



# The 2011 Amendments to Kentucky's Business Entity Laws

By **Thomas E. Rutledge**

In contrast with the significant amendments made to the various business entity acts in 2010<sup>1</sup> and the adoption of the Kentucky Business Entity Filing Act,<sup>2</sup> the 2011 amendments are far fewer and are safely characterized as being of a narrow technical nature.

## *Legislative History*

The 2011 amendments to the business entity laws contained in H.B. 331 were introduced to the 2011 General Assembly by Representative Thomas R. Kerr on February 3. The bill was referred to the House Judiciary Committee on February 4 and a hearing was held on February 16, where at all present members of the House Judiciary Committee voted in favor of the proposal. The bill was voted out of the House on the consent calendar on February 18. On February 23, the bill was assigned to the Senate State & Local Government Committee,<sup>3</sup> and the bill was called on March 1. The committee vote was unanimous in favor of the bill, and it was placed on the Senate consent calendar. The bill was approved by the Senate on March 3. Signed by Governor Beshear on March 15, the amendments in

H.B. 331 are effective as of June 8, 2011.<sup>4</sup>

S.B. 8, directing the study and implementation of an electronic business portal, was introduced by Senators Givens, Schickel and Wilson on January 4. The bill was heard by the Senate Licensing, Occupations & Administrative Regulations Committee on January 5 and was recommended to the Senate, where it passed on a vote of 37 yea and 0 nay. The House Economic Development Committee heard the bill on February 24, whereupon it was recommended to the House, which approved it on a vote of 99 yea and 0 nay. S.B. 8 was signed by the Governor on March 16. Consequent to an emergency clause it was immediately effective.<sup>5</sup>

S.B. 39, addressing qualification to transact business and the receipt of state contracts, was introduced by Senator McGeha. The bill was heard by the Senate State and Local Government Committee on February 2 and was recommended to the Senate, where it passed on a vote of 36 yea and 0 nay. The House State Government Committee heard the bill on February 24, whereupon it was recommended to the House, which approved it on a vote of 58 yea and 1 nay. S.B. 39

was signed by the Governor on March 16, and was effective on June 8, 2011.<sup>6</sup>

## *Secretary of State Office Organization*

The name of the former "Division of Corporations" has been changed to the "Division of Business Filings," and it has been made express that this Division has charge for UCC filings.<sup>7</sup> That the Division of Administration is responsible for elections has been confirmed.<sup>8</sup> The Division of Business Filings is afforded the authority to adopt regulations in furtherance of its responsibilities.<sup>9</sup>

## *The Business Entity Filing Act*

For many years there has existed a regulation to the effect that an entity must be in "good standing" in order to file documents with the Secretary of State.<sup>10</sup> While the sentiment of the regulation was clear, it neither said what it meant nor meant what it said.<sup>11</sup> By its terms the regulation was limited to corporations and LLCs, implying that, for example a limited partnership administratively dissolved for failure to file its annual report<sup>12</sup> could still file documents.<sup>13</sup> Further, by its terms the regulatory formula would preclude a corporation or LLC, having been administratively dissolved, from filing its reinstatement documents; obviously that was not the intent.

The regulation has now been superseded and replaced by statute. First, a definition of "good standing" has been added to the filing act.<sup>14</sup> The substance of the regulation has been added to the filing act,

providing that an entity or foreign entity<sup>15</sup> must be in good standing in order for its documents to be filed by the Secretary of State.<sup>16</sup> There are provided a series of exceptions to this rule such as reinstatement filings and permitted amendments to organizational filing of an entity whose duration has expired.<sup>17</sup> It is further provided that the registered agent, notwithstanding that the subject entity is in bad standing, may deliver and have filed either a resignation or a change of registered office.<sup>18</sup> The need for the carve-out permitting the resignation filing is obvious. Permitting the registered agent to update the registered office information even while the entity or foreign entity is in bad standing benefits third parties who need to serve process<sup>19</sup> or otherwise give notice.<sup>20</sup> This provision is of limited scope – it does not enable a company in bad standing to either change its registered office or agent or upon an agent’s resignation to appoint a replacement agent.<sup>21</sup> Rather, the entity or foreign entity, it having the capacity to address and remedy its bad standing status, must be in good standing to make those filings.

