

# **AMENDMENT AND/OR RESTATEMENT OF THE CERTIFICATE OF FORMATION OF A TEXAS STATE BANKING ASSOCIATION**

## **General**

In general, Section 32.101 of the Texas Finance Code governs amendment and restatement of the Certificate of Formation of Texas state banking associations. Except 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 state bank 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 Certificate of Formation with current requirements is the designation of the city and county of the bank’s principal office, rather than the current requirement to state the street address of the bank’s home office. Thus, when amending the Certificate of Formation, the article concerning the bank 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 bank, including a recitation that it is a Texas state-chartered banking association. Confusion resulting from similar bank names can be avoided by also stating the bank’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 bank.
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 bank. 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 bank, 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.

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 §15.2. 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 state bank and a certified file-stamped copy is returned for the bank's records.

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 state banking association is [AnyBank], [City], Texas, charter number [xxxx-xx].
2. The Certificate of Formation of [AnyBank] is amended as follows:
  - a. Article I is changed to reflect the new name for the bank. The full text of Article I as amended is: The name of the bank is [AnyWhereBank].
  - 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. The amendments have been approved in the manner required by the Texas Business Organizations Code, Texas Finance Code, and governing documents of the bank.
4. The amendments will be effective on [January 7, 2010 at 5:00 p.m.] NOTE: This statement is not needed if the amendments are to be effective upon filing and approval by the DOB.

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 bank'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 bank that is a resulting bank 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 (the most obvious being a provision for operating under a system of deposit security that is no longer available).
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 bank, including a recitation that it is a Texas state-chartered banking association. Confusion resulting from similar bank names can be avoided by also stating the bank'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 contain 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 bank.
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 bank. 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 state bank and a certified file-stamped copy is returned for the bank'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 State Bank], [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.]
  
  - [d. The current article [xx] relating to operation under the bond security system is deleted as that system no longer exists.]
  
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 bank.

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 state bank and a certified file-stamped copy is returned for the bank'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. [AnyBank], [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 [AnyBank] is amended as follows:
  - a. Article I is changed to reflect the new name for the bank. The full text of Article I as amended is: The name of the bank is [AnyWhereBank].
  - 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 [AnyBank] is replaced in its entirety with the Amended and Restated Certificate of Formation of [AnyBank] 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 bank.
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. The Restated Certificate of Formation becomes effective [when filed and approved by the Texas Banking Commissioner] *or* [Month] [day], [year] at [time] *or* [upon the occurrence of a specified event] which date must be not later than the 90<sup>th</sup> day after this instrument is signed.



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)