

AN ENTITY BY ANY OTHER NAME: TEXAS ADOPTS THE
DISTINGUISHABLE UPON THE RECORDS NAME AVAILABILITY
STANDARD

By: Kyle Stone*

I. INTRODUCTION

At first glance, the subject of name availability may seem simple. It seems obvious that if someone owns an entity named “ABC Corp.,” then nobody else can file their entity under the legal name “ABC Corp.”¹ The issue, however, is how similar a name can be before it is impermissible. What if someone else wants to file an entity with the name “ABC Inc.”? “ABCD Corp.”? “ABC West Corp.”? “ABC LLC”? Are none of these allowed? Are all of them allowed? Name availability standards answer that question by defining how similar two names can be before the proposed name becomes impermissible.

Texas adopted a new name availability standard effective June 1, 2018.² This article (1) introduces the topic of name availability; (2) examines how Texas has applied name availability standards in the past; (3) examines how other states apply the standard Texas recently adopted; and (4) examines how Texas began applying this new standard after June 1, 2018.

This introduction examines the topic of name availability in general, considering (a) what circumstances name availability issues arise under; (b) the difference between name availability standards and trademark and

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¹Note, however, the distinction between a legal name and an assumed name. The statute and regulations discussed in this article pertain to legal names. Therefore, this article focuses on legal name requirements. However, an entity may operate under an assumed name if it complies with the requirements in the Texas Business and Commerce Code. TEX. BUS. & COMM. CODE ANN. §§ 71.051–.054, 71.101–.104, 71.151–.158 (West 2015 & Supp. 2018). Furthermore, foreign entities that register to transact business in Texas may use a fictitious name. A fictitious name is an assumed name that the foreign filing entity adopts for use because the name of the entity is not available in Texas. TEX. BUS. ORGS. CODE ANN. § 1.002(21-a)(A) (West 2012 & Supp. 2018).

²Act of May 24, 2017, 85th Leg., R.S., ch. 503, § 3, 2017 Tex. Gen. Laws 1333 (current version at BUS. ORGS. § 5.053).

unfair competition laws; (c) some practical tools to avoid name availability issues in Texas; and (d) the previous and amended Texas name availability statute.

A. *When is name availability an issue?*

In Texas, when a filing entity³ submits its certificate of formation to the Secretary of State for filing, the Secretary of State reviews it for compliance with statutory and administrative rules.⁴ If the document seems to comply with the relevant rules, then the Secretary of State accepts it.⁵ When it comes to entity names, a statute and applicable administrative rules govern how similar a name may be to the name of another, already-existing entity.⁶ The Secretary of State applies these rules when considering an entity's name.⁷

It is before and during entity formation that name availability becomes an issue. If the name is not available under the applicable standard, then the Secretary of State will not file the certificate of formation and the entity will not be formed.⁸ Therefore, it is important to understand these standards, how they are applied, and practical ways to ensure approval of a certificate of formation.

³ *Adiuku v. Ikemenefuna*, No. 14-13-00722-CV, 2015 WL 778487, at *7 (Tex. App.—Houston [14th Dist.] Feb. 24, 2015, no pet.) (indicating that Texas's name availability statute applies only to filing entities); *see also* BUS. ORGS. § 1.002(22) (defining “filing entity” as “a domestic entity that is a corporation, limited partnership, limited liability company, professional association, cooperative, or real estate investment trust”). Furthermore, Section 5.053 of the Code, unlike the statutes of some states, applies to all filing entities. Section 5.053 relied on the following source laws but did not intend any substantive changes: TBCA §§ 2.05.A(3), 8.03.A(2); TLLCA §§ 2.03.A(3), 7.03.A(3); TNPCA §§ 2.04.A(2), 8.03.A(2); and TRLPA § 1.03(3). *See* Texas Legislative Council, Business Organizations Code Revisor's Report, Part I at 480–84 (last updated Nov. 15, 2004), www.tlc.state.tx.us/legal/bocode/bo_revisors_report.html.

⁴ For example, the proposed entity's certificate of formation must include, among other things, the name of the entity, its type, the street address of the initial registered office, and the name and address of each organizer for the filing entity. BUS. ORGS. § 3.005. Foreign entities that register to transact business in Texas are subject to a separate registration procedure. *Id.* § 9.004.

⁵ *See Payne v. Lucas*, 517 S.W.2d 602, 606 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.) (“The issuance of certificate of incorporation by the Secretary of State evidences that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under the [statute].”).

⁶ *See* BUS. ORGS. § 5.053; 43 Tex. Reg. 3341, 3344 (2018) (to be codified at 1 TEX. ADMIN. CODE § 79.30-79.46) (Office of the Sec'y of State).

⁷ *See* 43 Tex. Reg. 3341, 3344 (2018) (to be codified at 1 TEX. ADMIN. CODE §§ 79.30–79.46) (Office of the Sec'y of State).

⁸ *See Payne*, 517 S.W.2d at 606.

B. Name availability rules are different from trademark and unfair competition laws.

For some, the role of name availability standards is unclear.⁹ Sometimes, attorneys and their clients believe that the Secretary of State's permission to use a name grants them some intellectual property right.¹⁰ This belief, however, is incorrect.¹¹ The Secretary of State's acceptance of a filing and approval of a name does not establish any right to use the name in violation of trademark or unfair competition laws.¹² In most states, the secretary of state cannot and does not search outside of its own internal, statewide database.¹³ Therefore, attorneys should not rely on name approval by the secretary of state to establish any right to a name or defense against a trademark or unfair competition claim.¹⁴ In recognition of this confusion and in an attempt to counteract it, both the Texas Secretary of State's website and the Texas Business Organizations Code (the "Code") explicitly state that entity formation in Texas does not impart any right to use a name in commerce.¹⁵

Notably, name availability standards themselves may deserve some of the blame for the confusion. For example, the deceptively similar standard has two purposes: (1) to distinguish names in the Secretary of State's records and (2) to prevent unfair competition.¹⁶ To some extent, this second purpose—and the language in the old statute acknowledging it—may have misled attorneys and their clients.¹⁷

⁹Lucian Wayne Beavers & William R. Laney, *Choosing and Protecting the Corporate Name*, 30 OKLA. L. REV. 507, 508 (1977).

