes of shares; types of officers and their duties; the date and location of annual meetings; and procedures for special meetings.¹⁵¹

3. Shareholder Agreements

A corporation’s shareholders may enter into a shareholders’ agreement that does any of the following:

- (1) [R]estricts the discretion or powers of the board of directors;
- (2) [E]liminates the board of directors [altogether] . . . ;
- (3) [E]stablishes . . . who shall serve as directors or officers . . . ;

145. *Id.* § 21.057(c).

146. *Id.* § 21.059(b).

147. *Id.* § 3.007(a)–(b).

148. *Id.* § 3.007(b)(5).

149. *Id.* § 3.008 (“[T]he certificate of formation of a close corporation . . . must include the sentence, ‘This corporation is a close corporation.’”). While close corporations are addressed in Title 2, Subchapter O of the TBOC, they are not specifically addressed in this paper. *See id.* §§ 21.701–.732.

150. *See id.* §§ 21.057, 22.102.

151. *Id.* §§ 21.253, 21.352, 21.363 (setting forth the default provisions for a corporation’s bylaws); *see also* Jean Murray, *Bylaws/Corporate Bylaws*, ABOUT.COM, <http://biztaxlaw.about.com/od/glossaryb/g/bylaws.htm> (last visited May 15, 2014).

- (4) [D]etermines the term of office, manner of selection or removal, or terms or conditions of employment of a director, officer, or other employee of the corporation . . . ;
- (5) [G]overns the authorization or making of distributions . . . ;
- (6) [D]etermines the manner in which profits and losses will be apportioned;
- (7) [G]overns . . . the exercise or division of voting power . . . ;
-
- (10) [Establishes when and how] winding up and termination of the corporation [will occur] . . . ; [and]
-
- (12) [O]therwise governs the exercise of corporate powers, the management of the business and affairs of the corporation, or the relationship among the shareholders, the directors, and the corporation.¹⁵²

A shareholders' agreement will often contain buy-sell provisions.¹⁵³ All shareholders must approve or agree to the shareholders' agreement, and the agreement may be "amended only by all of the shareholders at the time of the amendment, unless the agreement provides otherwise."¹⁵⁴ "A shareholders' agreement . . . is valid for [ten] years, unless the agreement provides otherwise."¹⁵⁵ If a shareholders' agreement exists, it should "be noted conspicuously on the front or back of each certificate for outstanding shares."¹⁵⁶ If there are restrictions on transfers, restrictive legends must be included on share certificates.¹⁵⁷ Any restrictions on transfers must be reasonable.¹⁵⁸

IV. OPERATION AND MANAGEMENT OF BUSINESS ENTITIES

A. Operation and Management of Business Entities Generally

1. Governing Authority Generally

The governance structure for corporations, LLCs, and limited partnerships can be very similar or very different.¹⁵⁹ It is most common for limited partnerships to be managed by a general partner who is an owner of the partnership; for LLCs to be managed by either managers or members who are

152. TEX. BUS. ORGS. CODE ANN. § 21.101(a).

153. See *id.* § 21.714(b)(3).

154. *Id.* § 21.101(b)(2).

155. *Id.* § 21.102.

156. *Id.* § 21.103(a).

157. *Id.* §§ 21.210, 22.213; see also Egan, *supra* note 59, at 126.

158. TEX. BUS. ORGS. CODE ANN. § 21.211.

159. See *Formation of Texas Entities FAQs*, TEX. SECRETARY ST., <http://www.sos.state.tx.us/corp/formationfaqs.shtml> (last visited May 15, 2014) [hereinafter *Formation of Texas Entities*]; see also generally TEX. BUS. ORGS. CODE ANN. chs. 21 (corporations), 101 (LLCs), and 153 (limited partnerships).

owners of the LLC; and for small corporations to have a board of directors and officers who are also owners of the corporation.¹⁶⁰ However, limited partnerships may also be managed by a general partner who is not an owner, much like corporations can be managed by a board of directors who lack an ownership stake.¹⁶¹ LLCs may also be managed by managers and may appoint officers in the same way that a board of directors and officers may in a corporation.¹⁶² A corporation may choose to not have a board of directors and be managed like a member-managed LLC.¹⁶³ While there are many possibilities, some choices are dictated by the type of entity.¹⁶⁴ For instance, a limited partnership must have a general partner, and a corporation must have at least some officers.¹⁶⁵ A corporation must have at least some officers.¹⁶⁶

2. Recordkeeping Generally

The TBOC requires that all businesses keep books and records of accounts.¹⁶⁷ Also, under the TBOC, businesses, other than limited partnerships and LLCs, must keep minutes of the proceedings of their owners, members, governing authorities, and committees.¹⁶⁸ Moreover, each business must maintain “at its registered office or principal place of business, or at the office of its transfer agent or registrar, a current record of the name and mailing address of each owner or member.”¹⁶⁹ These records and minutes can be in any format, including electronic, so long as they can be “converted into written paper form within a reasonable time.”¹⁷⁰ Except as to limited partnerships, these books and records must be made available to governing persons of businesses.¹⁷¹ Under the TOBC, limited partnerships have different rules for record management and review.¹⁷² It is important to ensure that a client’s records are up-to-date and available for inspection.¹⁷³

160. See *Formation of Texas Entities*, *supra* note 159.

161. See *id.*

162. See *id.*

163. See *id.*

164. See, e.g., *infra* notes 165–66 and accompanying text.

165. See *Formation of Texas Entities*, *supra* note 159.

166. See *id.*

167. TEX. BUS. ORGS. CODE ANN. § 3.151(a)(1) (West 2012).

168. *Id.* § 3.151(a)(2), (c).

169. *Id.* § 3.151(a)(3).

170. *Id.* § 3.151(b).

171. *Id.* §§ 3.152–.153.

172. See *id.* §§ 153.551–.552.

173. See *id.* §§ 3.151–.153.

3. Registered Agent

All entities are required to have a registered agent in Texas.¹⁷⁴ An entity declares its registered agent upon formation.¹⁷⁵ If an entity's original registered agent fails to serve, it may select a new registered agent; the new registered agent should consent to serve.¹⁷⁶ The entity should send the secretary of state a notice of the change, either by filing Form 401 or by indicating the change on its annual franchise tax report.¹⁷⁷

B. Operation and Management of Partnerships

1. Governing Authority of Partnerships

A general partner in a limited partnership has the rights and powers of a partner in a general partnership.¹⁷⁸ Likewise, a general partner in a limited partnership is liable to third parties, just like a partner in a general partnership.¹⁷⁹ Unless otherwise provided, all partners must approve the admission of additional general partners.¹⁸⁰

“A limited partner is not liable for the obligations of a limited partnership unless . . . the limited partner participates in the control of the business.”¹⁸¹ Limited partnerships can have officers—being an officer does not automatically constitute control of the business, sufficient to lead to personal liability.¹⁸² Even then, “the limited partner is liable only to a person who transacts business with the limited partnership” and who reasonably believes “that the limited partner is a general partner.”¹⁸³

Limited partnerships are governed by certificates of formation and partnership agreements.¹⁸⁴ The “[r]ights of limited partners may be created

174. *Id.* § 5.201.