In several instances the act has been amended to provide that certain filings must be made on forms provided by the Secretary of State.<sup>22</sup>

KRS section 14.105, addressing the ability of the Secretary of State to accept electronic signatures on documents delivered for filing, has been amended to include documents filed pursuant to the Business Entity Filing Act.<sup>23</sup>

A foreign entity holding a certificate of authority is required

to amend the certificate upon any change in the information required in the application for a certificate.<sup>24</sup>

Several cross-references from the various organic acts to BEFA have been corrected.<sup>25</sup> These corrections each has a retroactive effective date of January 1, 2011.<sup>26</sup>

### ***The Business Corporation Act***

The amendment of KRS section 271B.14-330 is for purposes of clarification. Notwithstanding that this provision embodied the model act language,<sup>27</sup> that language was less than precise. The winding up and liquidation is not done “in accordance with KRS section 271B.14-050.” Rather, that provision details the effect of dissolution. The provision has been revised to (a) make express that the effect of a judicial dissolution is the same as that of a voluntary or administrative dissolution<sup>28</sup> and (b) to incorporate the receiver provisions of KRS section 271B.14-320 within the court’s oversight of the corporation’s winding up.<sup>29</sup>

Under the prior law, a board of directors could transfer some or all of a corporation’s property to a wholly-owned subsidiary organized as a business corporation without the requirement that the transaction have shareholder approval. Under the revised statute, so long as the subsidiary is wholly-owned, the transfer may take place.<sup>30</sup> With this change, a corporation may transfer assets, for example, to a wholly-owned LLC.

The provision setting forth the requirements for a registered agent and office have been revised

to incorporate the rule set forth in BEFA.<sup>31</sup>

### ***Professional Service Corporations***

KRS section 274.055 was in 2010 amended to the effect that the liability of a foreign PSC and its shareholders for claims arising in Kentucky will be determined applying Kentucky law.<sup>32</sup> While that amendment included a cross-reference to the “effect of a certificate of authority” provision of the Business Corporation Act,<sup>33</sup> that provision was in turn repealed by the legislation in which the Business Entity Filing Act was adopted.<sup>34</sup> KRS section 274.055 has been again amended to cross-reference the successor to KRS section 271B.15-050(3), that being KRS section 14A.9-050(3).<sup>35</sup>

### ***The LLC Act***

KRS section 275.315 has been amended in order to narrow its scope. This provision directed that each dissolved LLC is to file articles of dissolution. While appropriate for LLCs voluntarily dissolving, the statute implied an obligation to file subsequent to administrative or judicial dissolution or dissolution for the LLC having reached the end of its term. In the case of administrative dissolution the Secretary of State, and in the case of a judicial dissolution the court, will have filed or delivered for filing the document effecting the dissolution.<sup>36</sup> From those filings the LLC was not in good standing and could not file documents with the Secretary of State. An LLC with a limitation on its period of duration is dissolved (subject to cure) from that date and is no

longer in good standing.<sup>37</sup> The statute has been amended to make express that articles of dissolution are not filed upon judicial or administrative dissolution or upon an LLC reaching the end of its period of duration.<sup>38</sup> For purposes of clarity, the effect upon an LLC of its judicial dissolution has been made express.<sup>39</sup>

The addition to KRS section 275.275 provides a cross-reference to KRS section 275.285(4), it already providing for two additional mechanisms by which one may become a member.<sup>40</sup>

