The Kentucky Business Entity Filing Act: An Introduction

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The 2010 General Assembly approved the Kentucky Business Entity Filing Act, a central "hub" that from January 1, 2011 will control many of the processes and procedures by which business entities, both domestic and foreign, will interface with the Secretary of State’s office.

While the various business entity acts have, to a greater or lesser degree, typically contained provisions addressing common themes such as requirements of documents filed with the Secretary of State, entity names, registered office and agent and foreign qualification, in certain instances those provisions were non-existent and often otherwise strangely inconsistent. The primary goal of the Business Entity Filing Act was to enact common rules applicable across the range of business entities. In doing so, practitioners should experience reduced transaction costs in that they will no longer have to track often nonsensical distinctions between the various acts, hopefully reducing the overall error rate and increasing the efficiency of the Secretary of State’s office as it is able to apply a single consistent set of rules. To that end, the Business Entity Filing Act recites a common set of provisions addressing:

- filing requirements with respect to documents filed by or issued by the Secretary of State;
- business entity names;
- the registered office and registered agent;
- changes in the principal place of business;
- annual reports;
- administrative dissolution;
- the expiration of the term of business entities that are not perpetual; and
- qualification of foreign entities to transact business in Kentucky.

Each "entity" and each "foreign entity" is subject to BEFA.

The Business Entity Filing Act has a delayed effective date of January 1, 2011, thereby allowing practitioners to become familiar with the Act as well as enacting terminology introduced therein.

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1 Sometimes hereinafter "BEFA." This Act, contained in Senate Bill 151, was sponsored by Senator Tom Jensen, and was managed on the House side by Representative Scott Brinkman. Both authors testified on the bill before the Senate and House Judiciary Committees.

2 KRS § 14A.1-020 ("Each entity and each foreign entity is subject to the provisions of this chapter."). "Entity" and "foreign entity" are defined terms. KRS §§ 14A.1-070(7), (10).

3 For example, it was not until 2007 that provisions for a registered office/agent requirement applied to domestic business trust or that annual reports were required of foreign or domestic business trusts. See Thomas E. Rutledge, The 2007 Amendments to the Kentucky Business Entity Statutes, 97 Ky. L.J. 229, 236-37 (2008-09).

4 For example, while a limited partnership could serve as the registered agent of a business corporation (see KRS § 271B.5-010(1)(b)(6)), it could not do so for a nonprofit corporation (see KRS § 273.182(b)(b)) or for a limited partnership. See KRS § 362.407(1)(b); id. § 362.2-114(3).

5 Defined at KRS § 14A.1-070(7).

6 Defined at KRS § 14A.1-070(10).

7 KRS § 14A.1-020.

8 2010 Acts, ch. 151, § 152.
Powers and Interrogatories of the Secretary of State

The Secretary of State has all powers necessary to perform his or her functions under BEFA.9 In confirmation of the Secretary of State's visitorial powers, a series of provisions allow the Secretary of State to propound and require responses to interrogatories in order to ascertain compliance with the requirements of the Business Entity Filing Act.10 A domestic entity that does not respond to interrogatories is subject to administrative dissolution, and a foreign entity that does not respond may have its certificate of authority cancelled.11

General Requirements for Documents to be Filed

A single set of provisions address the physical requirements for the various documents to be filed with the Secretary of State,12 identify who may execute documents delivered for filing13 and who may correct previously filed documents.14 The Secretary of State is expressly empowered to give notification of filing, the basis on which a document delivered for filing has been rejected, and other issues by electronic means of communication.15 A person who executes a document intending that it be delivered for filing is deemed to have declared under penalty of perjury that to his or her knowledge the contents thereof are true.16 Incorporating into statute the prior regulatory provision,17 if the filing fee is ultimately not paid because the tendered funds are not collectable, after an opportunity for cure, the previously filed documents may be declared "null and void and of no legal effect" and withdrawn from the records of the Secretary of State.18

Almost every document may have a delayed effective time and date, which may not be more than 90 days after the date of filing.19 A document with a delayed effective date of more than 90 days will become effective on the 90th day.20 A new series of provisions, having no antecedent in Kentucky law, will permit, before the effective date of a document having a delayed effective time and date, the filing to be withdrawn, whereupon the initial filing will become a nullity.21 Once a document has become effective, it may not be withdrawn.

