

AMENDMENT AND/OR RESTATEMENT OF THE CERTIFICATE OF FORMATION OF A TEXAS TRUST COMPANY

General

In general, Section 182.101 of the Texas Finance Code governs amendment and restatement of the Certificate of Formation of a Texas trust company. Except for some specific wording for amendments establishing a series of shares, the Finance Code requires compliance with the Texas Business Organizations Code (“BOC”) procedures and filings for amending or restating, with or without amendments, the Certificate of Formation of a for-profit business corporation. The following sections of the BOC should be consulted for guidance:

Amending or restating Certificate of Formation: BOC §§3.051-.060, §3.063;
Board of directors’ acts to amend or restate: BOC §§21.052-.054, §21.056, §21.415; and
Shareholder action to amend: BOC §§6.201-.205, §21.055, §§21.352-.3531, §§21.364-.372.

Amending the Certificate of Formation

A trust company may amend its Certificate of Formation at any time and in as many respects as may be desired, so long as the Certificate of Formation as amended contains only provisions permissible for a contemporaneously filed Certificate of Formation. The most common non-conformity in existing Certificates of Formation with current requirements is the designation of the city and county of the trust company’s principal office, rather than the current requirement to state the street address of the trust company’s home office. Thus, when amending the Certificate of Formation, the article concerning the trust company location should also be amended if needed to comply with the current required language. An amendment may change an existing article, add a new article or delete an existing article. Amendments are adopted as set forth in the appropriate sections of the BOC, as previously listed. After adoption, the certificate of amendment is filed with the Texas Department of Banking (“DOB”). The form of the certificate of amendment is specified in §3.053 of the BOC. In general, the certificate of amendment must include:

1. The name of the trust company, including a recitation that it is a Texas state-chartered trust company. Confusion resulting from similar trust company names can be avoided by also stating the trust company’s charter number and the city in which its home office is located.
2. An identification by reference or description of each provision of the Certificate of Formation that is being altered, added, or deleted.
3. For provisions being altered or added, a statement of the text of the provision as altered or added.
4. A statement that the amendment or amendments have been approved in the manner required by the BOC and the governing documents of the trust company.
5. A statement of the effective date (and time, if desired) of the amendment(s), if other than the date of filing and approval by the DOB. NOTE: The specified date and time, if any, cannot be before the filing is received by the DOB.

6. The signature of an officer of the trust company. Notarization is not necessary.

Filing notes:

1. If an effective time is specified, it cannot be 12:00 (whether a.m. or p.m.)
2. Filing times are always the local time of Austin, Texas, so this does not need to be stated. Specifying another time zone is ineffective.
3. If the amendment is to change the name of the trust company, careful consideration should be given to the effective date given the changes that will need to be made in documents, signage, advertising materials, and the like.
4. Whenever an address of a director is required, it may be either a residential or business address.
5. If the amendment would necessitate an exchange, reclassification, or cancellation of any issued shares, insert a statement of the manner in which such exchange, reclassification, or cancellation is to be accomplished.
6. If the amendment in any manner effects a change in outstanding restricted capital of the trust company, insert a statement of the manner in which restricted capital is affected and a statement, expressed in dollars, of the amount of the trust company's restricted capital following the amendment. In addition, a trust company may not reduce or increase its outstanding restricted capital without the prior written approval of the banking commissioner, except as permitted by Section 182.103 of the TFC or rules adopted under such subtitle. Consult Section 182.103 of the TFC for information regarding transactions in which separate prior approval is not required.

Filing. Two copies of the certificate of amendment must be delivered to the DOB along with the filing fee prescribed in Title 7 of the Texas Administrative Code §21.2. The delivery address is: Banking Commissioner, Texas Department of Banking, 2601 N. Lamar Blvd., Austin, Texas 78705-4294. After review and approval, one original document is filed in the official records of the trust company and a certified file-stamped copy is returned for the trust company's records.

