

BILL ANALYSIS

C.S.H.B. 2856
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Business & Industry
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Interested parties assert that making the process of selecting a distinguishable name for a business entity in Texas more uniform with the requirements established in other states would facilitate the formation of new business entities and expedite the registration of out-of-state business entities to transact business in Texas. C.S.H.B. 2856 seeks to provide for this increased uniformity.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 2856 amends the Business Organizations Code to replace a prohibition against a filing entity having a name and a foreign filing entity registering to transact business in Texas under a name that is the same as or that the secretary of state determines to be deceptively similar to certain specified names with a requirement that the name of a filing entity or the name under which a foreign filing entity registers to transact business in Texas be distinguishable in the records of the secretary of state from such specified names. The bill includes in such specified names a fictitious name, defined by the bill as an assumed name that a foreign filing entity adopts for use because the name of the entity as stated in the entity's certificate of formation or similar organizational instrument is not available for use under state law and under which the entity is registered to transact business in Texas. The bill establishes that an exception from such distinguishability requirement that is based on the consent of the other entity with the name or the person for whom the name is reserved or registered, as appropriate, does not apply if the secretary of state determines that the names are the same.

C.S.H.B. 2856 replaces the prohibition against the secretary of state reserving or registering a name that is the same as, or that the secretary considers deceptively similar or similar to, certain specified names with an authorization for the secretary to reserve or register a name only if the name is distinguishable in the secretary's records from such specified names. The bill includes a fictitious name in such specified names. The bill establishes that certain exceptions from such distinguishability requirement for the reservation or registration of names do not apply if the secretary of state determines that the relevant names are the same.

C.S.H.B. 2856 authorizes the secretary of state to accept an indistinguishable name if the entity or person seeking acceptance of the filing instrument containing the name delivers to the

secretary of state a certified copy of the final judgment of a court of competent jurisdiction that establishes the entity's or person's right to the name in Texas. The bill includes consent in the definition of "filing instrument" under the Business Organizations Code.

EFFECTIVE DATE

June 1, 2018.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 2856 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and formatted in a manner that indicates the substantial differences between the introduced and committee substitute versions of the bill.

INTRODUCED

SECTION 1. Section 1.002, Business Organizations Code, is amended by adding Subdivision (21-a) to read as follows:

(21-a) "Fictitious name" means an assumed name:

(A) that a foreign filing entity adopts for use because the name of the entity as stated in the entity's certificate of formation or similar organizational instrument is not available for use under the laws of this state; and

(B) under which the foreign filing entity is registered to transact business in this state, in accordance with Chapter 9.

SECTION 2. Subchapter A, Chapter 5, Business Organizations Code, is amended by adding Sections 5.002, 5.003, and 5.004 to read as follows:

Sec. 5.002. EVIDENCE OF ESTABLISHED RIGHT TO INDISTINGUISHABLE NAME.

Notwithstanding Sections 5.053, 5.102, and 5.153, the secretary of state may register or reserve a name requested on an application for registration filed by a foreign filing entity, or an application for reservation or registration of a name filed by a person, that is not a distinguishable name from another name that is registered or reserved in the records of the secretary of state under this chapter if the foreign filing entity or person

HOUSE COMMITTEE SUBSTITUTE

SECTION 1. Section 1.002, Business Organizations Code, is amended by adding Subdivision (21-a) and amending Subdivision (23) to read as follows:

(21-a) "Fictitious name" means an assumed name:

(A) that a foreign filing entity adopts for use because the name of the entity as stated in the entity's certificate of formation or similar organizational instrument is not available for use under the laws of this state; and

(B) under which the foreign filing entity is registered to transact business in this state, in accordance with Chapter 9.

(23) "Filing instrument" means an instrument, document, consent, or statement that is required or authorized by this code to be filed by or for an entity with the filing officer in accordance with Chapter 4.

SECTION 2. Subchapter A, Chapter 5, Business Organizations Code, is amended by adding Section 5.002 to read as follows:

Sec. 5.002. EVIDENCE OF ESTABLISHED RIGHT TO INDISTINGUISHABLE NAME.