For most domestic entities, a certificate of existence may be issued,22 and a certificate of authorization may be issued for foreign entities qualified to transact business in the state.23 The Secretary of State may issue such additional certificates as it shall determine appropriate.24

Documents that must be filed with the county clerk have been reduced to an exclusive listing and it has been made express that annual reports do not need to be filed with the county clerk.25 The failure to file a document with the county clerk will not impact its efficacy.26

The Secretary of State is directed to create certain forms, is given the capacity to make the use of those forms mandatory, and while authorized to create other forms may not make their use mandatory.27 The total number of forms will be reduced and where in the past the various forms were entity specific, now they will be generic.28

Names of Business Entities

The provisions addressing the requirements as to business entity names, including required identifiers and the standard of distinguishability, have been combined into a single provision.29 The standards for name distinguishability were not

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9 KRS § 14A.1-030.
10 KRS § 14A.1-040.
11 KRS § 14A.1-050(1).
12 KRS § 14A.2-010.
13 KRS § 14A.2-020.
14 KRS § 14A.2-090.
15 KRS § 14A.2-010(12).
16 KRS § 14A.2-030.
17 30 KAR 1:050.
18 KRS § 14A.2-010(10).
19 KRS § 14A.2-070. An example of a document that may not have a delayed effective date/time are articles of correction.
20 While numerous predecessor statutes indicated that a delayed effective date could be no more than 90 days after the date the document is filed, the statutes were silent as to the effect of a purported effective date in excess of 90 days.
21 KRS § 14A.2-080.
22 KRS § 14A.2-130. A certificate of existence may not be issued with respect to a limited partnership that is not governed by the Kentucky Uniform Limited Partnership Act (2006) or for a business trust.
23 KRS § 14A.2-140.
24 KRS § 14A.2-150.
25 KRS § 14A.2-040.
26 KRS § 14A.2-070(3).
27 KRS § 14A.2-050.
28 For example, while there were previously four different forms, each type specific, for the qualification of various types of foreign entities (Forms FCO, FLC, FNP and FNT), there will now be a single application for a certificate of authority.
29 KRS § 14A.3-010. While the Act does not restrict permissible identifiers, their grouping in one provision will hopefully avoid errors, particularly as to "cooperative."
altered. A single set of provisions will address reserved and registered names, regardless of the form of organization seeking same, and likewise there is a single provision controlling the names of foreign entities under which they will qualify to do business, including fictitious names. An express cross-reference to the assumed name statute is included in BEFA.

Registered Office/Agent

A single set of provisions applicable across all the various forms will address requirements as to the registered office and agent, the means by which the office and agent are changed, a registered agent's resignation and the rules as to how service of process or other giving of notice is accomplished through the registered agent. An entity not previously required to maintain a registered office or agent is similarly not required to do so under BEFA. The requirement that the registered agent sign the documents pursuant to which the registered agent is appointed has been retained.

Where there were previously somewhat curious rules as to who could for a particular entity serve as the registered agent, there has been substituted a common rule that the registered agent may be a natural person, a domestic entity or a foreign entity qualified to transact business in the Commonwealth. Greater flexibility is now provided with respect to the ability of the registered agent to resign. For example, under the Kentucky Revised Uniform Limited Partnership Act, changing the registered agent required an amendment to the certificate of limited partnership; the registered agent did not have the power to unilaterally resign and cause that filing to be updated. Under BEFA, the registered agent of any form of entity may resign. All changes of registered agent/office will be by means of a form filing and not by amending the organic filing.

Adopting principles set forth in Delaware law, every business organization will be obligated to advise its registered agent of a "communications contact" at the company to whom process and other notices are to be forwarded. The responsibilities of the registered agent are specified, namely to maintain information as to the communications contact and to forward any process, notice or other communication received.

Change of Principal Office Address

A single provision now controls how the various forms of business organization may change the "principal office" address of record with the Secretary of State. Where previously certain entities could change that address only by an amendment of their organic filing, this information now will be updated by means of a distinct form. The statement of change of principal address, absent a delayed effective date, is effective upon filing. Numerous notices from the Secretary of State will be transmitted to the company at its principal office, as contrasted with its registered office, address. Therefore it is important for companies to keep this information current; companies will be prompted as to this matter by the annual report and its recitation of the principal place of business address then of record. A limited partnership's "designated office" is for these purposes treated as a "principal office."

