

COMMERCIAL LENDING

Due Diligence Checklists Under the New Texas Business Organizations Code

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The new Texas Business Organizations Code (TBOC) became effective January 1, 2006.

The TBOC represents a codification of eleven separate statutes governing non-profit and for-profit entities. Among the statutes codified and replaced by the TBOC are the Texas Business Corporation Act, the Texas Limited Liability Company Act, the Texas Revised Partnership Act, and the Texas Revised Limited Partnership Act. The TBOC impacts banks and other lending institutions by changing the landscape of due diligence checklists so closely relied upon by closing officers in making final commercial loan approvals. ***For the most part, the purpose of the Code is not to substantively change the laws governing the various types of business entities, but to rearrange and harmonize those statutes.***

Going forward, you should recognize that any domestic entity (for example, a Texas corporation) formed in Texas on or after January 1, 2006, must be formed under, and governed by, the TBOC. Domestic entities existing prior to January 1, 2006, will not become subject to the TBOC until January 1, 2010, unless they affirmatively elect to opt in to the TBOC before such date. Further, any foreign filing entity (for example, a Delaware corporation) that registers with the Texas Secretary of State on or after January 1, 2006, to transact business in Texas will be subject to the TBOC. Similar to domestic entities, foreign filing entities registered with the Texas Secretary of State prior to January 1, 2006, to transact business in Texas will not be governed by the TBOC until January 1, 2010, unless they elect to be governed by the TBOC before such date.

What does the TBOC mean to those of you who are on the front line preparing due diligence checklists and reviewing entity formation documents? Most significantly, you should now be seeing entity-formation documents that are more uniform and that differ slightly from documents reviewed prior to the enactment of the TBOC.

The most notable difference between the old statutes and the new TBOC is the replacement of familiar terminology used in titling entity formation documents. One of the new terms that you will begin to see regularly is the *Certificate of Formation*, which now applies to nearly every entity to which a bank might loan money. The Certificate of Formation will replace all of the following: Articles of Incorporation, Articles of Organization, Articles of Association, Certificate of Limited Partnership, Declarations of Trust, and Charters. Another new term used in the TBOC is the *Company Agreement*, which replaces what the old statutes identify as Regulations for a limited liability company.

The last fairly significant change in terminology is that you will no longer be seeing a Certificate of Incorporation, Certificate of Organization, or Certificate of Association for entities formed under the TBOC. ***Instead, you should look for a Certificate of Filing.*** In order to verify a company's legal

formation under the TBOC, you should obtain a copy of the Certificate of Filing, along with a file-stamped copy of the entity's Certificate of Formation.

There is at least one important organizational document that the Legislature did not feel compelled to rename. Corporate Bylaws will continue to be referred to as ABylaws@ under the new TBOC!

Finally, when revising your due diligence checklists to conform to the new terminology under the TBOC, you should remember that the old terminology will still apply to entities that were formed prior to January 1, 2006. Therefore, you will need to keep that terminology on your checklists for the time being. To make matters even more confusing, there may be some entities formed under the new TBOC which may incorrectly file documents containing the Aold@terminology. For example, someone might file AArticles of Incorporation@ for a corporation formed after January 1, 2006, instead of a "Certificate of Formation." ***The Texas Secretary of State will probably still accept documents entitled under the old regime for a limited amount of time, so that is another reason why your new due diligence checklists should include both the Aold@ and the Anew@ documents.***

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