175. *See id.*

176. *See id.* §§ 5.2011, 5.202, 5.206; *see also* TEX. SECRETARY ST., FORM 401-A: ACCEPTANCE OF APPOINTMENT AND CONSENT TO SERVE AS REGISTERED AGENT, § 5.201(b) BUSINESS ORGANIZATIONS CODE (rev. Dec. 2009), *available at* <http://www.sos.state.tx.us/corp/forms/401-a-boc.pdf> (containing Form 401-A, Acceptance of Appointment and Consent to Serve as Registered Agent, § 5.201(b) Business Organizations Code).

177. TEX. BUS. ORGS. CODE ANN. § 5.202; *see also* TEX. SECRETARY ST., FORM 401: STATEMENT OF CHANGE OF REGISTERED OFFICE/AGENT (rev. May 2011), *available at* http://www.sos.state.tx.us/corp/forms/401_boc.pdf (containing Form 401, Statement of Change of Registered Office/Agent).

178. TEX. BUS. ORGS. CODE ANN. § 153.152(a).

179. *Id.* § 153.152(b).

180. *Id.* § 153.151(a).

181. *Id.* § 153.102(a)(2).

182. *Id.* § 153.102; *see also id.* § 153.103 (providing a list of actions that do not constitute participation in business for purposes of establishing personal liability).

183. *Id.* § 153.102(b).

184. *Id.* §§ 3.011, 153.105.

only by: (1) the certificate of formation; (2) the partnership agreement"; and the TBOC.¹⁸⁵

2. Recordkeeping for Partnerships

The TBOC requires limited partnership to "maintain the following records in its principal office . . . or make [them] available" for review upon request:

- (1) a current list that states:
 - (A) the name and address of each partner . . . ;
 -
 - (C) the percentage or other interest in the partnership owned by each partner; and
 - (D) if one or more classes or groups are established under the partnership agreement, the names of the partners who are members of each specified class or group;
- (2) a copy of:
 - (A) the limited partnership's federal, state, and local information or income tax returns for each of the partnership's six most recent tax years;
 - (B) the partnership agreement . . . ; and
 - (C) all amendments or restatements;
 -
 - (4) an executed copy of any powers of attorney . . . ;
 - (5) unless contained in the written partnership agreement, a written statement of:
 - (A) the amount of . . . contribution[s] made by each partner;
 -
 - (C) the events requiring additional contributions to be made . . . ;
 - (D) the events requiring the winding up of the limited partnership; and
 - (E) the date on which each partner . . . became a partner; and
 - (6) books and records of the accounts of the limited partnership.¹⁸⁶

"On written request stating a proper purpose, a partner or an assignee of a partnership interest may examine and copy, in person or through a representative," such records.¹⁸⁷ Additionally, "[o]n written request by a partner or an assignee of a partnership interest, the partnership shall provide to the requesting [person,] without charge[,] copies of: (1) the partnership agreement and certificate of formation and all amendments or restatements; and (2) . . . tax return[s]."¹⁸⁸

185. *Id.* § 153.105.

186. *Id.* § 153.551.

187. *Id.* § 153.552(a).

188. *Id.* § 153.552(c).

3. Partnership Reports

The secretary of state requires limited partnerships to file periodic reports every four years.¹⁸⁹ Section 153.302 of the TBOC sets forth the form and content requirements for these reports.¹⁹⁰

4. Transfers of Partnership Interests

Unless “otherwise provided in the partnership agreement, a partnership interest is assignable.”¹⁹¹ However, the assignee does not become a limited partner unless all partners consent or unless such right is explicitly provided for in the partnership agreement.¹⁹²

5. When a Limited Partner Dies

Upon the death of a limited partner, or upon a court’s adjudication of incapacitation, “the limited partner’s executor, administrator, guardian, conservator, or other legal representative may exercise all of the limited partner’s rights and powers to settle the limited partner’s estate or administer the limited partner’s property, including the power of an assignee to become a limited partner under the partnership agreement.”¹⁹³ A fiduciary of a general partner’s estate can act as the general partner until the fiduciary distributes the estate’s entire interest in the partnership.¹⁹⁴

6. When a General Partner Ceases to Be

A person ceases to be a general partner upon death or upon a court’s adjudication of incompetence.¹⁹⁵ If an entity files a certificate of termination, or if an entity’s certificate of formation is terminated or revoked and is not reinstated within ninety days, it ceases to be a general partner.¹⁹⁶

189. See *id.* § 153.301; see also TEX. SECRETARY ST., FORM 804: PERIODIC REPORT OF A LIMITED PARTNERSHIP (rev. Nov. 2012), available at http://www.sos.state.tx.us/corp/forms/804_boc.pdf (containing Form 804, Periodic Report of a Limited Partnership).

190. See TEX. BUS. ORGS. CODE ANN. § 153.302.

191. *Id.* § 153.251(a).

192. *Id.* § 153.253(a).

193. *Id.* § 153.113.

194. See *id.* § 153.155(a)(11).

195. See *id.* § 153.155(a)(6), (7) (noting that TBOC § 153.155 provides multiple different events constituting a general partner’s withdrawal).

196. See *id.* § 153.155(a)(10).

7. Documents Accompanying a Transfer of Partnership Interests

A transfer of a partnership interest, by sale or gift, should include the following: (1) an assignment document signed by the transferor indicating the interest transferred, the date the interest is transferred, and the name of the transferee; (2) an acknowledgment of the transfer, signed by the transferee; (3) an acknowledgment signed by the other partners admitting the transferee as a partner or by the general partner(s), depending upon the organizational documents; (4) an amendment to the partnership agreement, signed by all partners, adjusting their respective partnership interests; and (5) an agreement by the new partner to be bound by the partnership agreement.¹⁹⁷ Also, if a general partner has changed, the entity “shall file a certificate of amendment reflecting the” change within thirty days after “the admission of a new general partner . . . [or] the withdrawal of a general partner.”¹⁹⁸

C. Operation and Management of LLCs

1. Governing Authority of LLCs

LLCs are either governed by “managers of the company, if the company’s certificate of formation states that the company will have one or more managers[,] or . . . members of the company, if the company’s certificate of formation states that the company will not have managers.”¹⁹⁹ There may be one or more managers, and managers need not be members of the company or Texas residents.²⁰⁰ The managers manage the company’s business and affairs, pursuant to the company agreement, as well as Title 1 and Title 3 of the TBOC.²⁰¹ For an LLC, if the certificate of formation provides for management by managers, the managers have the right to manage the company.²⁰² “[A] manager . . . may be removed, with or without cause, at a meeting of the company’s members called for that purpose.”²⁰³ When there is a vacancy in the manager position, the vacancy may be filled by either “(1) the affirmative vote of the majority of the remaining managers of the company . . . ; or (2) if the vacancy is a result of an increase in the number of managers, an election at an annual or special meeting.”²⁰⁴ Certain fundamental actions must be approved by a majority vote of all of the members, such as any action that would make it

197. See generally *id.* §§ 10.056, 152.401–406 (concerning the transfer of partnership interests).

198. *Id.* § 153.051; see also TEX. SECRETARY ST., FORM 424: CERTIFICATE OF AMENDMENT (rev. May 2011), available at http://www.sos.state.tx.us/corp/forms/424_boc.pdf (containing Form 424, Certificate of Amendment).

