



# Legal Minute

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## Missing State Filing Requirements: The Easy Way to Lose Your Charter

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Any entity transacting business in Texas has to file reports with the Secretary of State (SOS) and the Texas Comptroller of Public Accounts (Comptroller). Many nonprofit organizations think that simply notifying the Internal Revenue Service (IRS) takes care of notification requirements to these Texas regulatory agencies, but that is not true. A nonprofit that fails to notify all necessary state and federal agencies will face extra work trying to straighten out the problems that could have easily been avoided.

### 1. Keep a current registered agent.

The most common reason for a corporation's failure to file required forms is that the nonprofit did not receive the reporting requests from the SOS or the Comptroller because it did not have a current address or registered agent on file. To update this information, a nonprofit should file Form 401—General Information (Change of Registered Agent/Office). The report is available on the Secretary of State's website at <http://www.sos.state.tx.us/corp/forms.shtml> and online filing is available via SOSDirect at <https://direct.sos.state.tx.us/acct/acct-login.asp>. The corporation should also notify the Comptroller's Office separately at (800) 252-5555 if it would like to change the master mailing address.

### 2. Stay in good standing.

A corporation is "in existence" with the SOS and "in good standing" with the Comptroller as long as it files all the forms and documents required by the state agencies. When an organization does not respond to correspondence from the SOS or Comptroller, the organization may lose its corporate privileges. The organization's status with the SOS then changes from being "in existence" to "forfeited" or "involuntarily dissolved." Its status with the Comptroller changes from being "in good standing" to "not in good standing." The most common reasons that organizations lose their good standing are:

- failure to file Secretary of State Form 802; or
- failure to file a franchise tax return, request an exemption, or pay a state franchise tax to the Comptroller.

### 3. "Not in good standing" is not good.

If a nonprofit forfeits its good standing, it can still operate; however, the organization will lose some of its legal rights. A nonprofit that is "not in good standing," cannot sue another individual or organization but other corporations or individuals can sue the nonprofit. If sued, the directors of the corporation that has lost its good standing may be personally liable for the debts of the organization. The organization may also find it difficult to enter into contracts or open bank accounts.

### 4. How does a director find out whether or not a corporation is "in good standing"?

If a nonprofit forfeits its good standing, the SOS will mail a "notice of forfeiture" to the registered agent and/or principal place of business on file with the SOS. However, the best way to verify a corporation's current status is to contact the Texas Secretary of State at (512) 463-5555 or [Corpinfo@sos.state.tx.us](mailto:Corpinfo@sos.state.tx.us). To check an organization's Franchise Tax Account Status, perform a corporation search online at <http://ecpa.cpa.state.tx.us/coa/Index.html>.

## 5. Secretary of State filing requirements

A nonprofit must file Form 802 whenever the SOS mails it to the organization. By law, the SOS can only request a report once every four years. The SOS sends the form to the corporation's registered agent, so if the name and address of the registered agent are not current, the organization might not receive the required report or notice that the nonprofit will be involuntarily terminated or dissolved. Form 802 is a simple report that updates the organization's address and officers and directors. The report is available on the Secretary of State's website at <http://www.sos.state.tx.us/corp/forms/802.pdf>. If an organization fails to file Form 802 within 30 days after the SOS mails the form, the corporation will forfeit its corporate privileges as discussed above. If an organization does not file Form 802 within one hundred and twenty days (120) after the forfeiture, the SOS will **involuntarily dissolve** a domestic corporation and revoke the certificate of authority of a foreign corporation.

## 6. How can a nonprofit fix the problem after failure to file Form 802?

An organization can revive its right to conduct business:

- If less than 120 days have passed since forfeiture, by filing Form 802, along with the \$5.00 revival fee . A late fee of \$1 per month (or part of a month) after the original filing deadline will also apply. The late fee will be capped at \$25.
- If more than 120 days have passed and the organization has been involuntarily dissolved by the SOS, by filing an Application for Reinstatement (Form 801), filing Form 802, and paying the \$5.00 fee.

If more than three years after have passed since dissolution or revocation, an organization that is governed by the Texas Business Organizations Code will be reinstated with an "interruption" noted in the corporation's existence.

## 7. Comptroller filing requirements

All corporations in Texas must file state franchise/margin tax reports and pay applicable taxes unless they qualify for an exemption. Most nonprofit organizations that have received their 501(c)(3) determination letter from the IRS qualify for an exemption from state franchise/margin tax payments and reporting requirements, but the exemption is not automatic. Nonprofits must complete and submit Form AP-204, and include a copy of their IRS determination letter. Even without an exemption, many nonprofit corporations may not owe any tax but will still be required to file Form 05-141, Franchise No Tax Due Information Report, which is available at <http://window.state.tx.us/taxinfo/taxforms/05-141.pdf>. This form also provides the form and instructions to request an extension to file a Texas Corporation Franchise Tax Report.

If an organization does not file appropriate forms, the Comptroller will mail a notice of forfeiture to the organization. If the organization does not respond within 45 days, the Comptroller may terminate the organization's right to conduct business. The Comptroller may also revoke an organization's charter if the corporation does not permit the Comptroller to investigate or examine the records of the corporation to determine the franchise tax liability. But the Comptroller will not automatically dissolve a corporation for failing to pay taxes or file tax reports. During franchise tax forfeiture, a corporation not only loses its rights to sue **and** defend in Texas courts, but its directors or officers are also held personally liable for debts of the corporation that are created or incurred in Texas after the tax, penalty, or report was due and before the corporate privileges are revived. See Texas Tax Code, Chapter 171.

## 8. How can a nonprofit fix the problem after forfeiture for tax reasons?

If an organization falls out of good standing for tax reasons, it can revive its corporate privileges by:

- bringing its franchise tax account into current status;
- obtaining a Certificate of Tax Clearance from the Comptroller's office;
- filing an Application for reinstatement and Certificate of Tax Clearance with the SOS;
- obtaining SOS approval for reinstatement; and
- obtaining a Certificate of Account Status (certificate of good standing) from the Comptroller.

Because losing a charter is more trouble than doing it right in the first place, a nonprofit should create a checklist of reporting requirement for the organization that will be reviewed by the board and staff on an annual basis. Additionally, a corporation should assign someone the responsibility of both updating any changes with the IRS, the Secretary of State, and the Texas Comptroller and monitoring the periodic and annual reporting periods.

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