¹⁰*Id.*

¹¹*Id.*

¹²*Id.* Similarly, filing an assumed name certificate does not create any trademark defenses or rights. 200 William V. Dorsaneo III, *Texas Litigation Guide* § 200.80 (2018) (citing *Burge v. Dallas Retail Merchs. Ass'n*, 257 S.W.2d 733, 735 (Tex. Civ. App.—Dallas 1953, no writ)).

¹³Leonard D. DuBoff, *What's in a Name: The Interplay between the Federal and Trademark Registries and State Business Registries*, 6 DEPAUL BUS. L.J. 15, 23–30 (1993).

¹⁴*Id.*

¹⁵*See* Texas Secretary of State, *Trademarks FAQs*, <http://www.sos.state.tx.us/corp/tradefaq.shtml> (last visited Sept. 15, 2018); *see also* TEX. BUS. ORGS. CODE ANN. § 5.001 (West 2015) (filing a certificate of formation, applying for registration by a foreign filing entity, and applying for reservation or registration of a name does not authorize an entity to use a name in violation of the 15 U.S.C. § 1051, the Code, or the common law).

¹⁶ALAN R. PALMITER, *EXAMPLES AND EXPLANATIONS: CORPORATIONS* 50 (8th ed. 2015).

¹⁷*See id.*

2018]

AN ENTITY BY ANY OTHER NAME

947

C. In Texas, there are practical tools to avoid name availability issues.

While understanding name availability standards is important, one can avoid these issues altogether. These issues do not generally result in litigation but knowing how to avoid these issues can help ensure that the Secretary of State will accept submitted filings. Fortunately, in Texas, the Secretary of State provides some options.

First and foremost, the Secretary of State will provide a preliminary determination on name availability upon request.¹⁸ This tool can be used to determine, at an early stage in the entity formation process, whether the entity should be formed under a different name. Note, however, that this determination is not final.¹⁹ A final determination can only be made once the filing is reviewed by the Secretary of State.²⁰

Second, names can be reserved to prevent another entity from taking them.²¹ By default, reservations last for 120 days.²² Name reservations can also be extended upon filing a form with the Secretary of State.²³ Additionally, there is no limitation on the number of times that an individual can reserve an entity name.²⁴ Names cannot be reserved if they are unavailable for registration under the applicable standard.²⁵

D. Texas updated its name availability standard.

Texas's name availability standard has changed. Before June 1, 2018, Texas's standard provided as follows:

Section 5.053. IDENTICAL AND DECEPTIVELY
SIMILAR NAMES PROHIBITED.

¹⁸Texas Secretary of State, *Name Filings FAQs*, www.sos.state.tx.us/corp/namefilingsfaqs.shtml (last visited Sept. 15, 2018).

¹⁹*Id.*

²⁰*Id.*

²¹*Id.*; TEX. BUS. ORGS. CODE ANN. § 5.101–.106 (West 2015 & Supp. 2018).

²²Texas Secretary of State, *Trademarks FAQs*, <http://www.sos.state.tx.us/corp/tradefaq.html> (last visited Sept. 15, 2018).

²³*Id.*

²⁴*Id.*

²⁵Act of May 13, 2003, 78th Leg., R.S., ch. 182, 2003 Tex. Gen. Laws 340–41 (amended 2017) (current version at BUS. ORGS. § 5.102). This requirement has been carried over into the amended statute, as well, and is governed by the new standard. *See* BUS. ORGS. § 5.102.

(a) A filing entity may not have a name, and a foreign filing entity may not register to transact business in this state 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) a name that is reserved under Subchapter C; or
- (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.²⁶

Governor Greg Abbott signed H.B. 2856 into law on June 9, 2017.²⁷ H.B. 2856 amends, among other provisions, section 5.053 of the Code to provide the following:

Section 5.053. DISTINGUISHABLE NAMES REQUIRED.

(a) The name of a filing entity or the name under which a foreign filing entity registers to transact business in this state must be *distinguishable in the records of the secretary of state* from

- (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;²⁸

²⁶ Act of May 13, 2003, 78th Leg., R.S., ch. 182, 2003 Tex. Gen. Laws 338 (amended 2017) (current version at BUS. ORGS. § 5.053).

²⁷ H.J. of Tex. 85th Leg., R.S. 6060, 6064 (2017).

²⁸ While this article does not discuss fictitious names in depth, it is noteworthy that a "fictitious name" refers to an assumed name that a foreign filing entity uses in Texas because the name in the entity's certificate of formation is not available for use. This new term's definition is included in

2018]

AN ENTITY BY ANY OTHER NAME

949

- (4) a name that is reserved under Subchapter C; or
- (5) 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 name.²⁹

The new standard, which was adopted for business efficiency purposes, became effective on June 1, 2018.³⁰ The Texas Legislature allowed for this interim period to give the Secretary of State time to draft, propose, and approve new rules defining what “distinguishable” means.³¹ The Secretary of State proposed new rules in early April, and those rules were adopted with minor changes in late May.³²

II. THE OLD RULE IN TEXAS: THE DECEPTIVELY SIMILAR STANDARD

Prior to June 1, 2018, Texas used the deceptively similar standard.³³ This standard was codified, until recently amended, in section 5.053 of the Code.³⁴ This standard has two purposes: (1) it ensures that entity names are distinguishable and (2) it aims to prevent deception and unfair competition.³⁵

Section 1.002 of the amended statute. BUS. ORGS. § 1.002(21-a); Tex. H.B. 2856, 85th Leg., R.S. (2017).