Notwithstanding Sections 5.053, 5.102, and 5.153, the secretary of state may accept a name if the entity or person seeking acceptance of the filing instrument with the indistinguishable name

delivers to the secretary of state a certified copy of the final judgment of a court of competent jurisdiction that establishes the entity's or person's right to the name in this state.

Sec. 5.003. LIABILITY FOR CERTAIN FALSE WRITTEN STATEMENTS. (a) This section applies only to a written statement of consent to use of a name that is provided to the secretary of state under Section 5.053(b), 5.102(b), or 5.153(b).

(b) A person may recover damages, court costs, and reasonable attorney's fees if the person incurs a loss and:

(1) the loss is caused by a:

(A) forged written statement; or

(B) delivered written statement that constitutes an offense under Section 5.004;
or

(2) the person reasonably relies on:

(A) a false statement of material fact in a written statement; or

(B) the omission in a written statement of a material fact required by this code to be included in the statement.

(c) A person may recover under Subsection (b) from:

(1) each person who forged the forged written statement or signed the written statement and knew when the statement was signed of the false statement or omission;

(2) any managerial official of the entity who directed the signing and delivery of the written statement who knew or should have known when the statement was signed or filed of the false statement or omission; or

(3) the entity that authorizes the delivery of the written statement.

Sec. 5.004. DELIVERY OF FALSE STATEMENT; OFFENSE. (a) A person commits an offense if the person signs or directs the delivery of a written statement of consent described by Section 5.053(b), 5.102(b), or 5.153(b) that the person knows is materially false with intent that the written statement of consent be delivered on behalf of an entity to the secretary of state.

(b) An offense under this section is a Class A misdemeanor unless the actor's intent is to defraud or harm another, in which event the offense is a state jail felony.

SECTION 3. Section 5.053, Business Organizations Code, is amended to read as

delivers to the secretary of state a certified copy of the final judgment of a court of competent jurisdiction that establishes the entity's or person's right to the name in this state.

SECTION 3. Section 5.053, Business Organizations Code, is amended to read as

follows:

Sec. 5.053. DISTINGUISHABLE
~~[IDENTICAL AND DECEPTIVELY~~
~~SIMILAR]~~ NAMES REQUIRED
~~[PROHIBITED]~~. (a) The name of a [A]
filing entity or the name under which ~~[may~~
~~not have a name, and]~~ a foreign filing entity
registers ~~[may not register]~~ to transact
business in this state must be distinguishable
in the records of the secretary of state from
~~[under a name, that is the same as, or that~~
~~the secretary of state determines to be~~
~~deceptively similar or similar to]:~~

(1) the name of another existing filing
entity;

(2) the name of a foreign filing entity that is
registered under Chapter 9;

(3) the fictitious name under which a
foreign filing entity is registered to transact
business in this state;

(4) a name that is reserved under
Subchapter C; or

(5) ~~(4)~~ a name that is registered under
Subchapter D.

(b) Subsection (a) does not apply if the
other entity or the person for whom the
name is reserved or registered, as
appropriate, provides to the secretary of
state a notarized written statement of the
entity's or person's consent to the use of the
~~[similar]~~ name.

(c) If the secretary of state determines that
an entity or person described by Subsection
(b) is consenting to the use of a name that is
the same as the name or fictitious name of
the entity or is the same as the name
reserved or registered for the entity or
person, the entity's or person's consent is not
valid.

SECTION 4. Section 5.102, Business
Organizations Code, is amended to read as
follows:

Sec. 5.102. LIMITATION ON THE
RESERVATION OF CERTAIN NAMES
~~[PROHIBITED; EXCEPTIONS]~~. (a) The
secretary of state may ~~[not]~~ reserve a name
under this subchapter only if the name ~~[that]~~
is distinguishable in the records of the
secretary of state from ~~[the same as, or that~~
~~the secretary of state considers deceptively~~
~~similar or similar to]:~~

(1) the name of an existing filing entity;

(2) the name of a foreign filing entity that is

follows:

Sec. 5.053. DISTINGUISHABLE
~~[IDENTICAL AND DECEPTIVELY~~
~~SIMILAR]~~ NAMES REQUIRED
~~[PROHIBITED]~~. (a) The name of a [A]
filing entity or the name under which ~~[may~~
~~not have a name, and]~~ a foreign filing entity
registers ~~[may not register]~~ to transact
business in this state must be distinguishable
in the records of the secretary of state from
~~[under a name, that is the same as, or that~~
~~the secretary of state determines to be~~
~~deceptively similar or similar to]:~~

(1) the name of another existing filing
entity;

(2) the name of a foreign filing entity that is
registered under Chapter 9;

(3) the fictitious name under which a
foreign filing entity is registered to transact
business in this state;

(4) a name that is reserved under
Subchapter C; or

(5) ~~(4)~~ a name that is registered under
Subchapter D.

(b) Subsection (a) does not apply if the
other entity or the person for whom the
name is reserved or registered, as
appropriate, provides to the secretary of
state a notarized written statement of the
entity's or person's consent to the use of the
~~[similar]~~ name.

(c) Subsection (b) does not apply if the
secretary of state determines that the names
are the same.

SECTION 4. Section 5.102, Business
Organizations Code, is amended to read as
follows:

Sec. 5.102. LIMITATION ON THE
RESERVATION OF CERTAIN NAMES
~~[PROHIBITED; EXCEPTIONS]~~. (a) The
secretary of state may ~~[not]~~ reserve a name
under this subchapter only if the name ~~[that]~~
is distinguishable in the records of the
secretary of state from ~~[the same as, or that~~
~~the secretary of state considers deceptively~~
~~similar or similar to]:~~

(1) the name of an existing filing entity;

(2) the name of a foreign filing entity that is

registered under Chapter 9;

(3) the fictitious name under which a foreign filing entity is registered to transact business in this state;

(4) a name that is reserved under this subchapter; or

(5) ~~(4)~~ a name that is registered under Subchapter D.

(b) Subsection (a) does not apply if the other entity or the person for whom the name is reserved or registered, as appropriate, provides to the secretary of state a notarized written statement of the entity's or person's consent to the subsequent reservation of the ~~[similar]~~ name.

(c) If the secretary of state determines that an entity or person described by Subsection (b) is consenting to the subsequent reservation of a name that is the same as the name or fictitious name of the entity or is the same as the name reserved or registered for the entity or person, the entity's or person's consent is not valid.

SECTION 5. Section 5.153, Business Organizations Code, is amended to read as follows:

Sec. 5.153. LIMITATION ON THE REGISTRATION OF CERTAIN NAMES ~~[REGISTRATIONS — PROHIBITED; EXCEPTIONS]~~. (a) The secretary of state may ~~[not]~~ register a name under this subchapter only if the name ~~[that]~~ is distinguishable in the records of the secretary of state from ~~[the same as, or that the secretary of state determines to be deceptively similar or similar to]~~:

(1) the name of an existing filing entity;

(2) the name of a foreign filing entity that is registered under Chapter 9;

(3) the fictitious name under which a foreign filing entity is registered to transact business in this state;

(4) a name that is reserved under Subchapter C; or

(5) ~~(4)~~ a name that is registered under this subchapter.

(b) Subsection (a) does not apply if:

(1) the other entity or the person for whom the name is reserved or registered, as appropriate, provides to the secretary of state a notarized written statement of the entity's or person's consent to the registration of the ~~[similar]~~ name; or

registered under Chapter 9;

(3) the fictitious name under which a foreign filing entity is registered to transact business in this state;

(4) a name that is reserved under this subchapter; or

(5) ~~(4)~~ a name that is registered under Subchapter D.

(b) Subsection (a) does not apply if the other entity or the person for whom the name is reserved or registered, as appropriate, provides to the secretary of state a notarized written statement of the entity's or person's consent to the subsequent reservation of the ~~[similar]~~ name.

(c) Subsection (b) does not apply if the secretary of state determines that the names are the same.