The revisions to KRS section 275.280 address a transfer of all of a member's limited liability company interest. It has been the rule that upon a member assigning all of her limited liability company interest, the other members, by a vote of the majority-in-interest, may dissociate the transferor member. This rule is different than that employed in many states pursuant to which upon transfer of the interest in the LLC the transferor member is automatically dissociated.<sup>41</sup> The existing rule has been retained for LLCs in which, prior to the transfer, there were at least two members.<sup>42</sup> The revisions go to what were, prior to the assignment, single member LLCs. In those situations, the class of non-assigning members bring a null set, no post-transfer action is required, and the transferor member ceases to be a member of the LLC upon the effective time and date of the transfer.<sup>43</sup> By way of example, assuming a single-member LLC, the judgment-debtor against whom a charging order has been issued<sup>44</sup> will be dissociated upon the foreclosure on the

charged limited liability company interest. From there the holder of the interest may elect themselves a member of the LLC<sup>45</sup> or permit the LLC to dissolve for the lack of a member.<sup>46</sup> One effect of this amendment is to address single-member LLCs used for abusive asset protection. Where, in favor of the judgment-creditor, the court orders foreclosure on the charging order,<sup>47</sup> by reason of the foreclosure the former sole member will be disassociated.<sup>48</sup>

The revision of KRS § 275.377(1) corrects a typographical error.<sup>49</sup>

### ***The Uniform Limited Partnership Act***

A new defined term “converted organization” has been added,<sup>50</sup> and that term (as well as other already defined terms) are utilized in the description of the effect of a conversion.<sup>51</sup> There was no substantive change to the effect of a conversion, only a streamlining of the language employed.

### ***Qualification of Foreign Entities With State Contracts***

The precise objective of Senate Bill 39<sup>52</sup> is somewhat difficult to ascertain. If it sought to limit state contracts awarded under KRS chapter 45A and 176 to business organizations registered with the Secretary of State, then it was unsuccessful. If, alternatively, its purpose was to preclude foreign entities entering into contracts with the Commonwealth from utilizing the isolated transaction exception from the requirement to qualify to transact business,<sup>53</sup> then it was successful, but at the cost of

significant confusion.

Amendments to KRS sections 45A.480 and 176.085 provide, inter alia, that a state (or political subdivision thereof) contract may not be awarded to a foreign entity unless that entity shall have received a certificate of authority from the Secretary of State.<sup>54</sup> KRS section 14A.9-010(2)(j) provides an exception from the need to qualify to transact business if the activities of the foreign entity are restricted to:

“Conducting an isolated transaction that is completed within thirty (30) day and that is not one (1) in the course of repeated transactions of like nature.”

S.B. 39 amended KRS section 14A.9-010 to provide, inter alia, that a foreign entity seeking a contract under KRS chapters 45A or 176 may not rely upon the occasional transaction exemption.<sup>55</sup> One must wonder why an exclusion from only this particular provision was desired rather than an affirmative declaration that entering into a contract subject to KRS chapter 45A or 176 is ipso facto transacting business for which qualification is required.

S.B. 39 created KRS section 14A.9-010(6), to provide that subsection (4) thereof, it providing that foreign LLPs and general partnerships are exempt from the requirement to have a certificate of authority, does not apply to foreign entities desiring a 45A or 176 contract. The exclusion in subsection (4), as applied to foreign LLPs, accounts for the parallel registration system that exists in the Kentucky Revised Uniform Partnership Act (2006)<sup>56</sup>



and the Statement of Foreign Qualification.<sup>57</sup> As to the exclusion of general partnerships that are not LLPs, there has never existed either a requirement or a mechanism for them to qualify.<sup>58</sup>

The amendments embodied in S.B. 39 are problematic for LLPs and general partnerships, each of which it seeks, on a limited basis, to bring within the scope of KRS § 14A.9-010.<sup>59</sup> As previously described, foreign LLPs qualify to transact business not by means of a certificate of authority but rather by a statement of foreign qualification. As written, the amended statute could require either (i) a foreign LLP that is otherwise qualified under KyRUPA to transact business have as well a BEFA certificate of authority in order to be awarded a 45A or 176 contract or (ii) a foreign LLP, if it is qualifying only for purposes of a 45A or 176 contract, to apply for and receive a 14A.9-010 certificate of authority. The latter application presents few problems. In comparing the requirements of KRS §§ 14A.9-030(1) and 362.1-1102(1), there is significant overlap. Presumably, pursuant to its authority to promulgate regulations,<sup>60</sup> the Secretary of State could require a representation to the effect that the purpose of the application for a certificate of authority is compliance with requirements under chapters 45A and 176. The problems that arise in connection with the former situation, on the other hand, may be significant. Assume foreign LLP has offices in and is qualified to transact business in Kentucky pursuant to a statement of foreign qualification. As amended, KRS sections 45A.480 and 176.085 require that the foreign LLP, in