²⁹BUS. ORGS. § 5.053; Tex. H.B. 2856, 85th Leg., R.S. (2017).

³⁰See House Comm. on Bus. and Indus., Bill Analysis, Tex. H.B. 2856, 85th Leg., R.S. (2017) (citing uniformity, facilitating the formation of new business entities, and expediting registration of out-of-state entities to transact business in Texas as reasons for the change); BUS. ORGS. § 5.053.

³¹See Carmen I. Flores, UPDATE FROM THE OFFICE OF THE SECRETARY OF STATE 46 (2017).

³²43 Tex. Reg. 2077–82 (2018), adopted by 43 Tex. Reg. 3341–44 (2018) (codified as an amendment to 1 TEX. ADMIN. CODE §§ 79.30–79.46).

³³BUS. ORGS. § 5.053; Act of May 13, 2003, 78th Leg., R.S., ch. 182, 2003 Tex. Gen. Laws 338 (amended 2017) (current version at BUS. ORGS. § 5.053).

³⁴Act of May 13, 2003, 78th Leg., R.S., ch. 182, 2003 Tex. Gen. Laws 338 (amended 2017) (current version at BUS. ORGS. § 5.053).

³⁵Palmiter, *supra* note 16; see also Bull & Bear Club, Inc. v. San Antonio Bull & Bear Club, 424 S.W.2d 489, 491 (Tex. Civ. App.—San Antonio 1968, no writ.) (acknowledging this second policy purpose when affirming the trial court's determination that “the public will not be confused or misled by the names” of the corporations).

Texas case law applying name availability standards is notably sparse. This is likely due to the expensive cost of litigating compared to the relatively negligible cost of filing a certificate of formation. For example, the filing fee for a for-profit corporation is only \$300.³⁶ In what few cases that exist on the subject, the courts tend to defer to the Secretary of State's determination.³⁷ For example, in *Bull and Bear Club, Inc. v. San Antonio Bull and Bear Club*, the defendant originally sought to form a nonprofit corporation under the name 'Bull and Bear Club.'³⁸ The Secretary of State informed the defendant that the name was not available.³⁹ The defendant then used the name 'San Antonio Bull and Bear Club,' which the Secretary of State approved.⁴⁰ The plaintiff sued to enjoin the defendant from using the name.⁴¹ The trial court, when holding in the defendant's favor, acknowledged the significance of the Secretary of State's approval of the defendant entity's name.⁴²

Case law confirms that the Secretary of State has the authority and discretion to determine how to implement the standard provided in section 5.053.⁴³ Texas courts allow this discretion because the old statute explicitly referred to the Secretary of State's role in applying the standard.⁴⁴ This level of discretion is not provided to the secretaries of state in all states,

³⁶ See OFFICE OF THE TEXAS SECRETARY OF STATE, Form 201 at 3, www.sos.state.tx.us/corp/forms/201_boc.pdf (last visited Sept. 15, 2018).

³⁷ See, e.g., *Bull & Bear Club, Inc.*, 424 S.W.2d at 491 (affirming judgment in support of the Secretary's determination that a name was permissible); *Steakley v. Braden*, 322 S.W.2d 363, 366 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e) (reversing judgment inconsistent with the Secretary's determination that a name was impermissible).

³⁸ 424 S.W.2d at 490.

³⁹ *Id.*

⁴⁰ *Id.* at 491.

⁴¹ *Id.* at 490.

⁴² *Id.* at 491 (“[T]he Secretary of State by issuing the charter conclusively found that . . . the names were not similar . . .”). The court of appeals affirmed this judgment. *Id.* at 492.

⁴³ See *Ergon, Inc. v. Dean*, 649 S.W.2d 772, 774 (Tex. App.—Austin 1983, no writ) (noting that the Secretary of State creates the rules administering the statute).

⁴⁴ See Act of May 13, 2003, 78th Leg., R.S., ch. 182, 2003 Tex. Gen. Laws 338 (amended 2017) (current version at TEX. BUS. ORGS. CODE ANN. § 5.053 (West 2015 & Supp. 2018)) (“A filing entity may not have a name, and a foreign filing entity may not register to transact business in this state under a name, that is the same as, or that *the secretary of state determines to be deceptively similar or similar . . .*”) (emphasis added). The current version of the statute also refers, though not as explicitly, to the Secretary of State's role. See BUS. ORGS. § 5.053 (“The name . . . must be distinguishable *in the records of the secretary of state . . .*”) (emphasis added).

however.⁴⁵ For example, Ohio's Secretary of State's duties in applying name availability standards are mandatory and ministerial rather than discretionary.⁴⁶

Given the absence of case law, the real heart of the deceptively similar standard used to be in the Texas Administrative Code.⁴⁷ According to the now-repealed regulations, there were three categories of name similarity: (1) same; (2) deceptively similar; and (3) similar requiring letter of consent.⁴⁸

The first category of names was the simplest. Names were the same if a comparison of the names revealed no difference.⁴⁹ For example, "ABC Corp." and "ABC Corp." were the same.