199. TEX. BUS. ORGS. CODE ANN. § 101.251.

200. *Id.* § 101.302(a), (d).

201. See *id.* § 101.252.

202. See *id.* §§ 101.251–252.

203. *Id.* § 101.304.

204. *Id.* § 101.305(a).

impossible to carry on the business, unless modified by agreement.²⁰⁵ Some actions, such as amending the certificate of formation, must be approved by all of the members, unless modified by agreement.²⁰⁶

2. Recordkeeping for LLCs

The TBOC requires that all LLCs keep books and records of their accounts.²⁰⁷ LLCs, however, are not required to keep minutes of the proceedings involving their owners, their members, their governing authority, and their committees.²⁰⁸ Moreover, each LLC must maintain, “at its registered office or principal place of business, or at the office of its transfer agent or registrar, a current record of the name and mailing address of each owner or member.”²⁰⁹ These records and minutes can be in any format, including electronic, so long as they can be timely converted into written paper form.²¹⁰ These books and records must be made available to governing persons and members of the LLC.²¹¹

In addition, LLCs must maintain, at their principal office, a list all members’ ownership interests, including their dates of membership, and details about each class or group of member interests that the company has created.²¹² LLCs are also required to keep, and make available, are their principal office, copies of the following documents: the company’s tax returns for the preceding six tax years; the company’s certificate of formation and its company agreement; any powers of attorney that the company has executed; a breakdown of the amounts members have contributed to the company; information about requirements related to any additional contributions; and a list of the types of events that would require winding up of the company.²¹³ LLCs cannot waive these requirements.²¹⁴ All members, assignees, and representatives of LLCs have the right to examine these documents.²¹⁵

3. Transfers of LLC Interests

A membership interest in a LLC, which can also be called a unit, can be assigned, but assignment “does not entitle the assignee to . . . participate in the management and affairs of the company[,] . . . become a member of the

205. *See id.* § 101.356(c).

206. *See id.* § 101.356(d).

207. *Id.* § 3.151(a)(1).

208. *Id.* § 3.151(a)(2), (c).

209. *Id.* § 3.151(a)(3).

210. *Id.* § 3.151(b).

211. *Id.* §§ 3.152–.153.

212. *Id.* § 101.501(a).

213. *Id.*

214. *Id.* § 101.054(a)(2).

215. *Id.* § 101.502.

company[,] or . . . exercise any rights of a member of the company.”²¹⁶ Assignees are permitted to “receive any allocation of income, gain, loss, deduction, [or] credit,” as well as any assigned distributions.²¹⁷ Assignees are also entitled to request reasonable information about the LLC and to make reasonable inspections of the LLC’s books and records.²¹⁸ Any “assignee of a membership interest in [an LLC] is entitled to become a member of the company on the approval of all of the company’s members.”²¹⁹

4. *When a Member Dies*

If a member gets divorced, the member’s former spouse, “to the extent of the spouse’s membership interest, if any, [becomes] an assignee of the membership interest.”²²⁰ Upon “the death of a member, the member’s surviving spouse, if any, and an heir, devisee, personal representative, or other successor of the member, to the extent of their respective membership interest, are assignees of the membership interest.”²²¹ That being said, however, the TBOC will not, at any time, impair any agreements related to the purchase or sale of a member’s interest, even upon the occurrence of one of the foregoing events.²²²

5. *Member Required*

A LLC must have at least one member, except during two distinct periods: (1) “between the date the company is formed and the date the first member is admitted to the company[,]” and (2) between the date the last member leaves the company “and the date the agreement to continue the company described by [TBOC §] 11.056 is executed.”²²³

6. *Documents Accompanying a Transfer of Units*

A transfer of an LLC interest, by sale or by gift, must be in writing and should include the following: (1) an assignment document signed by the transferor showing the interest being transferred, the date the interest is transferred, and the name of the transferee; (2) an acknowledgment of the transfer, signed by the transferee; (3) an acknowledgment signed by the other members admitting the transferee as a member—not simply as assignee—or by the managers, depending upon the organizational documents; (4) an

216. *Id.* § 101.108.

217. *Id.* § 101.109(a)(1)–(2).

218. *Id.* § 101.109(a)(3)–(4).

219. *Id.* § 101.109(b).

220. *Id.* § 101.1115(a)(1).

221. *Id.* § 101.1115(a)(2).

222. *Id.* § 101.1115(b).

223. *Id.* §§ 101.101; *see also id.* § 11.056.

amendment to the company agreement, signed by all members, adjusting their respective ownership interests; and (5) an agreement by the new member to be bound by the company agreement.²²⁴ If the company issues certificates of interest, those certificates should be returned and new certificates should be issued in the transferee's name.²²⁵ Also, this should be reflected in the transfer ledger in the company's minute book, which tracks the issuance of membership interests.²²⁶

D. Operation and Management of Corporations

1. Governing Authority of Corporations

“Except as provided by [TBOC §] 21.101 or [TBOC,] Subchapter O, the board of directors of a corporation shall: (1) exercise or authorize the exercise of the powers of the corporation; and (2) direct the management of the business and affairs of the corporation.”²²⁷ Other than the election of the initial board of directors, directors are elected for at least a one-year term, and if there is a vacancy on the board of directors, the shareholders fill the vacancy.²²⁸ The corporation's board of directors is charged with electing a president and a secretary for the corporation, and in doing so, the board of directors must adhere to the timing and procedural requirements set forth in the corporation's bylaws.²²⁹ “Other officers, including assistant officers and agents as deemed necessary, may be elected in accordance with [TBOC §] 3.103.”²³⁰ Corporations should add new officers or directors in the event that their numbers are insufficient.²³¹

2. Recordkeeping for Corporations

The TBOC requires that all corporations keep books and records of their accounts.²³² Also, all corporations must keep minutes of the proceedings of their shareholders, their governing authority, and their committees.²³³ Each corporation must maintain, “at its registered office or principal place of business, or at the office of its transfer agent or registrar, a current record of the

224. See generally *id.* §§ 10.051, 10.052. (concerning the transfer of LLC interests).

225. See *id.* § 21.217.

226. See *id.* § 21.218. (stating only members of record have rights to examine the corporation's relevant books).

227. *Id.* § 21.401(a) (explaining that TBOC § 21.101 gives shareholders the ability to restrict the powers and actions of the board of directors through the execution of a shareholders' agreement and noting that Subchapter O of the TBOC pertains to close corporations).

228. *Id.* §§ 21.405(a), 21.407, 21.410.

229. *Id.* § 21.417.