SECTION 5. Section 5.153, Business Organizations Code, is amended to read as follows:

Sec. 5.153. LIMITATION ON THE REGISTRATION OF CERTAIN NAMES ~~[REGISTRATIONS — PROHIBITED; EXCEPTIONS]~~. (a) The secretary of state may ~~[not]~~ register a name under this subchapter only if the name ~~[that]~~ is distinguishable in the records of the secretary of state from ~~[the same as, or that the secretary of state determines to be deceptively similar or similar to]~~:

(1) the name of an existing filing entity;

(2) the name of a foreign filing entity that is registered under Chapter 9;

(3) the fictitious name under which a foreign filing entity is registered to transact business in this state;

(4) a name that is reserved under Subchapter C; or

(5) ~~(4)~~ a name that is registered under this subchapter.

(b) Subsection (a) does not apply if:

(1) the other entity or the person for whom the name is reserved or registered, as appropriate, provides to the secretary of state a notarized written statement of the entity's or person's consent to the registration of the ~~[similar]~~ name; or

(2) the applicant is a bank, trust company, savings association, or insurance company that has been in continuous existence from a date that precedes the date the indistinguishable [~~conflicting~~] name is filed with the secretary of state.

(c) If the secretary of state determines that an entity or person described by Subsection (b)(1) is consenting to the registration of a name that is the same as the name or fictitious name of the entity or is the same as the name reserved or registered for the entity or person, the entity's or person's consent is not valid.

SECTION 6. Section 9.105, Business Organizations Code, is amended to read as follows:

Sec. 9.105. USE OF DISTINGUISHABLE NAME REQUIRED [~~SIMILAR TO PREVIOUSLY REGISTERED NAME~~]. If the secretary of state determines that the [~~a foreign filing entity's~~] name of a foreign filing entity or the fictitious name under which it is registered to transact business in this state does not comply with Chapter 5 [~~is the same as, deceptively similar to, or similar to a name of a filing entity or foreign filing entity as provided by or reserved or registered under this code~~], the secretary of state may not accept for filing the certificate of reinstatement unless the foreign filing entity contemporaneously amends its registration to change its name to a name that complies with Chapter 5, or provides a fictitious name under which the foreign filing entity will transact business in this state that complies with Chapter 5 [~~obtains consent for the use of the similar name~~].

SECTION 7. Section 11.203, Business Organizations Code, is amended to read as follows:

Sec. 11.203. USE OF DISTINGUISHABLE NAME REQUIRED [~~SIMILAR TO PREVIOUSLY REGISTERED NAME~~]. If the secretary of state determines that a filing entity's name contained in a certificate of reinstatement filed under Section 11.202 does not comply with Chapter 5 [~~is the same as, deceptively similar to, or similar to a name of a filing entity or foreign entity on file as provided~~

(2) the applicant is a bank, trust company, savings association, or insurance company that has been in continuous existence from a date that precedes the date the indistinguishable [~~conflicting~~] name is filed with the secretary of state.

(c) Subsection (b) does not apply if the secretary of state determines that the names are the same.

SECTION 6. Same as introduced version.

SECTION 7. Same as introduced version.

~~by or reserved or registered under this code], the secretary of state may not accept for filing the certificate of reinstatement unless the filing entity contemporaneously amends its certificate of formation to change its name to a name that complies with Chapter 5 ~~[or obtains consent for the use of the similar name]~~.~~

SECTION 8. Section 5.002, Business Organizations Code, as added by this Act, applies only to an application filed on or after the effective date of this Act. An application filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose.

No equivalent provision.

SECTION 9. Sections 5.102 and 5.153, Business Organizations Code, as amended by this Act, apply only to an application for registration or reservation of a name filed on or after the effective date of this Act. An application for registration or reservation of a name filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose.

No equivalent provision.

SECTION 10. Sections 9.105 and 11.203, Business Organizations Code, as amended by this Act, apply only to a certificate of reinstatement filed on or after the effective date of this Act. A certificate of reinstatement filed before the effective date of this Act is governed by the law in effect on the date the certificate of reinstatement was filed, and the former law is continued in effect for that purpose.

No equivalent provision.

SECTION 11. This Act takes effect June 1, 2018.

SECTION 8. Same as introduced version.