This information is provided by the Texas Department of Banking solely to assist with procedural matters. THIS OFFICE CANNOT PROVIDE LEGAL ADVICE. WE RECOMMEND THAT YOU CONSULT WITH A PRIVATE ATTORNEY. If extensive amendments are proposed, the trust company may wish to consider filing a Restated Certificate of Formation pursuant to Section 3.057 of the Texas Business Organizations Code, as incorporated by Sections 182.101 and 182.009 of the TFC.

The DOB does not provide forms for filing amendments. However, the following sample certificate of amendment meets minimum statutory requirements, and may be used for guidance (text in brackets ([...]) should contain the correct specific wording for your amendment). Note that the actual amendments below are examples only, and are not required.

Sample Certificate

Certificate of Amendment to the Certificate of Formation

1. The name of the trust company is [AnyTrust], [City], Texas, charter number [xxxx-xx].
2. The Certificate of Formation of [AnyTrust] is amended as follows:

[a. Article I is changed to reflect the new name for the trust company. The full text of Article I as amended is: The name of the trust company is [AnyWhereTrust].

b. Article III specifying the size of the initial board of directors is deleted, and replaced with the following: The number of directors may vary between 5 and 25, according to procedures set forth in the by-laws. The current number of directors is [6], and their names and addresses are as follows:

c. Article IX is added to make indemnification of officers and directors mandatory, and its complete text is as follows:]

3. EXCHANGE, RECLASSIFICATION OR CANCELLATION OF SHARES

*If the amendment **provides** for an exchange, reclassification or cancellation of issued shares, and the manner in which the same is to be affected is not set forth in the amendment, insert the following:*

The manner in which any exchange, reclassification or cancellation of issued shares provided for in the amendment shall be affected, is as follows:

*(Insert concise statement of the **change to be affected** here.)*

4. CHANGE IN RESTRICTED CAPITAL

[The prior written approval of the Banking Commissioner is required pursuant to Section 182.103(a) of the Texas Finance Code for changes in the restricted capital (including the Certified Surplus) other than those listed in Section 182.103(b) of the Texas Finance Code.]

*If the amendment **effects a change in restricted capital**, insert the following:*

The manner in which such amendment effects a change in the amount of restricted capital, and the amount of restricted capital as changed by such amendment, are as follows:

*(Insert concise statement of the **change to be affected** here.)*

5. The amendments have been approved in the manner required by the Texas Business Organizations Code, Texas Finance Code, and governing documents of the trust company.

6. This document becomes effective when accepted and filed by the Texas Department of Banking. **OR**

6. This document becomes effective on [January 31, 20XX, at 12:01 a.m.] which is not more than 90 days from the date of signing. **OR**

6. This document becomes effective upon acceptance and filing with the Texas Secretary of State and Texas Department of Banking, the occurrence of the latter of which filings shall not be more than 90 days from the date of signing.

The undersigned signs this document subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument and certifies under penalty of perjury that the undersigned is authorized under the provisions of law governing the entity to execute the filing instrument.

Dated _____.

President (or other authorized officer)

Restating the Certificate of Formation (without amendment)

At any point, a trust company's effective Certificate of Formation is its original, restated, or corrected Certificate of Formation and any previous amendments to the articles still in effect, i.e., the last of what may be numerous amendments to alter the same provision (such as authorized shares of stock). The purpose of a restatement is to collect what may be a number of different amendments and the previous Certificate of Formation (whether original, restated, or corrected) into one document that will be the current Certificate of Formation. The Certificate of Formation may be restated at any time, but **must** be restated and included as an exhibit in the certificate of merger for a state trust company that is a resulting state trust company in a merger (even if there have been no amendments to the prior document). A restatement of the Certificate of Formation may be with or without new amendments.