230. *Id.*

231. See *id.*; see also *id.* § 3.103.

232. See *id.* § 3.151(a)(1).

233. See *id.* § 3.151(a)(2).

name and mailing address of each” shareholder.²³⁴ These records and minutes can be in any format, including electronic, so long as they can be “converted into written paper form within a reasonable time.”²³⁵

Section 21.173 of the TBOC explains the supplemental recordkeeping requirements for corporations:

In addition to the books and records required to be kept under [TBOC §] 3.151, a corporation shall keep at its registered office or principal place of business, or at the office of its transfer agent or registrar, a record of: (1) the original issuance of shares issued by the corporation; (2) each transfer of those shares . . . ; (3) the names and addresses of all past shareholders of the corporation; and (4) the number and class or series of shares . . . held by each current and past shareholder.²³⁶

Corporations are also required to have bylaws, which are their governing documents—the default provisions are set forth in the TBOC.²³⁷

Additionally, the TBOC contains various provisions related to the examination of records, including the following provision related shareholders:

Subject to the governing documents and on written demand stating a proper purpose, a [shareholder] of a corporation for at least six months immediately preceding the holder’s demand, or a holder of at least five percent of all of the outstanding shares of a corporation, is entitled to examine and copy, at a reasonable time, the corporation’s relevant books, records of account, minutes, and share transfer records. The examination may be conducted in person or through an agent, accountant, or attorney.²³⁸

Corporations are required to have an annual meeting of their shareholders, but if a corporation fails to hold such meeting at the time specifically designated in its bylaws, it will not cause the winding up of the corporation or result in the termination of the corporation.²³⁹

3. Transfers of Corporate Shares

A restriction on the transfer of a corporation’s shares is enforceable, so long as it “is reasonable and noted conspicuously on the certificate or other instrument representing the security[,] or” . . . for “an uncertificated security, the restriction is reasonable and a notation of the restriction is contained in the

234. *See id.* § 3.151(a)(3).

235. *Id.* § 3.151(b).

236. *Id.* § 21.173.

237. *See id.* § 21.057. Details pertaining to special meetings, notice of meetings, and voting on matters other than the election of directors, can be found in a corporation’s bylaws. *See generally id.* §§ 21.352 (special meetings), 21.353 (notice of meeting), and 21.363 (voting on matters other than election of directors).

238. *Id.* § 21.218(b).

239. *Id.* § 21.351(a), (c).

notice sent with respect to the security under [TBOC §] 3.205.”²⁴⁰ Unless otherwise provided for in a corporation’s certificate of formation, “a shareholder of a corporation does not have a preemptive right . . . to acquire the corporation’s unissued or treasury shares.”²⁴¹

4. *Documents Accompanying a Transfer of Shares*

A transfer of a corporation’s shares, by sale or gift, should include the following: (1) an assignment document signed by the transferor showing the shares transferred, the date transferred, and the name of the transferee; (2) an acknowledgment of the transfer signed by the transferee; (3) depending upon the organizational documents, an acknowledgment signed by the other shareholders admitting the transferee as a shareholder entitled to vote; (4) an agreement by the new member to be bound by the shareholder agreement; (5) the older certificates should be returned and new certificates issued in the transferee’s name.²⁴² If the shares are being transferred to a trust, there are additional considerations.²⁴³ If the certificates have been lost, there is a process to reissue them.²⁴⁴ Also, this should be reflected in the transfer ledger in the company minute book, which tracks the issuance of shares.²⁴⁵ If the shares of an S Corporation are transferred to a trust, steps should be taken to ensure the corporation’s status as an S Corporation is not terminated.²⁴⁶

V. VOLUNTARY WINDING UP, CANCELLING, REVOKING, TERMINATING, AND REINSTATING

A. *Voluntary Winding Up, Cancelling, Revoking, Terminating, and Reinstating Generally*

1. *Vocabulary*

There is a difference between winding up and termination—termination was formerly called dissolution.²⁴⁷ “Winding up” is the process of liquidating

240. *Id.* § 21.213(a); *see also id.* § 3.205 (providing the notice requirements for uncertificated ownership interests).

241. *Id.* § 21.203(a); *see also id.* § 21.208 (noting that, unless there is a restriction in a corporation’s certificate of formation, shareholders of certain existing corporations may have a preemptive right to acquire these types of shares).

242. *See id.* § 21.209–.210; *see also id.* §§ 21.213, .323, .720.

243. *See id.* § 21.244.

244. *See id.* § 21.251.

245. *See id.* § 3.151.

246. *See* I.R.C. § 1361(d). Typically, the shares are held in a Qualified Subchapter S Trust (QSST) and a timely election is made pursuant to I.R.C. § 1361(d). *See* I.R.C. § 1361(c)(2).

247. *See generally* TEX. BUS. ORGS. CODE ANN. ch. 11 (containing the provisions related to the winding up and the termination of an entity).

an entity or preparing it for termination.²⁴⁸ “Termination,” however, occurs after the winding up of the business and its affairs; it involves the actual filing of a certificate of termination with the secretary of state and the secretary of state’s acceptance of the paperwork filed, ending the existence of an entity.²⁴⁹ A number of events can mandate the winding up of an entity.²⁵⁰ However, if an entity decides to continue after an event requiring winding up occurs, it may continue by cancelling the event requiring the winding up.²⁵¹ Likewise, if an entity decides to continue after it has voluntarily started winding up, it may continue by revoking its voluntary decision to wind up.²⁵² After completing the winding up process, an entity can then be terminated.²⁵³ If, after termination, an entity’s owners decide to revive their entity, they can do so through reinstatement.²⁵⁴ Reinstatement must be accomplished within three years of the effective date of an entity’s termination.²⁵⁵ An entity cannot be reinstated if it was forfeited for tax reasons, but it may be revived.²⁵⁶

2. Voluntary Winding Up—The Process

The general procedures for nonjudicial winding up of an entity are set forth in TBOC §§ 11.052 and 11.053, while the general procedures for judicial winding up of an entity are set forth in TBOC §§ 11.054 and 11.055.²⁵⁷ Winding up of an entity can happen upon any of the following occurrences:

- (1) the expiration of any period of duration specified in [an] entity’s governing documents;
- (2) a voluntary decision to wind up . . . ;
- (3) an event specified in [an entity’s] governing documents . . . ;
- (4) an event specified in other sections of [the TBOC] . . . ; or
- (5) a decree by a court.²⁵⁸

During the winding up process, as soon as reasonably practicable, entities must do the following: cease carrying on their business, “except to the extent necessary to wind up [their] business”; send business creditors written notice that they are winding up—notice is not required of general partnerships; collect any assets; sell any property that “is not to be distributed in kind to the . . .

248. *Id.* §§ 11.001(8), 11.052.

249. *Id.* §§ 11.001(4), 11.101–.102.

250. *See id.* § 11.051.

251. *Id.* § 11.152.

252. *Id.* § 11.151.

253. *See id.* § 11.101.

254. *Id.* §§ 11.201–.202.

255. *Id.* § 11.202(a).

256. *See id.* § 11.201(b)(3); *see also* TEX. TAX CODE ANN. § 171.3125 (West 2012).