The second category of names was significantly more complex. Names were deceptively similar if there was a difference between the new and existing names, but the deceptively similar name was likely to be confused with the existing entity.⁵⁰ Names that were the same or deceptively similar were not acceptable and would not be filed by the Secretary of State, even if the existing entity consented.⁵¹ Names were deceptively similar if there were no differences other than (1) the entity designator;⁵² (2) articles, prepositions, or conjunctions;⁵³ (3) periods and spaces that did not make the names readily distinguishable;⁵⁴ (4) the presence or absence of letters that did not alter the names sufficiently to make them readily distinguishable;⁵⁵ (5) words that were phonetic equivalents;⁵⁶ or (6) a different abbreviation for the same

⁴⁵ See, e.g., *Results, Inc. v. Sec'y of State, Corp. Dep't*, 368 N.E.2d 339, 341 (Ohio Ct. Cl. 1977).

⁴⁶ *Id.*

⁴⁷ 1 TEX. ADMIN. CODE §§ 79.30–.54 (2018) (Office of the Sec'y of State), *repealed by* 43 Tex. Reg. 3341, 3341 (2018).

⁴⁸ *Id.* § 79.35.

⁴⁹ *Id.* § 79.36.

⁵⁰ *Id.* § 79.37.

⁵¹ *Id.* § 79.38.

⁵² *Id.* § 79.39(1) (*E.g.*, Sampson, Inc. is deceptively similar to Sampson Corporation.).

⁵³ *Id.* § 79.39(2) (*E.g.*, The Slaughter Co. is deceptively similar to Slaughter Co.).

⁵⁴ *Id.* § 79.39(3) (*E.g.*, Fair View Rest Home, Inc., is deceptively similar to Fairview Rest Home, Inc.).

⁵⁵ *Id.* § 79.39(4) (*E.g.*, Exxon is deceptively similar to Exxon.).

⁵⁶ *Id.* § 79.39(5) (*E.g.*, Chemtech Corporation is deceptively similar to Kemtek Incorporated.).

term.⁵⁷ The regulations provided many helpful examples to understand and navigate these rules.⁵⁸

The third category of names was likewise complex. An entity had a similar name when a comparison revealed similarities which could mislead others to the identity or affiliation of the entity, but not to the extent that they were the same or deceptively similar.⁵⁹ Like deceptively similar names, the regulations explained and provided examples for names that were similar requiring consent.⁶⁰ Names that were similar were permissible if the filer obtained a letter of consent from the existing entity.⁶¹

Names were similar and required a letter of consent if the proposed entity's only difference with an existing entity was (1) a geographical designation at the end of the name;⁶² (2) a numerical expression which implied that the proposed entity was an affiliate of or in a series with the existing entity;⁶³ (3) an inversion of the name's words;⁶⁴ (4) the use of the term "companies";⁶⁵ (5) an Internet locator designation at the beginning or end of the name;⁶⁶ or (6) contractions of words that were derived from the same root word, if there is no other distinguishing word in the name.⁶⁷ A name was also similar and required consent when the first two or more words of a proposed entity name were the same as, or deceptively similar to, the first two words of an existing entity and were not frequently used in

⁵⁷ *Id.* § 79.39(6) (*E.g.*, The Commons Northwest, Inc. is deceptively similar to The Commons NW, Company.).

⁵⁸ *See id.* § 79.39.

⁵⁹ *Id.* § 79.40.

⁶⁰ *Id.* § 79.43.

⁶¹ *Id.* § 79.41.

⁶² *Id.* § 79.43(1)(A)-(B) (*E.g.*, Bull and Bear Club of San Antonio would need a letter of consent from Bull and Bear Club, but San Antonio Bull and Bear Club would not need a letter of consent from Bull and Bear Club.).

⁶³ *Id.* § 79.43(3)(A) (*E.g.*, United IV would need a letter of consent from United Company.).

⁶⁴ *Id.* § 79.43(5)(A) (*E.g.*, Energy Ventures, Inc., would need a letter of consent from Ventures Energy Corp.).

⁶⁵ *Id.* § 79.43(6) (*E.g.*, Satterwhite Companies Ltd. would need a letter of consent from Satterwhite Corporation.).

⁶⁶ *Id.* § 79.43(7)(A) (*E.g.*, BusinessWorks.com, Inc. would need a letter of consent from Business Works, L.P.).

⁶⁷ *Id.* § 79.43(8)(A) (*E.g.*, Magic Show, Inc. would need a letter of consent from Magical Show, Ltd.).

combination.⁶⁸ Lastly, a name was not similar requiring consent when the existing entity's name had only one significant word and the proposed entity's name has the same word followed by another significant word.⁶⁹ The regulations provided many examples to help navigate these rules as well.⁷⁰

III. DISTINGUISHABLE UPON THE RECORDS: HOW HAVE OTHER STATES DONE IT?

Currently, over 40 states have adopted some variant of the “distinguishable upon the records” standard that Texas began using June 1, 2018.⁷¹ This standard is more permissive than the “deceptively similar” standard.⁷² Unlike the deceptively similar standard, it is only concerned with ensuring that entity names are distinguishable.⁷³ It does not have the additional policy goal of preventing unfair competition.⁷⁴

To understand how Texas is now applying the standard, this article first examines how the distinguishable upon the records standard has been applied in three different circumstances. First, it examines the Model Business Corporation Act (“MBCA”) due to its widespread acceptance; second, it examines Delaware because of its well-known and developed corporate law and its influential role on the MBCA; third, it examines Colorado because of the state's unusually permissive application of the standard.⁷⁵

⁶⁸ *Id.* § 79.43(2)(B) (*E.g.*, Sunset Oil Co. would need a letter of consent from Sunset Oil and Gas, Inc.).

⁶⁹ *Id.* § 79.43(4)(A) (*E.g.*, United Sales would not need a letter of consent from United Company.).

⁷⁰ *Id.* § 79.43.

