

Client Alert

June 2018

Texas Changes Its Name Availability Standard for Entities

The choosing of a name for a business entity is one of the most important decisions its owner will make, and the availability of names greatly affects this decision. Texas previously used a “deceptively similar” standard for determining name availability, which is widely believed to be more complex and restrictive, resulting in fewer names being available. The old standard made it more difficult for an entity to be formed in Texas under its preferred name, and many foreign entities could not do business in the state under their legal names.

On June 1, 2018, Texas House Bill 2856 became effective, bringing Texas in line with the vast majority of other states that have a “distinguishable in the records” name standard. At the same time, new rules promulgated by the Texas Secretary of State also went into effect. The process of selecting an entity name in Texas is now more business-friendly. The reduced complexity of the naming process will yield a decrease in legal costs related to forming entities and registering entities to do business in the state. This new legislation benefits both new and out-of-state business entities wanting to transact business in Texas, all while preserving a systematic recordkeeping policy that allows the Office of the Texas Secretary of State to maintain and search its official entity records effectively.

The Old “Deceptively Similar” Standard

States generally use one of two standards to determine the availability of names for new entities: the deceptively similar standard or the distinguishable in the records standard. Prior to June 1, 2018, Texas used the more restrictive deceptively similar standard.

Under the deceptively similar standard, the Texas Business Organizations Code prohibited domestic filing entities (which are entities like corporations, LLCs and limited partnerships that must file a certificate of formation with the Texas Secretary of State) from having a legal name, and foreign filing entities from registering under a name, “that is the same as, or that the Secretary of State determines to be deceptively similar or similar to” the legal name of an existing domestic filing entity, a registered foreign filing entity, or an active name reservation or name registration. This standard involved a three-tier conflict system under which the Secretary of State reviewed whether a proposed entity name was: 1) the same as; 2) deceptively similar to; or 3) similar to any existing entity name. A proposed name that fell in category 2 or 3 could only be approved if the conflicting entity provided a notarized, written consent to use of the proposed name. A proposed name that fell in category 1 was not permitted under any circumstance.

The New “Distinguishable in the Records” Standard

As of June 1, 2018, Texas now uses the more business-friendly distinguishable in the records standard to determine name availability. The name of a domestic filing entity and the name under which a foreign filing entity registers “must be distinguishable in the records of the Secretary of State” from the names of other domestic and registered foreign filing entities, the fictitious names of foreign filing entities, and all reserved and registered names. The revised Texas law still prohibits the use of the same name by two filing entities. These standards effectively create a new three-tier system whereby proposed entity names are compared to registered names and categorized as: 1) distinguishable in the records; 2) the same; or 3) available with consent.

Under its new rules, the Secretary of State uses a variety of conditions to determine when a name is considered distinguishable and therefore available. The difference of one key word will make a name distinguishable. A name can contain the same key words as another name, but the names will be distinguishable if the key words appear in a different order. Key words can all have the same sound, but if at least one word, on its face, has a different meaning or connotation, the name is considered distinguishable. The old “geographical ending rule” no longer applies because two entities with the same name but a different geographical ending are now considered distinguishable. Overall, a name will be considered distinguishable in the records so long as a comparison shows that there are sufficient differences to make the name distinguishable.

Names are considered to be the same, and are therefore not available, when a comparison shows no differences between the proposed name and the pre-existing entity name or the only differences between the names do not alter the name sufficiently to make them distinguishable in the records of the Secretary of State. Specifically, differing uses of uppercase or lowercase letters, distinctive typeface, punctuation, accent marks, spacing, articles or conjunctions alone will not render names distinguishable in the records of the Secretary of State.

If the Secretary of State determines there are certain similarities between names and their differences do not render them distinguishable in the records, the proposed name can be available with consent. Use of an indistinguishable name (other than the same name) will be permitted when the other entity or person for whom the name is reserved or registered provides a notarized written consent for use of the name.

Fictitious Names

The new legislation also added the term “fictitious name” to describe the name adopted by a foreign entity because its legal name is unavailable in Texas. While fictitious names must meet the same distinguishable in the records name standard, the newly enacted legislation is projected to increase the amount of names available for both Texas and foreign entities. Thus, many foreign entities domiciled in Texas now have the opportunity to transact business in the state under their legal names when they could not previously do so.

Takeaways

The new distinguishable in the records standard adopted in Texas is less restrictive than the old deceptively similar standard and should lead to a greater availability of names for newly forming domestic entities and newly registering foreign entities, as well as decreased legal costs for these entities. This should also result in more foreign entities being able to register in Texas under their legal names. In addition, entities already registered with the Secretary of State may consider amending their formation or registration filings to use a name that was previously unavailable but, under the new standard, may now be found to be available for use.

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