

- SUBJECT:** Changing the standard for approving names of certain businesses
- COMMITTEE:** Business and Industry — committee substitute recommended
- VOTE:** 5 ayes — Oliveira, Simmons, Fletcher, Romero, Villalba
2 nays — Collier, Rinaldi
- WITNESSES:** For — Krista Ali, Capitol Services, Inc.; Lori Ann Fox; (*Registered, but did not testify*: Yvette Cleveland, Capitol Services, Inc.)
Against — None
On — Mike Powell and Briana Godbey, Secretary of State
- BACKGROUND:** Business Organizations Code, ch. 5 governs the names of entities. Sec. 5.053 prohibits a filing entity or foreign filing entity from having a name that is the same as, or in the secretary of state’s judgment, is deceptively similar to:
- the name of an existing filing entity or foreign filing entity;
 - a name reserved with the secretary of state under chapter 5, subchapter C; or
 - a name registered with the secretary of state under chapter 5, subchapter D.
- This prohibition does not apply if the original entity or person who registered or reserved the name gives written consent for the use of the similar name.
- DIGEST:** The bill would require that a name under which a filing entity or foreign filing entity registered to transact business in Texas be distinguishable in the records of the secretary of state from:
- the name of an existing filing entity or foreign filing entity;

- a name reserved under chapter 5, subchapter C or registered under chapter 5, subchapter D; or
- an assumed name under which a foreign filing entity was registered to transact business in Texas because the foreign entity's name was not available.

This requirement would not apply if:

- the original entity or person who registered or reserved the name gave written consent for its use and filed an instrument with the secretary of state that changed the entity's name or withdrew the name's reservation or registration; or
- the filing entity or foreign filing entity delivered to the secretary of state a certified copy of the final judgment of a court establishing the right of the filing entity or foreign filing entity to have the name.

CSHB 2753 would amend provisions regarding the reservation and registration of names in subchapters C and D of Business Organizations Code, ch. 5 to conform to these changes.

The bill would take effect June 1, 2016.

SUPPORTERS
SAY:

CSHB 2753 would make Texas more business friendly, while simplifying the name-filing process for entities and helping to prevent fraud. The bill also would make Texas law on entity names consistent with that of other states.

Texas's current "similar or deceptively similar" standard makes it difficult for businesses that operate out of state to file in Texas because it is more stringent than the "distinguishable on the record" standard used by most other states. Moreover, the filing process in Texas is more expensive than in other states because of the difficult and confusing standard in current law. CSHB 2753 would make the process for businesses to pick a name more uniform with requirements in other states.

The entity name standard Texas currently uses is complicated and difficult to implement. The most common reason for the secretary of state to reject a filing is because it fails the name standard. This can cause frustration for businesses because it is unclear which names are acceptable. Training staff in the office of the secretary on the standard also is difficult, and the law's complexity results in inconsistent decisions. This bill would modernize and simplify the standard to minimize confusion both in the secretary of state's office and among filing entities. While some say this bill would attempt to solve a problem that does not exist, the proof of the issue is in the billable hours of attorneys hired to file papers with the secretary of state on behalf of business entities.

CSHB 2753 would prevent fraud by requiring an entity or person that consented to another's use of an indistinguishable name to change its own name. Under current law, only written consent is required, which can be easy to forge. The bill also would protect a small business from being strong-armed into consenting to a name that was indistinguishable from the name of a larger company, particularly when the small business might not understand the ramifications of consenting. By requiring the consenting business to change its name, the bill would ensure that the business understood that providing consent could result in a significant change.

Requiring consenting businesses to change their names would not increase conflict between businesses. This requirement is necessary because the new standard would be more open to accepting names that were similar to existing names. If businesses were allowed to keep their own names while allowing another entity to use a similar name, it would create confusion in the secretary of state's office. The requirement also would be important for business acquisitions in which an entity was created to take over another entity. The existing entity could consent to the use of its original name and then change its name, allowing the new entity to carry the existing name along with it.

CSHB 2753 would not increase litigation among businesses because the changes primarily would be administrative, helping the secretary of state

approve or reject business entity filings. Specifically, it would not increase trademark litigation because, as the secretary states in letters confirming entity formation, the issuance of a certificate of filing does not authorize the use of a name in Texas in violation of the rights of another under federal, Texas, or common law. The fundamental rights of businesses would not be changed by this bill.

OPPONENTS
SAY:

CSHB 2753 would not be an improvement on the current standard in Texas and could invite increased trademark conflicts.

The current standard in Texas protects businesses from new entities acquiring names that are similar to their own. The existing exception for businesses that provide written consent to authorize another entity to have a similar name allows businesses to amicably resolve such conflicts. There is not a problem with written consent letters being forged, and the burdensome requirement for a business to change its name could result in businesses declining to give consent, leading to conflict among entities.

The current standard in Texas has the ancillary effect of decreasing trademark litigation because it provides a first-level review for names that might be deceptively similar. Adopting a less stringent standard for entity names might make it easier for businesses to file in Texas, but it also would allow businesses to have names that were similar to one another. Existing businesses might worry that a new entity being granted a similar name would confuse its customers or would otherwise infringe upon its trademark rights, which could prompt lawsuits to settle the issue.