257. TEX. BUS. ORGS. CODE ANN. §§ 11.052–.055.

258. *Id.* § 11.051.

entity's" creditors or owners; and take such other actions, as necessary, to wind up their affairs.²⁵⁹ Entities should first distribute their assets to discharge their liabilities and obligations, and only after they satisfy all of their liabilities and obligations, should they distribute any remaining assets to their owners.²⁶⁰ If an entity so desires, it may either apply to have a court supervise the winding up process or appoint a third party to carry out the process.²⁶¹ Before the termination of an entity takes effect, the entity may continue its business operations by revoking its earlier decision to wind up, so long as its governing authority approves the revocation.²⁶²

3. Voluntary Termination—The Process

The general procedures for voluntary termination of an entity are set forth in TBOC §§ 11.101 through 11.104.²⁶³ The general procedures for judicial winding up and termination of an entity are set forth in TBOC §§ 11.301 through 11.315.²⁶⁴ Once the winding up process is complete, entities must file a certificate of termination.²⁶⁵ The certificate of termination must contain the following:

- (1) the name of the filing entity;
- (2) the name and address of each of the filing entity's governing persons;
- (3) the entity's file number assigned by the secretary of state . . . ;
- (4) the nature of the event requiring winding up;
- (5) a statement that the filing entity has complied with the provisions of [the TBOC] governing its winding up; and
- (6) any other information required by [the TBOC] to be included in the certificate of termination for the filing entity.²⁶⁶

Also, entities must obtain a certificate from the comptroller showing that all of their Texas taxes have been paid, and they must file this certificate along with their certificate of termination.²⁶⁷ Generally, "the existence of [an] . . . entity terminates on the filing of the certificate of termination."²⁶⁸

259. *Id.* § 11.052(a).

260. *Id.* § 11.053.

261. *Id.* § 11.054.

262. *Id.* § 11.151(a).

263. *Id.* §§ 11.101–.104.

264. *Id.* §§ 11.301–.315.

265. *Id.* § 11.101(a); *see also* TEX. SECRETARY ST., FORM 651: CERTIFICATE OF TERMINATION OF A DOMESTIC ENTITY (rev. May 2011), *available at* http://www.sos.state.tx.us/corp/forms/651_boc.pdf (containing Form 651, Certificate of Termination of a Domestic Entity).

266. TEX. BUS. ORGS. CODE ANN. § 11.101(c).

267. *Id.* § 11.101(b).

268. *Id.* § 11.102.

4. Reinstatement—The Process

To be reinstated, entities must complete the reinstatement requirements within three years of their termination.²⁶⁹ First, “[t]he owners, members, governing persons, or other persons must approve the reinstatement.”²⁷⁰ After an entity obtains approval of the reinstatement, it must file a certificate of reinstatement in the manner dictated by Chapter 4 of the TBOC.²⁷¹ According to the TBOC, the certificate of reinstatement must contain the following:

- (1) the name of the filing entity;
- (2) the filing number . . . assigned to the entity;
- (3) the effective date of the entity’s termination;
- (4) a statement that the reinstatement of the filing entity has been approved . . . ;
- (5) the name of the entity’s registered agent and the address of the entity’s registered office.²⁷²

Entities must also file “a tax clearance letter from the comptroller stating that the filing entity has satisfied all franchise tax liabilities and may be reinstated.”²⁷³ Thus, entities must have all franchise tax reports filed, including reports from previous years, if never filed.²⁷⁴ These reports can be sent in with a request for a tax clearance letter, or if an entity is in a hurry, these reports can be hand delivered to a field office and a tax clearance letter may be issued on the same day.²⁷⁵

B. Winding Up, Cancelling Winding Up, Termination, and Reinstatement of Partnerships

1. Voluntary Winding Up—Limited Partnerships

The general procedures for nonjudicial winding up of an entity are set forth in TBOC §§ 11.052 and 11.053.²⁷⁶ The general procedures for judicial

269. *Id.* § 11.202(a).

270. *Id.* § 11.202(b).

271. *Id.* § 11.202(c); *see also* TEX. SECRETARY ST., FORM 811: CERTIFICATE OF REINSTATEMENT (rev. May 2011), *available at* http://www.sos.state.tx.us/corp/forms/811_boc.pdf (containing Form 811, Certificate of Reinstatement).

272. TEX. BUS. ORGS. CODE ANN. § 11.202(d).

273. *Id.* § 11.202(e).

274. *See id.*

275. *See* TEX. COMPTROLLER PUB. ACCTS., FORM 05-391: TAX CLEARANCE LETTER REQUEST FOR REINSTATEMENT (rev. 2014) [hereinafter FORM 05-391], *available at* <http://www.window.state.tx.us/taxinfo/taxforms/05-391.pdf> (containing Form 05-391, Tax Clearance Letter Request for Reinstatement); *see also Taxpayer Services and Collections Field Offices*, TEX. COMPTROLLER PUB. ACCTS., <http://www.window.state.tx.us/taxinfo/fieldoff.html> (last visited May 15, 2014).

276. TEX. BUS. ORGS. CODE ANN. §§ 11.052–.053.

winding up of an entity are set forth in TBOC §§ 11.054 and 11.055.²⁷⁷ Winding up of an entity occurs upon any of the following:

- (1) the expiration of any period of duration specified in [an] entity's governing documents;
- (2) a voluntary decision to wind up . . . ;
- (3) an event specified in [an entity's] governing documents . . . ;
- (4) an event specified in other sections of [the TBOC] . . . ; or
- (5) a decree by a court.²⁷⁸

During the winding up process, limited partnerships should discontinue their operations, collect assets, sell any property that will not be distributed in kind to the partnership's creditors or owners, and take any other necessary actions to wind up their affairs.²⁷⁹ Next, limited partnerships should discharge their liabilities and obligations by distributing their assets; after such liabilities and obligations are satisfied, limited partnerships may then distribute any remaining assets to their owners.²⁸⁰ Limited partnerships that prefer the winding up process to be supervised may either apply for court supervision of the process or may appoint a third party to carry out the winding up process.²⁸¹ If a limited partnership voluntarily decides to wind up, it may revoke such decision before its termination takes effect, which will allow it to continue business operations; the limited partnership must first obtain approval of such revocation from its governing authority.²⁸²

While some aspects of the winding up process for limited partnerships are similar to that of other entities, there are some differences.²⁸³ Unless the partnership agreement provides otherwise, "[a] voluntary decision to wind up a . . . limited partnership requires the written consent of all partners in the limited partnership."²⁸⁴ Additionally, winding up is required when a limited partnership has no remaining members, unless this is remedied and the winding up is cancelled.²⁸⁵

After the occurrence of an event requiring winding up of a limited partnership and until the filing of a certificate of termination, a partner winding up the limited partnership may take any of the actions specified in TBOC §§ 11.052 and 11.053, unless a written partnership agreement provides otherwise.²⁸⁶ Unless a limited partnership's partnership agreement state

277. *Id.* §§ 11.054–.055.

278. *Id.* § 11.051.

279. *Id.* § 11.052(a).

280. *Id.* § 11.053.

281. *Id.* § 11.054.

282. *Id.* § 11.151(a).

283. *See id.* § 11.058.

284. *Id.* § 11.058(a).

285. *See id.* § 11.058(c); *see also id.* §§ 11.152, 153.501.