order to receive a state contract, to have a certificate of authority (and not a statement of foreign qualification).<sup>61</sup> The foreign LLP cannot, however, apply for a “parallel” certificate of authority – its name is already of record with the Secretary of State and the name of the foreign entity set forth on the certificate of authority must be distinguishable from any name of record.<sup>62</sup> Consequently, our foreign LLP, already qualified under its real name by means of a statement of foreign qualification, will need to file a certificate of authority under a distinguishable fictitious name.<sup>63</sup>

The issue for foreign general partnerships is more involved. For example, assuming the partnership applies for a certificate of authority, it must appoint a registered agent.<sup>64</sup> Service on that registered agent will not, however, constitute service on the individual partners. Further, depending on the applicable law, a foreign general partnership may not be subject to suit in its common name.

From another perspective, the entire effort to require foreign general partnerships to qualify begs a crucial question, namely what is a foreign general partnership? Is the partnership of Able and Baker, organized between two Ohio residents for the purpose of bidding on a Kentucky state contract an Ohio or a Kentucky partnership? Recall that no filing is required in either state to bring the partnership into being.

### ***S.B. 8 – The One-Stop Electronic Business Portal***

S.B. 8<sup>65</sup> directs the Secretary of State, the Finance

and Administration Cabinet, the Cabinet for Economic Development and the Office of Technology to establish a “one-stop electronic business portal” through which business owners may access and submit initial and ongoing filings with the state.<sup>66</sup> An advisory committee is directed, by December 31, 2011, to issue and provide recommendations for the creation and operation of the portal,<sup>67</sup> with the intention that aspects of the system be in testing mode by December 31, 2012.<sup>68</sup>

### ENDNOTES

1. See generally Thomas E. Rutledge and Dean Dennis R. Honabach, *Kentucky Business Entity Laws: The 2010 Amendments*, 74 BENCH & BAR 6 (Sept. 2010) and Thomas E. Rutledge, *The 2010 Amendments to Kentucky's Business Entity Laws*, 38 N. KY. L. REV. \_\_\_\_ (2011) (forthcoming), available on SSRN, abstract 1705557.
2. See generally Thomas E. Rutledge and Laura K. Tzanetos, *The Kentucky Business Entity Filing Act: The Next Step Forward in the Rationalization of Business Entity Law*, 38 N. KY. L. REV. \_\_\_\_ (2011) (forthcoming), available on SSRN, abstract 1705558.
3. It was explained to the author that the Senate Judiciary Committee, the presumptive committee assignment, was significantly backed up with work including on the updated penal code. See 2011 SB 161. Assignment was made to State & Local Government Committee as its Chair,