Annual Report

A single provision will now govern the annual reports that are filed by various domestic and foreign entities. With one exception, those entities

30. KRS § 14A.3-020 (reserved names); KRS § 14A.3-030 (registered names). A registered or reserved name is required to include an acceptable identifier. See KRS § 14A.3-020(2); id. § 14A.3-030(1)(b).
31. KRS § 14A.9-030(1)(a).
32. KRS § 14A.3-050.
33. A registered agent/office is not required for a rural telephone or electric cooperative, an LLP registered under KRS § 362.265, or a limited partnership formed prior to the adoption of the Kentucky Revised Uniform Limited Partnership Act that has not elected coverage by that act or the Kentucky Uniform Limited Partnership Act (2006).
34. KRS § 14A.4-010(2).
35. See supra note 3.
36. KRS § 14A.4-010(1)(b).
38. KRS § 14A.4-030.
39. KRS § 14A.4-020.
40. See, e.g., DEL. CODE ANN. tit. 6, § 18-104(g).
41. See KRS § 14A.4-010(3). While the failure of an entity or foreign entity to provide a communications contact is a valid basis for a registered agent's resignation, such is not mandatory.
42. KRS § 14A.4-050.
43. "Principal office" is a defined term. See KRS § 14A.1-070(25).
44. A change of principal office address is to be filed as well with the county clerk. See KRS § 14A.2-040(1)(h).
45. See KRS § 14A.5-010(1) ("on a form supplied by the Secretary of State."). Also see KRS § 14A.2-060(1)(b).
46. See, e.g., KRS § 14A.2-010(12) (all communications from the Secretary of State); id. § 14A.4-030(2) (notice of registered agent's resignation).
47. See KRS § 362.2-020(1)(b); id. § 362.415(1)(b); id. § 362.407(1)(a); and see also KRS § 362.2-102(5).
48. KRS § 14A.5-010(3).
that did not previously file an annual report\textsuperscript{49} will continue to be exempt from an annual report requirement. The one departure is limited partnerships governed by the Kentucky Revised Uniform Limited Partnership Act;\textsuperscript{50} beginning in 2011, such partnerships will be subject to an obligation to file an annual report with the Secretary of State and, failing to do so, will be administratively dissolved.\textsuperscript{51}

With respect to annual reports filed by a corporation, the annual report must now expressly identify the secretary as well as any "other" principal officers; corporate annual reports that do not identify a secretary will be returned.\textsuperscript{52} Foreign corporations not utilizing the MBCA formula (i.e., not requiring the designation of a "secretary") should identify the person having the custody of and capacity to authenticate the records of the corporation.\textsuperscript{53} Annual reports filed by a member-managed LLC will no longer be required to recite the name and address of a member.\textsuperscript{54} An annual report filed for a manager-managed LLC will continue to be required to list the names and addresses of all managers.\textsuperscript{55} The information in an annual report must be current as of the date of execution,\textsuperscript{56} and annual reports may be amended.\textsuperscript{57}

\textbf{Administrative Dissolution}

A domestic entity may be administratively dissolved for failure to maintain a registered office/agent, failure to file a required annual report, failure to respond to interrogatories issued by the Secretary of State or as otherwise dictated by the entity's organic act.\textsuperscript{58} Notice that, in the view of the Secretary of State, grounds exist for administrative dissolution will be sent to the entity at its principal office address, and the entity will have sixty (60) days within which to either cure the deficiency or explain that the Secretary of State's assessment is incorrect.\textsuperscript{59} Thereafter, the Secretary of State will administratively dissolve the LLC by issuing a certificate of dissolution and mailing a copy thereof to the entity at its principal office address.\textsuperscript{60}

Administrative dissolution may be cured at any time, and the cure thereof will relate back to the date of dissolution with the effect that the existence of the entity will be deemed not to have been interrupted.\textsuperscript{61}

\textbf{End of Duration}

Certain business entities historically were required to indicate when their duration would end,\textsuperscript{62} and entities have the flexibility to indicate a maximum period of duration.\textsuperscript{63} Previously, the implications of having reached that date were unclear, with that event having been at times treated as an administrative dissolution.\textsuperscript{64} Under BEFA, an entity having reached the end of its duration is a unique category.