⁷¹ See Daryl B. Robertson, *2017 Texas Legislative Update on Amendments to Texas Business Organizations Code*, reprinted in UNIVERSITY OF TEXAS SCHOOL OF LAW CONTINUING LEGAL EDUCATION, July 13–14, 2017, at 4 (indicating that 43 states require that entity names be distinguishable); see also LexisNexis 50-State Survey on Corporation Names, Apr. 2017 (indicating that 41 states require that entity names be distinguishable).

⁷² See MODEL BUS. CORP. ACT § 4.01 cmt. 2 (AM. BAR ASS'N 2013) (stating that the “distinguishable upon the records” standard “should only ensure that each corporation has a sufficiently distinctive name” rather than the goals of unfair competition or antifraud statutes).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *Id.* hist. n.; Colorado Secretary of State, *Entity Names*, Business FAQs, www.sos.state.co.us/pubs/business/FAQs/entityNames.html.

A. The Model Business Corporation Act's approach

The MBCA adopted the distinguishable upon the records standard in 1984.⁷⁶ When it did so, the MBCA abandoned the deceptively similar standard, which it had used since 1960.⁷⁷ The MBCA changed standards to abandon the policy goals of the old standard, reasoning that different laws—not name availability standards—should accomplish these policy goals.⁷⁸ According to the MBCA, the goals of the distinguishable upon the records standard are to (1) prevent confusion within the secretary of state's office and (2) permit accuracy in naming corporate defendants in litigation.⁷⁹ The MBCA characterizes this policy shift as pragmatic because secretaries of state do not generally police the unfair competitive use of names, nor do they usually have the resources to do so.⁸⁰

According to the Official Comment to the MBCA, the rule itself is simple: entity designators, minor punctuation differences, substitutions of a numeral for a word, and capitalization are all insufficient to distinguish a name.⁸¹

B. Delaware's approach

Delaware also applies the distinguishable upon the records standard.⁸² In fact, Delaware's approach influenced the MBCA.⁸³ Its statute requires that the name of a new corporation "shall be such as to distinguish it upon the records . . . of the [secretary of state]."⁸⁴ In interpreting this standard, Delaware courts have concluded that it requires only distinguishability.⁸⁵ Like Texas, determining whether a name meets the statutory requirements

⁷⁶MODEL BUS. CORP. ACT § 4.01 hist. n.

⁷⁷*Id.*

⁷⁸*Id.* cmt. 2.

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹*Id.*

⁸²DEL. CODE. ANN. tit. 8, § 102(a)(1) (2017).

⁸³MODEL BUS. CORP. ACT § 4.01 cmt. 2.

⁸⁴DEL. CODE. ANN. tit. 8, § 102(a)(1).

⁸⁵*See, e.g.,* *Trans-Americas Airlines, Inc. v. Kenton*, 491 A.2d 1139, 1142 (Del. 1985) ("The plaintiff argues that [DEL. CODE. ANN. tit. 8, § 102(a)(1)] should be construed to prevent the registration of corporate names, which are . . . 'confusingly similar.' We do not agree. . . . [T]he only statutory restriction in the choice of a name is that it must be distinguishable on the records in the office of the Secretary of State.").

2018]

AN ENTITY BY ANY OTHER NAME

955

has been left to the Secretary of State's discretion.⁸⁶ Unlike Texas, however, the rules governing the standard's application are not published anywhere.⁸⁷

As a general rule, practitioners in Delaware change at least one word to distinguish a name.⁸⁸ According to the Secretary of State's office, however, a name can be distinguished with even less.⁸⁹ Names must be different by one letter or number to be distinguishable.⁹⁰ Including different entity designators or adding articles, such as "a" or "the," are not sufficient to distinguish names.⁹¹

C. Colorado's approach

Colorado, like the MBCA and Delaware, also adheres to the distinguishable upon the records standard.⁹² Colorado's application, however, is even more permissive than other states applying this standard.⁹³ Unlike the MBCA and Delaware standards, Colorado allows a changed entity designator to distinguish a name.⁹⁴ Similarly, articles such as "the" and "a" are sufficient to distinguish a name.⁹⁵ However, capitalization and punctuation changes are not sufficient to distinguish a name.⁹⁶ Colorado's unusually permissive approach applies the distinguishable upon the records standard almost literally.

⁸⁶ See FREDERICK H. ALEXANDER, *THE DELAWARE CORPORATION: LEGAL ASPECTS OF ORGANIZATION AND OPERATION A-4* (5th ed., 2016) (citing *Standard Oilshares, Inc. v. Standard Oil Grp., Inc.* 150 A. 174 (Del. Ch. 1930)); see also *Kenton*, 491 A.2d, at 1142 ("[U]nder the plain meaning of § 102(a)(1), the Secretary of State has one statutory duty: to ensure, in the exercise of his discretion, that a new corporate name can be distinguished on the records of the Division of Corporations from those names previously registered.").

⁸⁷ Telephone Interview with Div. of Corps., Office of Sec'y of State of Del. (Nov. 3, 2017).

⁸⁸ Interview with Div. of Corps., *supra* note 87.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² COLO. REV. STAT. § 7-90-601 (2018).