286. *See id.* §§ 11.052–.053.

otherwise, the winding up of a limited partnership's affairs can be accomplished by any of the following individuals: (1) the general partners; (2) if there are no general partners, the limited partners or a person chosen by the limited partners; or (3) a person appointed by the court to carry out the winding up.²⁸⁷ When someone winding up a limited partnership is acting on behalf of the entity, the person's actions will not create liability for the limited partners.²⁸⁸

During the winding up process, a limited partnership's assets must be paid or transferred in the following order:

- (1) to the extent otherwise permitted by law, to creditors, including partners who are creditors . . . [but not just] to satisfy the liabilities of the limited partnership;
- (2) unless otherwise provided by the partnership agreement, to partners and former partners to satisfy the partnership's liability for distributions . . . ;
- (3) unless otherwise provided by the partnership agreement, to partners first for the return of their capital and second with respect to their partnership interests.²⁸⁹

Partnerships are the only entity that are not required to send notice of their winding up to their different claimants.²⁹⁰

2. *Cancelling an Event of Winding Up—Limited Partnerships*

A limited partnership may cancel "an event requiring winding up arising from the expiration of its period of duration . . . or from . . . an event specified in its governing documents" so long as "all remaining partners, or another group or percentage of partners as specified by the partnership agreement," sign, within ninety days, a written agreement to continue the entity's business operations.²⁹¹ If a limited partnership is required to wind up because a general partner withdraws, the partnership may continue upon either of the following: the limited partnership still has at least one general partner, the agreement among the partners allows business operations to continue, and the partners who remain continue to carry on business operations; or within one year of the date the general partner withdraws, all remaining partners, or a group of partners specified in the entity's partnership agreement, sign a written agreement to continue business operations and to appoint one or more general partners.²⁹² If a limited partnership is required to wind up because it no longer has any limited partners, the partnership may cancel the wind up within one

287. *Id.* § 153.502(a).

288. *Id.* § 153.503.

289. *Id.* § 153.504.

290. *See id.* § 11.052(a)(2).

291. *Id.* 153.501(a).

292. *Id.* § 153.501(b).

year only if one of the following is present: the last limited partner's legal representative or successor and all of the limited partnership's general partners agree to continue the limited partnership's business operations, and the last limited partner's legal representative, successor, nominee, or designee is admitted to the limited partnership; or the limited partnership admits a new limited partner in accordance with the terms of its partnership agreement.²⁹³

3. *Revoking a Decision to Wind Up—Limited Partnerships*

Before a limited partnership is terminated, it “may revoke a voluntary decision to wind up . . . by [obtaining] approval of the revocation” from its governing authority; after obtaining approval, the limited partnership may continue conducting its business.²⁹⁴

4. *Voluntary Termination—Limited Partnerships*

The TBOC sets forth the general procedures for voluntary termination of an entity in §§ 11.101 through 11.104.²⁹⁵ Additionally, the TBOC sets forth the general procedures for judicial winding up and termination of an entity in §§ 11.301 through 11.315.²⁹⁶ Entities must file a certificate of termination after they completing their winding up process.²⁹⁷ A limited partnership must include the following information in the certificate of termination:

- (1) the name of the filing entity;
- (2) the name and address of each of the filing entity's governing persons;
- (3) the entity's file number assigned by the secretary of state . . . ;
- (4) the nature of the event requiring winding up;
- (5) a statement that the filing entity has complied with the provisions of [the TBOC] governing its winding up; and
- (6) any other information required by [the TBOC] to be included in the certificate of termination for the filing entity.²⁹⁸

293. *Id.* § 153.501(e). However, from a tax perspective, it may be problematic for a partnership or an LLC to have no members because of the following provision in the United States Code:

[The] partnership shall be considered as terminated only if—

(A) no part of any business, financial operation, or venture of the partnership continues to be carried on by any of its partners . . . , or
 (B) within a 12-month period there is a sale or exchange of 50 percent or more of the total interest in partnership capital and profits.

26 U.S.C. § 708 (West 2013) (noting that, for tax purposes, the termination will be treated as a liquidation).

294. TEX. BUS. ORGS. CODE ANN. § 11.151.

295. *See id.* §§ 11.101–104.

296. *See id.* §§ 11.301–315.

297. *See id.* § 11.101(a).

298. *Id.* § 11.101(c).

For a limited partnership, if general partners are winding up the business, all general partners must sign the certificate of termination, but if there are no general partners involved, then all non-partner liquidators must sign the certificate; additionally, if limited partners are winding up the business, only a majority-in-interest must sign the certificate of termination.²⁹⁹ However, “[i]f a person fails or refuses to execute or file a certificate . . . or execute a partnership agreement, another person adversely affected by the failure or refusal may petition a court to direct the execution or filing of” such document.³⁰⁰ A limited partnership must also obtain a certificate from the comptroller verifying that it has paid all of its taxes, and the limited partnership must file this certificate along with its certificate of termination.³⁰¹ Generally, the limited partnership terminates upon filing its certificate of termination.³⁰²

5. Reinstatement—Limited Partnerships

To be reinstated, entities must complete the TBOC’s reinstatement requirements within three years of their termination.³⁰³ First, “[t]he owners, members, governing persons, or other persons must approve the reinstatement.”³⁰⁴ Then, once an entity obtains such approval, it must “file a certificate of reinstatement in accordance with Chapter 4” of the TBOC.³⁰⁵

A limited partnership must include the following information in its certificate of reinstatement:

- (1) the name of the filing entity;
- (2) the filing number . . . assigned to the entity;
- (3) the effective date of the entity’s termination;
- (4) a statement that the reinstatement of the filing entity has been approved . . . ;
- (5) the name of the entity’s registered agent and the address of the entity’s registered office.³⁰⁶

A limited partnership must also obtain and file “[a] tax clearance letter from the comptroller stating that [it] has satisfied all franchise tax liabilities and may be reinstated.”³⁰⁷ If a limited partnership is not current in filing its franchise tax reports, it must complete any deficient reports and sent them to

299. *Id.* § 153.553(a-1)(3).

300. *Id.* § 153.554(a).

301. *Id.* § 11.101(b).

302. *Id.* § 11.102.

303. *Id.* § 11.202(a).

304. *Id.* § 11.202(b).

305. *Id.* § 11.202(c).

306. *Id.* § 11.202(d).

307. *Id.* § 11.202(e).

the comptroller when it submits its request for a tax clearance letter.³⁰⁸ Alternatively, if a limited partnership needs to rush its reinstatement, it may present proof that it has paid all of its taxes through the comptroller's online system; doing so will allow for faster processing of the request.³⁰⁹ "To approve a reinstatement of a limited partnership under [TBOC §] 11.202, all of the remaining partners, or another group or percentage of partners as specified by the partnership agreement, must agree in writing to reinstate and continue the business of the limited partnership."³¹⁰

C. Winding Up, Cancelling Winding Up, Termination, and Reinstatement of LLCs

1. Voluntary Winding Up—LLCs

The general procedures for nonjudicial winding up of an entity are set forth in §§ 11.052 and 11.053 of the TBOC.³¹¹ The general procedures for judicial winding up of an entity are set forth in §§ 11.054 and 11.055 of the TBOC.³¹² Winding up of an entity can happen upon any of the following:

- (1) the expiration of any period of duration specified in [an] entity's governing documents;
- (2) a voluntary decision to wind up . . . ;
- (3) an event specified in [an entity's] governing documents . . . ;
- (4) an event specified in other sections of [the TBOC] . . . ; or
- (5) a decree by a court.³¹³

For an LLC to voluntarily wind up under Chapter 11 of the TBOC, it must obtain approval from a majority of all of its members, or if it does not have any members, a majority of all of its managers.³¹⁴ The winding up of an LLC must be carried out by one of the following: solely by its entire governing authority; or by one or more individuals along with a governing person, as designated either in the company's governing documents or by its governing authority or its members.³¹⁵ If the event requiring the winding up of the LLC is that there is no longer any members, then the winding up will be carried out by the last

308. See *Tax Requirements for Filings with the Secretary of State*, TEX. COMPTROLLER PUB. ACCTS., http://www.window.state.tx.us/taxinfo/franchise/tax_req_sos.html (last visited May 15, 2014); see also FORM 05-391, *supra* note 275.