Having reached the end of its term, an entity, in the sixty days thereafter, may amend its organic filing to either eliminate its durational limit or extend it to a future date.\textsuperscript{65} That action will relate back to and be effective as of the previously provided for date of termination and the existence of the entity will be uninterrupted. After that sixty day period, the amendment of the organic filing is no longer

\textsuperscript{49} Examples of business entities that need not file an annual report are Rural Electric and Rural Telephone Cooperatives and limited liability partnerships not governed by the Kentucky Revised Uniform Partnership Act (2006).

\textsuperscript{50} Hereinafter "KYRULPA." Limited partnerships governed by the Kentucky Uniform Limited Partnership Act (2006) have always been obligated to file an annual report. See KRS § 362.2-210; see also Vestal and Rutledge, Uniform Limited Partnership Act (2001) Comes to Kentucky: An Owner's Manual, 34 NORTHERN KENTUCKY LAW REVIEW 411 (2007).

\textsuperscript{51} ForYRULPA limited partnerships will receive notice of the new obligation at the registered office address. To the extent a limited partnership has not kept that address current the limited partnership is out of compliance with existing law (see KRS § 362.417(2)(a)(5)) and cannot complain when notice is not received and administrative dissolution follows.

\textsuperscript{52} KRS § 271B.16-220, § 273.3671. See also KRS § 271B.8-400(3) (requirement to have the officer); KRS § 273.227(3) (same); KRS § 271B.1-400(23) (defining the "secretary" and referencing KRS § 271B.8-400(3)); KRS § 273.161(10) (defining the "secretary").

\textsuperscript{53} See MBCA § 1.40(20) (defining the person discharging the MBCA § 8.40(c) obligations as the "secretary"). For example, while a Tennessee corporation is not required to designate a "secretary," that not being a defined term (see TENN. CODE § 48-11-201), it is required to have an officer to whom is delegated "responsibility for preparing minutes of the directors' and shareholders' meetings and for authenticating records of the corporation." See TENN. CODE § 48-18-401(c). See also DEL. CODE ANN. tit. 8, § 142(a).

\textsuperscript{54} Contrast KRS § 275.190(1)(d) prior to amendment by 2010 Acts, ch. 151, § 78.

\textsuperscript{55} See KRS § 14A.6-010(1)(d).

\textsuperscript{56} KRS § 14A.6-010(3).

\textsuperscript{57} See KRS § 14A.6-010(6).

\textsuperscript{58} KRS § 14A.7-010(1).

\textsuperscript{59} KRS §§ 14A.7-020(1), (2).

\textsuperscript{60} KRS § 14A.7-020(2); id. § 14A.2-010(12).

\textsuperscript{61} KRS § 14A.7-030; see also Rutledge, The 2007 Amendments, supra note 3 at 239-43.

\textsuperscript{62} See, e.g., KRS § 362.415(1)(e); id. § 362.020; id. § 362.420(1)(e)(5).

\textsuperscript{63} See, e.g., KRS § 271A.270(1)(b); id. § 275.025(2).

\textsuperscript{64} See, e.g., KRS § 271B.14-200(4). In contrast, while a KyRULPA certificate of limited partnership was required to set forth "the latest date upon which the limited partnership is to dissolve" (KRS § 362.415(1)(e)), that act does not treat reaching that date as an administrative dissolution. See KRS § 362.467.

\textsuperscript{65} KRS § 14A.8-010(1).
permitted and the organization must proceed to wind up and terminate. 66 The entities' organic law 67 will determine rules of authority, agency and limited liability after the entity has reached the end of its duration. 68

**Foreign Qualification**

A single provision applicable to all foreign entities directs that such entities qualify in Kentucky if the entity is "transacting business," the statute lists the activities that of themselves do not constitute transacting business. 69 The exceptions to the application for a certificate of authority are foreign limited liability partnerships,70 they will continue to qualify to transact business by filing a statement of foreign qualification pursuant to KyRUPA,71 and foreign general partnerships, which need not qualify.72

Qualification will be by means of an application for a certificate of authority.73 In a departure from prior practice, a foreign entity will not be obligated to submit a "certificate of existence" from the jurisdiction of organization.74 Rather, the application requires a representation that the entity validly exists under the laws of its jurisdiction of organization.75 All foreign entities qualified to transact business are required to have a registered office/agent76 and to file an annual report.77