⁹³ See Colorado Secretary of State, *Entity Names, Business FAQs*, www.sos.state.co.us/pubs/business/FAQs/entityNames.html.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

IV. HOW WILL TEXAS APPLY THE STANDARD?

The Secretary of State proposed repealing the old rules and adopting new rules on April 6, 2018.⁹⁷ On May 25, 2018, the Secretary of State repealed the old rules and adopted new rules, with some minor changes between the proposed and adopted rules.⁹⁸ The substance of some of the existing rules was carried over.⁹⁹ For example, the substance of sections 79.31–.34 and 79.48–.49 of the Texas Administrative Code appears in the new rules.¹⁰⁰ Consistent with the statute, the new rules became effective on June 1, 2018.¹⁰¹

These rules that carried over (1) describe the type of characters of print that are acceptable in names;¹⁰² (2) prohibit false implications of government affiliation or unlawful activity;¹⁰³ (3) prohibit grossly offensive names;¹⁰⁴ (4) describe words necessary for organization;¹⁰⁵ (5) list matters not considered by the Secretary of State when determining name availability;¹⁰⁶ and (6) indicate that a final determination on name availability is made after the document is submitted for filing.¹⁰⁷

⁹⁷43 Tex. Reg. 2077, 2077–82 (2018), *adopted by* 43 Tex. Reg. 3341–44 (2018) (codified as an amendment to 1 TEX. ADMIN. CODE §§ 79.30–.46).

⁹⁸43 Tex. Reg. 3341, 3341–44 (2018) (codified as an amendment to 1 TEX. ADMIN. CODE §§ 79.30–.46). The Texas Register notes the relatively minor differences between the proposed and adopted rules. 43 Tex. Reg. at 3341.

⁹⁹43 Tex. Reg. at 3341.

¹⁰⁰*See id.*

¹⁰¹43 Tex. Reg. 3341, 3344 (2018) (to be codified at 1 TEX. ADMIN. CODE § 79.30-79.46) (Office of the Sec’y of State).

¹⁰²43 Tex. Reg. 3341, 3341 (2018) (to be codified at 1 TEX. ADMIN. CODE § 79.32) (Office of the Sec’y of State, Characters of Print Acceptable in Names).

¹⁰³*Id.* (to be codified at 1 TEX. ADMIN. CODE § 79.33) (Office of the Sec’y of State, False Implication of Governmental Affiliation; False Implication of Purpose).

¹⁰⁴*Id.* (to be codified at 1 TEX. ADMIN. CODE § 79.36) (Office of the Sec’y of State, Grossly Offensive Name).

¹⁰⁵*Id.* (to be codified at 1 TEX. ADMIN. CODE § 79.37) (Office of the Sec’y of State, Organizational Identifiers) (changing the phrase “words of organization” to “organizational identifiers”). For example, the name of a corporation must contain the word “company,” “corporation,” “incorporated,” or “limited,” or an abbreviation of those words. TEX. BUS. ORGS. CODE ANN. § 5.054 (West 2012).

¹⁰⁶43 Tex. Reg. 3341, 3341 (2018) (to be codified at 1 TEX. ADMIN. CODE § 79.44) (Office of the Sec’y of State, Matters Not Considered).

¹⁰⁷*Id.* (to be codified at 1 TEX. ADMIN. CODE § 79.45) (Office of the Sec’y of State, Final Determination of Name Availability). In other words, preliminary determinations are not binding on the Secretary.

However, Texas's application of the standard is still more complex than the MBCA, Delaware, and Colorado. The amended version of section 5.053 still permits similar names if the filing entity obtains consent.¹⁰⁸ Consistent with that, the Secretary of State defined what makes names distinguishable,¹⁰⁹ the same,¹¹⁰ and permissible with consent.¹¹¹

A proposed name is permissible if it is distinguishable on the records from another entity's name.¹¹² According to the new rules, names are distinguishable on the record if (1) there is a difference of at least one key word;¹¹³ (2) the key words are the same but are in a different order;¹¹⁴ (3) the key words are contractions of key words derived from the same root word;¹¹⁵ (4) the key words are the same but are in a different language;¹¹⁶ (5) the key word or words sound the same but at least one word, on its face, has a

¹⁰⁸BUS. ORGS. § 5.053(b).

¹⁰⁹43 Tex. Reg. 3341, 3343 (2018) (to be codified at 1 TEX. ADMIN. CODE § 79.38) (Office of the Sec'y of State, (2018) (Office of Secretary of State Distinguishable Names).

¹¹⁰*Id.* (to be codified at 1 TEX. ADMIN. CODE § 79.39) (Office of the Sec'y of State, Same Defined).

¹¹¹43 Tex. Reg. 3341, 3343–44 (2018) (to be codified at 1 TEX. ADMIN. CODE § 79.40) (Office of the Sec'y of State, Names that are Available with Consent).

¹¹²BUS. ORGS. § 5.053.

¹¹³43 Tex. Reg. 3341, 3343 (2018) (to be codified at 1 TEX. ADMIN. CODE § 79.38(1)) (Office of the Sec'y of State, Distinguishable Names) (E.g., United is distinguishable from United One, whereas Texas Cowboys is the same as The Texas Cowboys.). Section 79.30 of the new rules defines "key word" as "a word or words that alters the proposed name sufficiently to make it distinguishable in the record," but notes that the term does not include "an article of speech or a conjunction; a preposition, unless the addition, substitution, or omission alters the name sufficiently to make it distinguishable; the word "company" or abbreviation "Co." unless the addition or omission of the word or abbreviation alters the name sufficiently to make it distinguishable; or an organizational identifier which operates as an organizational identifier for the entity or appears after all key words in the name." 43 Tex. Reg. 3341, 3342 (2018) (to be codified at 1 TEX. ADMIN. CODE § 79.30(2)) (Office of the Sec'y of State, Definitions).

¹¹⁴43 Tex. Reg. 3341, 3343 (2018) (to be codified at 1 TEX. ADMIN. CODE § 79.38(2)) (Office of the Sec'y of State, Distinguishable Names) (E.g., Global One is distinguishable from One Global.).