309. See *Request Tax Certificates and Tax Clearance Letters Online*, TEX. COMPTROLLER PUB. ACCTS., http://www.window.state.tx.us/taxinfo/franchise/cert_ltr_requests.html (last visited May 15, 2014).

310. TEX. BUS. ORGS. CODE ANN. § 153.505.

311. See *id.* §§ 11.052–.053.

312. See *id.* §§ 11.054–.055.

313. See *id.* § 11.051.

314. *Id.* § 101.552(a)(1).

315. *Id.* § 101.551(1).

member's legal representative or successor, a person designated by the last member's legal representative or successor, or someone appointed by the court.³¹⁶

The winding up procedures required of LLCs are as follows: cease business operations, except those that are necessary for winding up; notify its business creditors of the winding up process; collect assets and sell any property that is not to be disbursed in kind to any of its members or owners; and take any additional actions that are necessary to wind up its affairs.³¹⁷ LLCs should first distribute their assets to discharge any outstanding liabilities and obligations, and only if it satisfies all of its outstanding liabilities and obligations may it then distribute any remaining assets or property to its owners.³¹⁸ It is important to note that, regardless of what members contribute to an LLC, they are not entitled to demand a distribution, unless the demand is for cash.³¹⁹ If an LLC prefers, it may send in an application to obtain court supervision of its winding up process; either the court will supervise the LLC's winding up process, or the court will appoint a third party to carry out the LLC's winding up process.³²⁰ When dealing with series LLCs, there are additional considerations involved in the winding up process.³²¹

2. *Cancelling an Event of Winding Up—LLCs*

To revoke an LLC's voluntary decision to wind up under TBOC § 11.151, it must obtain approval of the revocation from a majority of all of its members, or if it does not have any members, from a majority of all of its managers.³²² Similarly, to cancel an event that requires an LLC to wind up, all of the LLC's members must agree to approve the cancellation.³²³

Generally, if an LLC does not have at least one member, the TBOC requires the LLC start winding up; however, if the requirements for either of the cure periods—the ninety-day cure period under TBOC § 11.056 to install a new member or the one-year cure period under TBOC § 11.152(a) to cancel the

316. *Id.* § 101.551(2)–(3).

317. *See id.* § 11.052(a).

318. *See id.* § 11.053(a), (c).

319. *See id.* § 101.202.

320. *See id.* § 11.054.

321. *See id.* §§ 101.614–.622 (containing special rules relating to the winding up and termination of series LLCs). “Except to the extent otherwise provided in the company agreement and subject to [TBOC §§] 101.617, 101.618, 101.619, and 101.620, a series and its business and affairs may be wound up and terminated without causing the winding up of the [LLC].” *Id.* § 101.614. “Except as otherwise provided by [TBOC §§] 101.617, 101.618, 101.619, and 101.620, the series terminates on the completion of the winding up of the business and affairs of the series in accordance with [TBOC §§] 101.617, 101.618, 101.619, and 101.620.” *Id.* § 101.615.

322. *Id.* § 101.552(a)(2).

323. *Id.* § 101.552(b).

event requiring winding up—are met, the LLC may continue its operations.³²⁴ If an LLC’s last remaining member terminates—an event that would normally mandate winding up—it may continue its business operations by cancelling such event, so long as the last member’s legal representative or successor agrees to “cancel the event requiring winding up and continue the company” and agrees to either “become a member of the [LLC] . . . or designate another person who agrees to become a member of the [LLC].”³²⁵

3. *Revoking a Decision to Wind Up—LLCs*

Before an LLC terminates, it may revoke its prior decision to voluntarily wind up by obtaining its governing authority’s approval of the revocation; once approved, the LLC may continue its business operations.³²⁶ “A majority vote of all of the members of [an LLC], or if the [LLC] has no members, a majority vote of all of the managers of the company is required to approve . . . a revocation of a voluntary decision to wind up the company.”³²⁷

4. *Reinstatement—LLCs*

To be reinstated, entities must complete the requirements for reinstatement within three years of their termination.³²⁸ First, “[t]he owners, members, governing persons, or other persons must approve the reinstatement.”³²⁹ An LLC must get a majority of all of its members, or if it does not have any members, a majority of all of its managers, to approve the reinstatement.³³⁰

After a majority approves the reinstatement, the LLC must then “file a certificate of reinstatement in accordance with Chapter 4” of the TBOC.³³¹ The LLC’s certificate of reinstatement must contain the following information:

- (1) the name of the filing entity;
- (2) the filing number . . . assigned to the entity;
- (3) the effective date of the entity’s termination;
- (4) a statement that the reinstatement of the filing entity has been approved . . . ;
- (5) the name of the entity’s registered agent and the address of the entity’s registered office.³³²

324. See *id.* §§ 11.056 (noting the requirements for the ninety-day cure period), 11.152(a) (noting the requirements for the one-year cure period); see also *id.* § 101.101(c).

325. *Id.* § 101.552(c).

326. *Id.* § 11.151.

327. *Id.* § 101.552(a)(2).

328. *Id.* § 11.202(a).

329. *Id.* § 11.202(b).

330. *Id.* § 101.552(a)(3).

331. *Id.* § 11.202(c).

332. *Id.* § 11.202(d).

To be reinstated, an LLC must have all of its franchise tax liabilities satisfied; so long as the LLC has no tax deficiencies, it can obtain a tax clearance letter from the comptroller verifying so.³³³ This means that an LLC must file all of its franchise tax reports, including any reports from previous years, if never filed.³³⁴ An LLC can send these reports when it submits its request for a tax clearance letter.³³⁵ However, if an LLC needs to proceed quickly, it may hand deliver these reports to a nearby field office, and it may obtain a tax clearance letter that same day.³³⁶

D. Winding Up, Cancelling Winding Up, Termination, and Reinstatement of Corporations

1. Voluntary Winding Up—Corporations

The general procedures for nonjudicial winding up of an entity are set forth in TBOC §§ 11.052 and 11.053.³³⁷ The general procedures for judicial winding up of an entity are set forth in TBOC §§ 11.054 and 11.055.³³⁸ Winding up of an entity can happen if any of the following occur:

- (1) the expiration of any period of duration specified in [an] entity's governing documents;
- (2) a voluntary decision to wind up . . . ;
- (3) an event specified in [an entity's] governing documents . . . ;
- (4) an event specified in other sections of [the TBOC] . . . ; or
- (5) a decree by a court.³³⁹

Because voluntary winding up is a fundamental business decision of a corporation, it requires approval through a minimum of a two-thirds vote by its shareholders, unless the corporation's certificate of formation provides otherwise.³⁴⁰

If a corporation decides to wind up, or it is required to wind up pursuant to the TBOC, the corporation's directors are responsible for managing the winding up process.³⁴¹ During the winding up process, corporations must, as

333. See *id.* § 11.202(e).

334. See *Tax Requirements for Filings with the Secretary of State*, *supra* note 308; *Request Tax Certificates and Tax Clearance Letters Online*, *supra* note 309.