The certificate of authority must be amended if certain information changes, including the form of organization of the foreign entity.78 Before BEFA, a foreign entity that changed its form was required to withdraw its prior registration and then, in its new form, file a new application for a certificate of authority.79 Under the new system, a foreign entity that changes its form of organization, such as consequent to a conversion, will merely amend the existing certificate of authority to indicate the correct form of organization.80

A foreign professional service corporation will need to qualify to transact business under the same test applied to general business corporations; the prior exception from registration if no office was maintained in Kentucky81 has been eliminated.82

The authority to transact business may be voluntarily forfeited by filing a certificate of withdrawal,83 and after withdrawing an entity will need to apprise the Secretary of State of changes in its mailing address to which any process or other notice may be forwarded.84

The certificate of authority issued to a foreign entity may be revoked for a variety of reasons, including the failure to maintain a registered office/agent or to file an annual report.85 In addition, a certificate of authority may be revoked for failure to respond to interrogatories issued by the Secretary of State.86

**Conforming Amendment to Non-Entity Acts**

KRS § 64.012 has been amended to expressly cross-reference KRS § 14A.2-040 as to those documents that need be filed with the county clerk. Deleted from KRS 382.335 is the requirement that documents relating to "the organization or dissolution of a private corporation," in order to be filed with the county clerk, include a scrivener's block.87 Grammatical revisions have been made in the definitions of "domestic" and "foreign" as applied to business entities in KRS section 446.010.88

**Other Conforming Amendments and Repeals**

The various organic acts have been amended to address BEFA. Generally speaking, substantive provisions as to topics addressed by BEFA have been deleted and typically a cross-reference to

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66 KRS § 14A.8-010(2).
67 See KRS § 14A.2-010(19) (defining "organic law").
68 KRS § 14A.8-010(4). In the case of a corporation or LLC, the dissolution will restrict the entity to activities appropriate for winding up and liquidation (see KRS § 271B.14-050(1); id. § 275.300(2)), but the entity will continue to exist (see KRS § 271B.14-050(1); id. § 275.300(2)) and the rules of limited liability will remain in place. See KRS § 271B.14-050(2)(i); id. § 275.300(2). Conversely the Business Trust Act is silent as to these points subsequent to the trust's dissolution.
69 KRS § 14A.9-010.
70 See KRS § 14A.9-010(4)(e).
71 See KRS § 362.1-1110.
72 KRS § 14A.9-010(4)(b).
73 KRS § 14A.9-030.
74 See, e.g., KRS § 271B.15-030(2).
75 KRS § 14A.9-030(2). See also KRS § 14A.2-030.
76 KRS § 14A.9-030(1)(g). See also KRS § 14A.4-010
77 KRS § 14A.5-010.
78 See KRS § 14A.9-040.
79 See KRS § 14A.9-040(1)(d).
80 KRS § 274.245(2).
81 See 2010 Acts, ch. 133, § 27.
82 KRS § 14A.9-060.
83 See KRS § 14A.9-060(4). See also KRS § 14A.9-060(2)(e).
84 KRS § 14A.9-070.
85 KRS § 14A.1-050(1).
86 KRS § 382.335(1), as amended by 2010 Acts, ch. 151, § 113.
87 KRS §§ 445.010(11), (14), as amended by 2010 Acts, ch. 151, § 120.
BEFA has been substituted. For example, the entirety of subtitle 15 of the Business Corporation Act, it addressing the qualification of foreign corporations, has been deleted, and a reference to the foreign qualification subtitle of BEFA has taken its place.88

Conclusion

BEFA, after what should be a minimally traumatic transition, will significantly reduce the cost of compliance with state law while significantly reducing the menu of rules and requirements the Secretary of State’s office must police. While there remain outlier provisions,89 consistency as to interface with the Secretary of State and as to points that are not entity specific will facilitate increased electronic filing opportunities and otherwise increase Kentucky’s already highly responsive systems.

This article has been previously published at 74 Bench & Bar 6 (Sept. 2010).

88 See KRS § 271B.15-010 as repealed and reenacted by 2010 Acts, ch. 151, § 55.
89 For example, the articles of organization of a rural telephone cooperative must be executed in triplicate and all signatures of the incorporators notarized. See KRS § 279.040. The articles of incorporation of an agricultural cooperative association, after filing by the Secretary of State, must be filed with the Dean of the College of Agriculture at the University of Kentucky and with the Commissioner of the Department of Agriculture. See KRS § 272.131(3).