¹¹⁵43 Tex. Reg. 3341, 3343 (2018) (to be codified at 1 TEX. ADMIN. CODE § 79.38(3)) (Office of the Sec'y of State, Distinguishable Names) (E.g., Great Products is distinguishable from Great Productions.).

¹¹⁶*Id.* (to be codified at 1 TEX. ADMIN. CODE § 79.38(4)) (Office of the Sec'y of State, Distinguishable Names) (E.g., Tejas Enterprises is distinguishable from Texas Enterprises whereas El Rodeo is the same as Rodeo or The Rodeo.).

different meaning or connotation;¹¹⁷ and (6) the key word or words are the same except for the addition, substitution, or omission of prepositions which alter the names sufficiently to make them readily distinguishable.¹¹⁸

A proposed name is not permissible if it is the same as another entity's name.¹¹⁹ Names are the same if a comparison between the two names reveals no difference, or the only difference is (1) the use of upper case or lower case, distinctive lettering, font, or typeface, or superscript or subscript letters or numerals;¹²⁰ (2) punctuation marks, accent marks, spaces, or symbols that do not alter the name sufficiently to make it readily distinguishable;¹²¹ (3) articles or conjunctions that do not alter the name sufficiently to make it readily distinguishable;¹²² and (4) letters that do not alter the name sufficiently to make it readily distinguishable.¹²³

Names are available with consent when the only difference between the names is (1) organizational identifiers;¹²⁴ (2) an abbreviation for a word that both names have;¹²⁵ (3) the use of the singular, plural, or possessive version of a word that both names have, unless the difference alters the name

¹¹⁷*Id.* (to be codified at 1 TEX. ADMIN. CODE § 79.38(5)) (Office of the Sec'y of State, Distinguishable Names) (E.g., Capitol Investments is distinguishable from Capital Investments whereas One World is the same as 1 World.).

¹¹⁸*Id.* (to be codified at 1 TEX. ADMIN. CODE § 79.38(6)) (Office of the Sec'y of State, Distinguishable Names) (E.g., Books for People is distinguishable from Books by People whereas Look to the Future is the same as Look toward the Future.).

¹¹⁹TEX. BUS. ORGS. CODE ANN. § 5.053 (West 2012 & Supp. 2018).

¹²⁰43 Tex. Reg. 3341, 3343 (2018) (to be codified at 1 TEX. ADMIN. CODE § 79.39(1)) (Office of the Sec'y of State, Same Defined) (E.g., H2O Supplies is the same as H₂O Supplies.).

¹²¹*Id.* (to be codified at 1 TEX. ADMIN. CODE § 79.39(2)) (Office of the Sec'y of State, Same Defined) (E.g., A.F.G. Consulting is the same as AFG Consulting.).

¹²²*Id.* (to be codified at 1 TEX. ADMIN. CODE § 79.39(3)) (Office of the Sec'y of State, Same Defined) (E.g., The Truck Stop is the same as Truck Stop.). Section 79.43 explicitly limits this provision as it applies to "Alphabet Names." *Id.* § 79.43.

¹²³43 Tex. Reg. 3341, 3343 (2018) (to be codified at 1 TEX. ADMIN. CODE § 79.39(4)) (Office of the Sec'y of State, Same Defined) (E.g., Texas Strong is the same as Texas Strong.).

¹²⁴*Id.* (to be codified at 1 TEX. ADMIN. CODE § 79.40(1)) (Office of the Sec'y of State, Names that are Available with Consent) (E.g., Sampson, Inc. is available with consent from Sampson, PLLC however, ABC, LLC is the same as ABC Limited Liability Company.).

¹²⁵*Id.* (to be codified at 1 TEX. ADMIN. CODE § 79.40(2)) (Office of the Sec'y of State, Names that are Available with Consent) (E.g., Smith Brothers Plumbing is available with consent from Smith Bros. Plumbing.).

sufficiently to make it readily distinguishable,¹²⁶ or (4) the name of a state, when the name already includes a city, unless the difference alters the name sufficiently to make it readily distinguishable.¹²⁷

The new rules also provide an administrative review process when the entity's name requires consent.¹²⁸ If a name is deemed to require consent under the rules, consent may not be waived under any circumstances.¹²⁹ Consent must accompany the document to which it relates.¹³⁰ Generally, this will be the certificate of formation or certificate of amendment.¹³¹ The rules also provide that consent may be implied under certain circumstances.¹³² For example, if one individual files two certificates of formation for two entities at the same time, and the names are sufficiently similar to require consent, consent will be implied.¹³³ If the proposed entity's name is sufficiently similar to the names of two or more already-existing entities, the Secretary of State requires that the filing party obtain consent from the entity that used the name the longest.¹³⁴

The new rules are more relaxed than the previous rules under the deceptively similar standard. Consistent with the purpose of the statute and the rule, the new proposed rules permit more names.¹³⁵ For example, consider the name "ABC Corp." when an already-existing entity has the name "ABC

¹²⁶43 Tex. Reg. 3341, 3344 (2018) (to be codified at 1 TEX. ADMIN. CODE § 79.40(3)) (Office of the Sec'y of State, Names that are Available with Consent) (E.g., On the Banks is available with consent from On the Bank whereas Child's Play is distinguishable from Children's Play.).

¹²⁷*Id.* (to be codified at 1 TEX. ADMIN. CODE § 79.40(4)) (Office of the Sec'y of State, Names that are Available with Consent) (E.g., Resources of Austin, Texas is available with consent from Resources of Austin.).

¹²⁸*Id.* (to be codified at 1 TEX. ADMIN. CODE § 79.41) (Office of the Sec'y of State, Administrative Review of Documents with Names Requiring Consent).