A few changes may be made in restated articles without them being considered amendments:

1. If the Certificate of Formation currently in effect states only the size of the initial board of directors and their names and addresses, the restatement may update the current number of directors and the names and addresses (residence or business) of the current directors. However, if the current Certificate of Formation specifies the number of directors in general (and not specifically the initial directors), a change in the size of the board will require an amendment.
2. Non-substantive changes such as the number of a specific article may be made without amendment (provided the actual text is not changed).
3. Articles that are no longer effective because of statutory changes may be deleted without amendment.
4. If the physical location of the home office has not changed, but the current articles list only the city and county of domicile, the street address may be added without an amendment.
5. If the physical location of the home office has not changed, but the street address has changed by governmental action, the new address may be included without amendment. In this case, the cover letter to the submission of the restatement should discuss the reason for the change.

Restated Certificate of Formation (without further amendment) must contain:

1. The name of the trust company, including a recitation that it is a Texas trust company. Confusion resulting from similar trust company names can be avoided by also stating the trust company's charter number and the city in which its home office is located.
2. A statement that the restatement accurately copies the Certificate of Formation and all amendments thereto that are in effect to date, and that the restatement contains no change in any provision [except changes which may be made without amendment pursuant to the BOC or DOB policy].

3. A statement that the Restated Certificate of Formation has been approved in the manner required by the BOC and the governing documents of the trust company.
4. A statement of the effective date (and time, if desired) of the restatement, if other than the date of filing and approval by the DOB. NOTE: The specified date and time, if any, cannot be before the filing is received by the DOB.
5. The signature of an officer of the trust company. Notarization is not necessary.

Filing. Two copies of the Restated Certificate of Formation must be delivered to the DOB along with the \$300.00 filing fee. The delivery address is: Banking Commissioner, Texas Department of Banking, 2601 N. Lamar Blvd., Austin, Texas 78705-4294. After review and approval, one original document is filed in the official records of the trust company and a certified file-stamped copy is returned for the trust company's records.

The DOB does not provide forms for restating a Certificate of Formation. However, the following sample Restated Certificate of Formation meets minimum statutory requirements, and may be used for guidance (text in brackets ([...]) should contain the correct specific wording for your restatement, or deleted if not applicable).

Sample Certificate

Restated Certificate of Formation

Without Further Amendment

1. [Anywhere Trust Company], [Anywhere], Texas, charter number [xxxx-xx], hereby adopts this Restated Certificate of Formation. This Restated Certificate of Formation does not make any amendment to the Certificate of Formation being Restated.
2. The Restated Certificate of Formation, which is attached, accurately copies the Certificate of Formation and all amendments thereto that are in effect to date, and contains no change in any provision [except the following changes which are permitted without amendment pursuant to the Texas Business Organizations Code or Texas Department of Banking policy:]

[a. The number, names, and addresses of the initial board of directors has been updated with the size, names, and addresses of the current board of directors.]

[b. The street address of the home office is included; the physical location of the home office has not changed since the filing of the previous Certificate of Formation, as amended.]

[c. Although the physical location of the home office has not changed, its street address was changed by action of [governmental authority], and the new street address is included in the restatement.]

3. The Restated Certificate of Formation has been approved in the manner required by the Texas Business Organizations Code, Texas Finance Code, and governing documents of the trust company.
4. This document becomes effective when accepted and filed by the Texas Department of Banking. **OR**
4. This document becomes effective on [January 31, 20XX, at 12:01 a.m.] which is not more than 90 days from the date of signing. **OR**
4. This document becomes effective upon acceptance and filing with the Texas Secretary of State and Texas Department of Banking, the occurrence of the latter of which filings shall not be more than 90 days from the date of signing.

The undersigned signs this document subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument and certifies under penalty of perjury that the undersigned is authorized under the provisions of law governing the entity to execute the filing instrument.

Dated _____.

President (or other authorized officer)

Restating the Certificate of Formation (with new amendments)

The required wording for Restated Certificate of Formation when new amendments are made is a combination of that required to amend the articles and to restate without amendments. Note that the non-substantive changes noted above for restatement without amendments may be handled as described there, with suitably modified wording in the required statements, but as the procedures for amendment must be followed anyway, it is more straightforward simply to list them as an amendment. The following sample Restated Certificate of Formation with new amendments assumes that all changes are listed as amendments.