- Damon Thayer, indicated he had time for its consideration.
4. *See* Op. Atty. Gen. 11-002 (March 17, 2011).
  5. S.B. 8, § 4.
  6. *See supra* note 4.
  7. *See* KRS § 14.025(3) as amended by 2011 Ky. Acts, ch. 29, § 2. It bears noting that the newly christened “Division of Business Filings” includes within its scope certain activities that are not strictly speaking filings. For example, it is this department that will, in connection with duly notarized documents, issue apostilles under the Hague Convention.
  8. *See* KRS § 14.025(2) as amended 2011 Ky. Acts, ch. 29, § 2.
  9. *See* KRS § 14.025(4) as created by 2011 Ky. Acts, ch. 29, § 2.
  10. 30 KAR 1:020.
  11. *See* THE LAST EMPEROR (1987), statement by Reginald ‘R.J.’ Johnson (played by Peter O’Toole) (“If you cannot say what you mean, your majesty, you will never mean what you say and a gentleman should always mean what he says.”).
  12. *See* KRS § 362.2-809; § 14A.7-010(1)(a).
  13. Strictly speaking a business entity does not file a document, but rather delivers a document for filing: the act of filing is done by the Secretary of State. *See* Rutledge, *The 2010 Amendments, supra* note 1 at \_\_\_, SSRN page 49. The vernacular is here employed as a concession to simplicity.
  14. *See* KRS § 14A.1-070(15) as created by 2011 Ky. Acts, ch. 29, § 4.
  15. “Entity” and “foreign entity” are defined terms. *See* KRS § 14A.1-070(7); *id.* § 14A.1-070(10).
  16. *See* KRS § 14A.2-160(1) as created by 2011 Ky. Acts, ch. 29, § 1.
  17. *See* KRS § 14A.2-160(2); *see also* Rutledge and Tzanetos, *The Kentucky Business Entity Filing Act, supra* note 2 at \_\_\_, SSRN pages 33-34.
  18. *See* KRS § 14A.2-160(3).
  19. *See, e.g.*, KRS § 271B.14-060(3)(b); § 275.320(3)(b).
  20. *See* KRS § 14A.4-040(1).
  21. *See* KRS § 14A.4-020(1).
  22. *See* KRS § 14A.2-050 as amended by 2011 Ky. Acts, ch. 29, § 5.
  23. *See* KRS § 14.105 as amended by 2011 Ky. Acts, ch. 29, § 3.
  24. *See* KRS § 14A.9-040 as amended by 2011 Ky. Acts, ch. 29, § 22. Previously changes in only certain of the information in the application for a certificate of authority necessitated an amendment.
  25. *See* KRS § 272.335 as amended by 2011 Ky. Acts, ch. 29, § 11; § 274.055(4) as amended by 2011 Ky. Acts, ch. 29, § 12; § 275.025(1)(a) as amended by 2011 Ky. Acts, ch. 29, § 13; and § 386.4422 as amended by 2011 Ky. Acts, ch. 29, § 21.
  26. *See* 2011 Ky. Acts, ch. 29, § 24.
  27. *See* MOD. BUS. CORP. ACT § 14.33.
  28. *See* KRS § 271B.14-330(2) as created by 2011 Ky. Acts, ch. 29, § 10.
  29. *See* KRS § 271B.14-330(3) as created by 2011 Ky. Acts, ch. 29, § 10.
  30. *See* KRS § 271B.12-010(c) as amended by 2011 Ky. Acts, ch. 29, § 9; *see also* KRS § 271B.13-200(1)(c) (affording a right to dissent from a sale of substantially all assets outside the ordinary course of business that otherwise requires shareholders approval).
  31. *See* KRS § 271B.5-010 as amended by 2011 Ky. Acts, ch. 29, § 8.
  32. *See* 2010 Ky. Acts, ch. 133, § 26; *see also* Rutledge, *The 2010 Amendments, supra* note 1 at \_\_\_, SSRN pages 17-18.
  33. KRS § 271B.15-050(3).
  34. *See* 2010 Ky. Acts, ch. 151, § 151.
  35. *See* 2011 Ky. Acts, ch. 29, § 12.
  36. *See* KRS § 14A.7-020(2); *id.* § 275.290(2).
  37. *See* KRS § 14A.8-010.
  38. *See* KRS § 275.315 as amended by 2011 Ky. Acts, ch. 29, § 17.
  39. *See* KRS § 275.290(4) as created by 2011 Ky. Acts, ch. 29, § 16.
  40. *See* KRS § 275.275 as amended by 2011 Ky. Acts, ch. 29, § 14; *see also* Rutledge, *The 2007 Amendments to the Kentucky Business Entity Statutes*, 97 KY. L.J. 229, 244-46 (2008-09).
  41. *See, e.g.*, DEL. CODE ANN. tit. 6, § 18-702(b)(3); N.C. CODE § 57C-5-02; and MONT. CODE § 35-8-803. This is not to suggest that Kentucky’s law is out of the mainstream. *See, e.g.*, REV. UNIF. LTD. LIAB. CO. ACT § 602(4)(B) (providing that a member may be dissociated upon the consent of all other members upon a member’s transfer of his transferable interest (i.e., economic interest) in the LLC) (2008); CONN. CODE § 34-180(a)(3)(B); and S.C. CODE §