¹²⁹*Id.*

¹³⁰*Id.*

¹³¹A domestic entity's name is initially decided in the certificate of formation, but the Secretary permits name changes if the entity's governing body changes its name by a certificate of amendment. For example, a corporation's board of directors may adopt a resolution to change the name, after which the shareholders would vote on the amendment. OFFICE OF THE TEXAS SECRETARY OF STATE, Form 424 at 1, https://www.sos.state.tx.us/corp/forms/424_boc.pdf.

¹³²43 Tex. Reg. 3341, 3344 (2018) (to be codified at 1 TEX. ADMIN. CODE § 79.41) (Office of the Sec'y of State, Administrative Review of Documents with Names Requiring Consent).

¹³³*Id.*

¹³⁴*Id.* (to be codified at 1 TEX. ADMIN. CODE § 79.41(d)) (Office of the Sec'y of State, Administrative Review of Documents with Names Requiring Consent).

¹³⁵*See* House Comm. on Bus. and Indus., Bill Analysis, Tex. H.B. 2856, 85th Leg., R.S. (2017); *see also* MODEL BUS. CORP. ACT § 4.01 cmt. 2 (AM. BAR ASS'N 2013).

LLC.” Under the old rules, one could not file an entity with the name “ABC Corp.” under these circumstances. ABC Corp. would be deemed deceptively similar to ABC LLC.¹³⁶ Under the new rules, however, one may acquire consent to use the name “ABC Corp.”¹³⁷

Under the old standard, many Texas entities could not specify their preferred name as their legal name in the certificate of formation. These Texas entities resorted to forming under an alternative name and using their preferred name as an assumed name.¹³⁸ Similarly, many foreign entities were precluded from registering to transact business in Texas under their legal name and were required to adopt a fictitious name for purposes of registration to transact business in Texas.¹³⁹ Given that the new standard is more relaxed, domestic and foreign entities that were unable to form or register under their preferred names may now find that their preferred names are available. These entities could amend their relevant filings to use their preferred legal names.¹⁴⁰

Furthermore, even though the deceptively similar standard did not adequately protect businesses from trademark and unfair competition law violations, the relaxed standard will permit the use of more potentially illegal names.¹⁴¹ Therefore, businesses should be vigilant and check the Secretary of State’s registry occasionally to ensure that newly-formed or recently-amended entities do not infringe upon their rights.¹⁴²

¹³⁶ See 1 TEX. ADMIN. CODE ANN. § 79.39(1) (2018) (Office of the Sec’y of State, Deceptively Similar Name), *repealed by* 43 Tex. Reg. 3341, 3341 (2018).

¹³⁷ See 43 Tex. Reg. 3341, 3343–44 (to be codified as an amendment to 1 TEX. ADMIN. CODE § 79.40) (Office of the Sec’y of State, Names that are Available with Consent).

¹³⁸ See *supra* text accompanying note 1.

¹³⁹ See *supra* text accompanying note 1.

¹⁴⁰ Domestic entities can amend their certificates of formation to change their legal names by filing a form with the Secretary of State. OFFICE OF THE TEXAS SECRETARY OF STATE, Form 424, https://www.sos.state.tx.us/corp/forms/424_boc.pdf. Domestic entities can file this form online. Texas Secretary of State, *Name Filings FAQs*, <https://www.sos.state.tx.us/corp/namefilingsfaqs.shtml> (last visited Oct. 19, 2018). Foreign entities may likewise amend their registrations to change their names by filing a form with the Secretary of State. OFFICE OF THE TEXAS SECRETARY OF STATE, Form 412, https://www.sos.state.tx.us/corp/forms/412_boc.pdf. This process can also be completed online. Texas Secretary of State, *Foreign or Out-of-State Entities FAQs*, <https://www.sos.state.tx.us/corp/foreignfaqs.shtml> (last visited Oct. 19, 2018).

¹⁴¹ See *supra* Section I(b).

¹⁴² See Texas Secretary of State, *SOSDirect*, <https://www.sos.state.tx.us/corp/sosda/index.shtml> (last visited Oct. 19, 2018).

2018]

AN ENTITY BY ANY OTHER NAME

961

The purpose of the rule change was to facilitate the formation of new business entities and expedite the registration of out-of-state business entities to transact business in Texas.¹⁴³ To some extent, the new proposed rules do this because that the standards are easier to comply with. However, Texas's rules are still complicated due to the unique "consent" language in section 5.053 of the Code.¹⁴⁴ While the change ensures that filing is easier, the new standard is just as complicated and difficult to navigate, especially for those unfamiliar with the rules. Therefore, while the new rules will ensure that more domestic and foreign entities can file in Texas, uncertainty about name availability will continue to be an issue. For that reason, attorneys should make use of the tools described in Section I(c), including seeking a preliminary determination by the Secretary of State about a particular name's availability.¹⁴⁵

V. CONCLUSION

On June 1, 2018, Texas's name availability standard changed.¹⁴⁶ The Secretary of State began applying its own, unique version of the distinguishable upon the records standard. The Secretary of State carried over some of the old regulations but proposed and adopted many new ones. While the new standard is more permissive than the current standard, the unique consent requirements in section 5.053 will make this standard more complicated in Texas than it is in other states.

¹⁴³House Comm. on Bus. and Indus., Bill Analysis, Tex. H.B. 2856, 85th Leg., R.S. (2017).

¹⁴⁴See Tex. BUS. ORGS. CODE ANN. § 5.053(b) (West 2012 & Supp. 2018).

¹⁴⁵See *supra* Section II(c).

¹⁴⁶Act of May 24, 2017, 85th Leg., R.S., ch. 503, § 3, 2017 Tex. Gen. Laws 1333 (current version at BUS. ORGS. § 5.053).