Filing. Two copies of the Restated Certificate of Formation must be delivered to the DOB along with the \$300.00 filing fee. The delivery address is: Banking Commissioner, Texas Department of Banking, 2601 N. Lamar Blvd., Austin, Texas 78705-4294. After review and approval, one original document is filed in the official records of the trust company and a certified file-stamped copy is returned for the trust company's records.

The DOB does not provide forms for filing a Restated Certificate of Formation. However, the following sample Restated Certificate of Formation with new amendments meets minimum statutory requirements, and may be used for guidance (text in brackets ([...]) should contain the correct specific wording for your restatement, or deleted if not applicable). Comments are in *italics* and are not to be part of the filed document.

Sample Certificate

Restated Certificate of Formation

With New Amendments

1. [AnyTrust], [Anywhere], Texas, charter number [xxxx-xx], hereby adopts this Restated Certificate of Formation. The Restated Certificate of Formation makes new amendments to the Certificate of Formation being restated.
2. The Certificate of Formation of [AnyTrust] is amended as follows:
 - a. Article I is changed to reflect the new name for the trust company. The full text of Article I as amended is: The name of the trust company is [AnyWhereTrust].
 - b. Article III specifying the size of the initial board of directors is deleted, and replaced with the following: The number of directors may vary between 5 and 25, according to procedures set forth in the by-laws. The current number of directors is [6], and their names and addresses are as follows:
 - c. Article IX is added to make indemnification of officers and directors mandatory, and its complete text is as follows:

or

2. The Certificate of Formation of [AnyTrust] is replaced in its entirety with the Amended and Restated Certificate of Formation of [AnyTrust] attached hereto as Exhibit A.
3. Each new amendment has been made in accordance with the provisions of the Texas Business Organizations Code and Texas Finance Code. The amendments to the Certificate of Formation and the Restated Certificate of Formation have been approved in the manner required by the Texas Business Organizations Code, Texas Finance Code, and governing documents of the trust company.
4. The Restated Certificate of Formation, which is attached to this filing document, accurately states the text of the Certificate of Formation being restated and each amendment to the Certificate of Formation that is in effect, and as further amended by the Restated Certificate of Formation. The attached Restated Certificate of Formation does not contain any other change in the Certificate of Formation being restated [except that information about the size and members of the current board of directors replaces the information relating to the initial board of directors].
5. **EXCHANGE, RECLASSIFICATION OR CANCELLATION OF SHARES**

*If the amendment **provides** for an exchange, reclassification or cancellation of issued shares, and the manner in which the same is to be affected is not set forth in the amendment, insert the following:*

The manner in which any exchange, reclassification or cancellation of issued shares provided for in the amendment shall be affected, is as follows:

*(Insert concise statement of the **change to be affected** here.)*

6. CHANGE IN RESTRICTED CAPITAL

[The prior written approval of the Banking Commissioner is required pursuant to Section 182.103(a) of the Texas Finance Code for changes in the restricted capital (including the Certified Surplus) other than those listed in Section 182.103(b) of the Texas Finance Code.]

*If the amendment **effects a change in restricted capital**, insert the following:*

The manner in which such amendment effects a change in the amount of restricted capital, and the amount of restricted capital as changed by such amendment, are as follows:

*(Insert concise statement of the **change to be affected** here.)*

7. This document becomes effective when accepted and filed by the Texas Department of Banking. **OR**
7. This document becomes effective on [January 31, 20XX, at 12:01 a.m.] which is not more than 90 days from the date of signing. **OR**
7. This document becomes effective upon acceptance and filing with the Texas Secretary of State and Texas Department of Banking, the occurrence of the latter of which filings shall not be more than 90 days from the date of signing.

The undersigned signs this document subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument and certifies under penalty of perjury that the undersigned is authorized under the provisions of law governing the entity to execute the filing instrument.

Dated _____.

President (or other authorized officer)