

**2019 HOUSE INDUSTRY, BUSINESS AND LABOR**

**HB 1127**

# 2019 HOUSE STANDING COMMITTEE MINUTES

## Industry, Business and Labor Committee Peace Garden Room, State Capitol

HB 1127  
1/22/2019  
31246

- Subcommittee  
 Conference Committee

Committee Clerk: Ellen LeTang

### Explanation or reason for introduction of bill/resolution:

Names of cooperatives, corporations, limited liability companies, domestic & foreign real estate investment trusts, limited partnerships, fictitious partnerships & limited liability partnerships.

### Minutes:

Attachment 1, 2, 3

**Chairman Keiser:** Opens the hearing on HB 1127.

**Rep Laning:** Attachment 1. Introduces HB 1127.

**Barb Siegel~Director of Business Service of Secretary of State:** Attachment 2.

**17:00**

**Rep P Anderson:** Do you have any idea of the effective date?

**Barb Siegel:** I would like to put it on the front burner, in the fall or early winter.

**Rep P Anderson:** Is there any recourse for that particular business with similar names other than the consent?

**Barb Siegel:** A court order establishing prior use or than that consent but really no.

**Rep Schauer:** How does both standards work & look?

**Barba Siegel:** Under deceptively similar, we would have said that's a conflict. Under most states distinguishable on the record, the language that would lead to it, not a conflict or duplicate.

**Rep D Ruby:** Do you have any companies that qualify under the current standard that would not qualify under the new standard & if so, what would you do with that?

**Barb Siegel:** We would not take any action to undo any existing names & grandfathered in. If the committee would want to do anything about it, we would not be opposed to it.

**Rep Louser:** Can you explain the technology to speed up the process?

**Barb Siegel:** In the public wizard, it's able to warn the person that they can't have that name. However, because we have deceptively similar standards, our vendors had to try & be creative but couldn't help us in anything but soft edit. Under a distinguishable record standard, those kinds of things could be programmed in.

**Rep Richter:** Which method provides the most protection to current businesses.

**Barb Siegel:** It depends on the meaning of protection that often businesses think they have with their name. Before you select a name you should get an attorney that knows trademark rights. A state doesn't look at the national trademark industry.

**Rep P Anderson:** Should we put the grandfathered name in the bill or is that rule making?

**Barb Siegel:** Whatever you think is appropriate. I don't think it's necessary because the bill talks about registering names. So any name that falls under that would naturally fall into that.

**Rep P Anderson:** So you think that the hundreds of thousands would fall under that, there isn't going to be an issue?

**Barb Siegel:** Certainly not, businesses don't go out & spend a lot of money because they want to make sure the name is right.

**Rep M Nelson:** You go to rule making, it will take a year. You will have to upgrade. Do you have money to do that?

**Barb Siegel:** We already have that in our budget. We are not establishing any new entity type filing. We feel we didn't need a fiscal note.

**28:00**

**Chairman Keiser:** Your new system is going to work better in our state with protection?

**Barb Siegel:** There will be more certainty & quicker processing.

**Chairman Keiser:** I understand it's going to be quicker, will it protect our names better?

**Barb Siegel:** There won't be any change in the protection.

**Chairman Keiser:** Can you share with the committee the problem we've have with ongoing discussion.

**Barb Siegel:** Takes about the situation involving the name CREEDENCE Energy Services, LLC versus CREEDENCE Oil Field.

**33:30**

**Rep Schauer:** My concern that there is less protection. Is there a chance of less protection under this new standard for businesses today?

**Barb Siegel:** Businesses don't have the protection they often think they have.

**Al Jaegar~Secretary of State:** We are well aware of that situation & that's one of the challenges that we have with the deceptively similar standard. We have pages & pages of policy that we have to make judgment calls. Once it's on record, it's on record. As long as the keeps registering, they will have no problem.

We are in the first go around of companies renewing their licenses on line. That is the processes underway. You are going to be able to do virtually everything on line which will speeds up business registration.

**Rep Richter:** If you are looking at two names & they are very close. Is there any way that you notify the company that already has the existing name, that somebody is putting a similar name to their company?

**Al Jaeger:** No, we don't.

**Chairman Keiser:** The CREEDENCE case outcome is improper. What if we give you the authority to say to the party that came in second, you're too close?