- 33-44-601(5)(ii).
42. See KRS § 275.280(1)(e)2 as amended by 2011 Ky. Acts, ch. 29, § 15.
43. See KRS § 275.280(1)(c)3 as created by 2011 Ky. Acts, ch. 29, § 15.
44. See KRS § 275.260. For a review of the charging order under Kentucky's LLC, partnership and limited partnership acts, see Thomas E. Rutledge and Sarah S. Wilson, *An Examination of the Charging Order under Kentucky's LLC and Partnership Acts (Part I)*, 99 KY. L.J. ONLINE 85 (2011).
45. See KRS § 275.275(4); see also Rutledge, *The 2007 Amendments*, supra note 40 at 244-46.
46. See *id.*
47. See KRS § 275.260(4); see also Rutledge and Wilson, *An Examination of the Charging Order*, supra note 44 at 101-105.
48. See also Thomas E. Rutledge, *I May Be Lost But I'm Making Great Time: The Failure of Olmstead to Correctly Recognize the Sine Qua Non of the Charging Order*, 13 J. PASSTHROUGH ENTITIES 65, 68-69 (Nov./Dec., 2010) (discussing the mechanism of foreclosure as a means for addressing single-member LLCs used for abusive asset protection); Rutledge, *Kentucky Responds Not to Olmstead, But to the Problem of Asset Protection SMLLCs*, XXVIII PUBOGRAM 17 (April 2011).
49. See KRS § 275.377(1) as amended by 2011 Ky. Acts, ch. 29, § 18.
50. See KRS § 362.2-1101(4) as created by 2011 Ky. Acts, ch. 29, § 19.
51. See KRS § 362.2-1105 as amended by 2011 Ky. Acts, ch. 29, § 20.
52. 2011 Ky. Acts, ch. 80.
53. See KRS § 14A.9-010(2)(j).
54. 2011 Ky. Acts, ch. 80, §§ 2, 3.
55. See KRS § 14A.9-010(6) as created by 2011 Ky. Acts, ch. 80, § 1.
56. KRS ch. 362.1.
57. See KRS § 362.1-1102.
58. See also THOMAS E. RUTLEDGE AND ALLAN W. VESTAL, RUTLEDGE & VESTAL ON KENTUCKY PARTNERSHIPS AND LIMITED PARTNERSHIPS at § 2.12.2: "It should be noted that only a foreign limited liability partnership is empowered (and at times required) to file a Statement of Foreign Qualification. There is no mechanism by which a foreign partnership that is not a foreign limited liability partnership may 'qualify to transact business' in Kentucky. This is consistent with KyUPA, which likewise lacks a means of qualification for foreign partnerships that are not limited liability partnerships. However, this lack of a filing requirement does not preclude foreign partnership from transacting business in Kentucky, and such partnerships are permitted to file a Statement of Partnership Authority." (footnote omitted).
59. See KRS § 14A.9-010(6) ("a foreign entity exempt under ... subsection (4) of this section shall obtain a certificate of authority ....").
60. See KRS § 14.025(3)(b) as created by 2011 Ky. Acts, ch. 29, § 2.
61. Here we assume that the state agency at issue will not treat a statement of foreign qualification as equivalent to a certificate of authority. One option may be for the Secretary of State to issue a regulation providing for such equivalence. See KRS § 14.025(3)(b) created by 2011 Ky. Acts, ch. 80, § 2; see also § 362.1-201(2).
62. See KRS § 14A.3-010(3); see also § 14A.3-010(22).
63. See KRS § 14A.3-040.
64. See KRS § 14A.9-030(1)(g).
65. See 2011 Ky. Acts, ch. 75.
66. 2011 Acts, ch. 75, § 1.
67. *Id.* § 3.
68. *Id.* § 4(a).

Thomas E. Rutledge is a member of Stoll Keenon Ogden PLLC resident in the Louisville office. A frequent speaker and writer on business organization law, he has published in journals including *The Business Lawyer*, the *Delaware Journal of Corporate Law* and the *American Business Law Journal*. He is an elected member of the American Law Institute.