335. See *Tax Requirements for Filings with the Secretary of State*, *supra* note 308; *Request Tax Certificates and Tax Clearance Letters Online*, *supra* note 309; see also FORM 05-391, *supra* note 275.

336. See *Taxpayer Services and Collections Field Offices*, *supra* note 275; see also *See Tax Requirements for Filings with the Secretary of State*, *supra* note 308.

337. TEX. BUS. ORGS CODE ANN. §§ 11.052–.053.

338. See *id.* §§ 11.054–.055.

339. *Id.* § 11.051.

340. *Id.* § 21.364(a)(2), (b); see also *id.* §§ 21.457(a), 21.501.

341. *Id.* § 21.504.

soon as reasonably practicable, take the following steps to wind up their business affairs: cease carrying on their business, “except to the extent necessary to wind up [their] business”; send business creditors written notice that they are winding up; collect their assets and sell off any property that “is not to be distributed in kind to the . . . entity’s” creditors or owners; and take such other actions, as necessary, to wind up their affairs.³⁴² Corporations must distribute their assets to discharge any of their outstanding liabilities and obligations, and once such distributions have been made, they may then distribute their remaining assets to their owners.³⁴³ Corporations may apply to have a court to supervise their winding up process or to have a court appoint a third party to carry out their winding up process.³⁴⁴ Before its termination takes effect, a corporation may revoke its voluntary decision to wind up if it obtains approval from its governing authority; only after obtaining such approval may it continue its business operations.³⁴⁵

2. *Cancelling an Event of Voluntary Winding Up—Corporations*

Because canceling an event that requires winding up is a fundamental business decision of a corporation, it requires approval by a two-thirds vote of the shareholders, unless the corporation’s certificate of formation states otherwise.³⁴⁶

3. *Revoking a Decision to Wind Up—Corporations*

Before a corporation is terminated, it “may revoke a voluntary decision to wind up . . . by approval of the revocation” by the corporation’s governing authority; following the approval of the revocation, it may continue its business.³⁴⁷ Because revoking a decision to wind up is another fundamental business decision of a corporation, such decision requires approval by two-thirds of its shareholders, unless its certificate of formation provides otherwise.³⁴⁸

4. *Reinstatement—Corporations*

To be reinstated, entities must complete the requirements for reinstatement set forth in the TBOC within three years of their termination.³⁴⁹ First, “[t]he owners, members, governing persons, or other persons must approve the

342. *Id.* § 11.052(a).

343. *Id.* § 11.053(a), (c).

344. *Id.* § 11.054

345. *Id.* § 11.151.

346. *Id.* § 21.364(a)(2), (b); *see also id.* §§ 21.457(a), 21.501.

347. *Id.* § 11.151.

348. *Id.* § 21.364(a)(2), (b); *see also id.* §§ 21.457(a), 21.501.

349. *Id.* § 11.202(a).

reinstatement.”³⁵⁰ Because reinstatement is a fundamental business decision of corporations, they must get two-thirds of their shareholders to vote to approve the reinstatement, unless the certificate of formation says otherwise.³⁵¹

After approval of the reinstatement by a corporation’s shareholders, the corporation must “file a certificate of reinstatement in accordance with Chapter 4” of the TBOC.³⁵² The following information must be included in a corporation’s certificate of reinstatement:

- (1) the name of the filing entity;
- (2) the filing number . . . assigned to the entity;
- (3) the effective date of the entity’s termination;
- (4) a statement that the reinstatement of the filing entity has been approved . . . ;
- (5) the name of the entity’s registered agent and the address of the entity’s registered office.³⁵³

A corporation must also obtain and file “[a] tax clearance letter from the comptroller stating that [it] has satisfied all franchise tax liabilities and may be reinstated.”³⁵⁴ Thus, a corporation must have all of its franchise tax reports filed, including reports from previous years, if never filed.³⁵⁵ A corporation can send any delinquent franchise tax reports when it requests a tax clearance letter from the comptroller.³⁵⁶ Alternatively, a corporation can hand deliver such reports to a field office, and the office may issue a tax clearance letter that same day.³⁵⁷

5. Procedures for Approving Fundamental Actions

The TBOC outlines various procedures for a corporation to wind up its business and affairs; specifically, the TBOC provides as follows:

§ 21.502. CERTAIN PROCEDURES RELATING TO WINDING UP

To approve a voluntary winding up, a reinstatement, a cancellation of an event requiring winding up, or a revocation of a voluntary decision to wind up, a corporation must follow one of the following procedures:

350. *Id.* § 11.202(b).

351. *Id.* § 21.364(a)(2), (b); *see also id.* §§ 21.457(a), 21.501.

352. *Id.* § 11.202(c).

353. *Id.* § 11.202(d).

354. *Id.* § 11.202(e).

355. *See Tax Requirements for Filings with the Secretary of State, supra* note 308; *Request Tax Certificates and Tax Clearance Letters Online, supra* note 309.

356. *See Tax Requirements for Filings with the Secretary of State, supra* note 308; *Request Tax Certificates and Tax Clearance Letters Online, supra* note 309; *see also* FORM 05-391, *supra* note 275.

357. *See Taxpayer Services and Collections Field Offices, supra* note 275; *see also See Tax Requirements for Filings with the Secretary of State, supra* note 308.

- (1) all shareholders of the corporation must consent in writing to the winding up, the reinstatement, the cancellation of an event requiring winding up, or the revocation of a voluntary decision to wind up the corporation;
- (2) if the corporation has not commenced business and has not issued any shares, a majority of the organizers or the board of directors of the corporation must adopt a resolution to wind up, to reinstate, to cancel an event requiring winding up, or to revoke a voluntary decision to wind up; or
- (3)(A) the board of directors of the corporation must adopt a resolution:
 - (i) recommending the winding up, reinstatement, cancellation of an event requiring winding up, or revocation of a voluntary decision to wind up the corporation; and
 - (ii) directing that the winding up, reinstatement, cancellation of an event requiring winding up, or revocation of a voluntary decision to wind up the corporation be submitted to the shareholders for approval at an annual or special meeting of shareholders; and
- (B) the shareholders must approve the action described by Paragraph (A) in accordance with [TBOC §] 21.503.³⁵⁸

A corporation must notify each of its corporate shareholders “that the fundamental business transaction is being submitted to the shareholders for approval at a meeting of shareholders[,] . . . regardless of whether the shareholder is entitled to vote on the matter.”³⁵⁹ The corporation must give notice of the meeting at least twenty-one days before the date the meeting is scheduled, and in the notice, the corporation must state that the purpose of the meeting, or at least one of the purposes of the meeting, is to vote on the fundamental business transaction.³⁶⁰

358. TEX. BUS. ORGS CODE ANN. § 21.502.

359. *Id.* § 21.456(a).

360. *Id.* § 21.456(c); *see also id.* §§ 21.457 (explaining the voting requirements for approval of fundamental business transactions), 21.455 (providing the procedures to be followed when a corporation is selling all, or a substantial portion, of its assets).