**Al Jaeger:** We made a decision under deceptively similar standard & on record, they can go in & do the same exact thing. In our best judgment, we only looked at the words.

**Chairman Keiser:** You have a low error rate, but when it happens, it's a huge error.

**Barb Siegel:** The issues with the protest is that the second business, they can't start their business.

**Chairman Keiser:** They can start it but they have to change their name.

**Megan Carmichael:** Presenting testimony on behalf of the State Bar Association of ND & William Guy III: Attachment 3.

**48:00**

**Chairman Keiser:** Al Jaeger, have you seen these amendments?

**Al Jaeger:** Yes, we have & agree with all of them except the one she is referring to should be changed.

**Barb Siegel:** Page 8, line1 & page 28, line 28, the amount paid in the two chapters. By replacing the struck out "with" will make it inconsistent with every other.

**Chairman Keiser:** Anyone else here to testify HB 1127 in support, opposition, neutral position? Closes the hearing. What are the wishes of the committee?

**Vice Chairman Lefor:** Moves the amendment 19.0695.01001.

**Rep Schauer:** Second.

**Voice vote ~ motion carried.**

**Chairman Keiser:** Further discussion?

**Vice Chairman Lefor:** Moves a Do Pass as Amended.

**Rep Schauer:** Second.

**Roll call was taken for a Do Pass as Amended with 11 yes, 0 no, 3 absent & Rep Louser is the carrier.**

January 23, 2019

DO 1/23/19

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1127

Page 2, line 30, after "the" insert "secretary of state's"

Page 4, line 28, after "the" insert "secretary of state's"

Page 5, line 2, after "the" insert "secretary of state's"

Page 8, line 9, after "the" insert "secretary of state's"

Page 8, line 13, after "the" insert "secretary of state's"

Page 11, line 19, after "the" insert "secretary of state's"

Page 11, line 23, after "the" insert "secretary of state's"

Page 14, line 6, after "the" insert "secretary of state's"

Page 15, line 30, after "the" insert "secretary of state's"

Page 16, line 4, after "the" insert "secretary of state's"

Page 19, line 12, after "the" insert "secretary of state's"

Page 20, line 18, after "the" insert "secretary of state's"

Page 20, line 21, after "the" insert "secretary of state's"

Page 23, line 11, after "the" insert "secretary of state's"

Page 23, line 14, after "the" insert "secretary of state's"

Page 26, line 24, after "the" insert "secretary of state's"

Page 26, line 28, after "the" insert "secretary of state's"

Page 30, line 4, after "the" insert "secretary of state's"

Re-number accordingly

Date: Feb 22, 2019

Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES

BILL/RESOLUTION NO. 1127

House \_\_\_\_\_ Industry, Business and Labor \_\_\_\_\_ Committee

Subcommittee

Amendment LC# or  
Description:

19.0695.01001 title 02000  
after "the" insert "secretary of state's"

Recommendation

- Adopt Amendment
- Do Pass     Do Not Pass     Without Committee Recommendation
- As Amended     Refer to Appropriations
- Place on Consent Calendar

Other Actions

- Reconsider
- \_\_\_\_\_

Motion Made by Rep Lefor      Seconded By Rep. Schauer

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser			Rep O'Brien		
Vice Chairman Lefor			Rep Richter		
Rep Bosch			Rep Ruby		
Rep C Johnson			Rep Schauer		
Rep Kasper			Rep Adams		
Rep Laning			Rep P Anderson		
Rep Louser			Rep M Nelson		

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment voice vote - motion carried

Date: Feb 22, 2019

Roll Call Vote #: 2

2019 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES

BILL/RESOLUTION NO. 1127

House \_\_\_\_\_ Industry, Business and Labor \_\_\_\_\_ Committee

Subcommittee

Amendment LC# or Description: \_\_\_\_\_

Recommendation

- Adopt Amendment
- Do Pass     Do Not Pass     Without Committee Recommendation
- As Amended     Rerefer to Appropriations
- Place on Consent Calendar

Other Actions     Reconsider     \_\_\_\_\_

Motion Made by Rep Lefor    Seconded By Rep Schauer

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	x		Rep O'Brien	Ab	
Vice Chairman Lefor	x		Rep Richter	x	
Rep Bosch	x		Rep Ruby	x	
Rep C Johnson	x		Rep Schauer	x	
Rep Kasper	Ab		Rep Adams	x	
Rep Laning	Ab		Rep P Anderson	x	
Rep Louser	x		Rep M Nelson	x	

Total (Yes) 11    No 0

Absent 3

Floor Assignment Rep Louser

**REPORT OF STANDING COMMITTEE**

**HB 1127: Industry, Business and Labor Committee (Rep. Keiser, Chairman)**  
recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING). HB 1127 was placed on the Sixth order on the calendar.

Page 2, line 30, after "the" insert "secretary of state's"

Page 4, line 28, after "the" insert "secretary of state's"

Page 5, line 2, after "the" insert "secretary of state's"

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Page 30, line 4, after "the" insert "secretary of state's"

Renumber accordingly

**2019 SENATE INDUSTRY, BUSINESS AND LABOR**

**HB 1127**

# 2019 SENATE STANDING COMMITTEE MINUTES

## Industry, Business and Labor Committee Roosevelt Park Room, State Capitol

HB 1127  
3/6/2019  
Job #33258

- Subcommittee  
 Conference Committee

Committee Clerk: Amy Crane / Florence Mayer

### Explanation or reason for introduction of bill/resolution:

Relating to the names of cooperatives, corporations, limited liability companies, domestic and foreign real estate investment trusts, limited partnerships, fictitious partnerships, and limited liability partnerships; and to provide a contingent effective date.

### Minutes:

Attachments # 1 - 2

**Chairman Klein:** Opened the hearing on HB 1127. Roll call was taken, all members were present.

**Representative Laning:** Introduced HB 1127 and provided Attachment #1.

**Barbara Siegel, Director of Business Services, Secretary of State's Office (on behalf of Secretary of State, Al Jaeger):** Testified in support of HB 1127 and provided Attachment #2.

**(9:33) Vice Chairman Vedaa:** If someone has a company called Wonder LLC and somebody else wants to have Oneder LLC, they could do that?

**Barbara Siegel:** Under the current standards, something that is phonetically the same, we would say there is a conflict. However, that is only if there are no other words in the title that set it apart. Under the new standard, it would depend on the criteria we develop. Usually states that have distinguishable in the record, phonetically similar is considered allowable.

**Senator Piepkorn:** So now, when you are doing it online and I'm applying for my business registration, I will type in a name and if it's too similar to another one it will pop up and tell me that?

**Barbara Siegel:** Yes. Right now, all it is able to say is if it is an exact match. Under the new standards, we could program the software to recognize those distinguishable criteria and could alert the business. The only time you would get through the online program and yet have a problem with the Secretary of State, is in very limited situations. Such as if the name would indicate an illegal purpose for that type of entity.

**Chairman Klein:** You need us to do this in order to implement it? You can't move forward until you fix this wording?

**Barbara Siegel:** We have already deployed our online filing system. We are currently rolling forward. The issue is that with a name, the software isn't able to let the user know with any certainty whether it can be used.

**Chairman Klein:** So because we're using this old standard, the equipment isn't working the way it will when we develop the rules for the new "distinguishable" standard?

**Barbara Siegel:** Correct, since the law was what it was, we couldn't program it to that.

**Senator Roers:** This seems like it's going to open up a can of worms for you. Won't it bring up every possible conflict in the world? How is it deceptively similar? If anything is similar won't it pop up and flag every little thing for you?

**Barbara Siegel:** First, I want to assure the committee that the names already approved would continue to be approved. What happens is many more business names get approved not less. Because all they have to do is not be a duplicate.

**Chairman Klein:** 25 years ago, there was a Gerry's food store in Kindred and I had a Jerry's food store in Fessenden. And I allowed him to do that. That consent thing would still be available?

**Barbara Siegel:** Correct, the consent law will still be accurate. We receive a lot of those. For the bargain price of \$10, they can file and we will register that name.

**Senator Piepkorn:** If I had a construction, company and I wanted to call it Roars Construction Company with a little lion symbol. However, there was already a Roers construction company. Would that be allowed?

**Barbara Siegel:** We have not finalized the criteria yet. Under the old standard, it would be rejected but under the new standard, it would be acceptable. Because it is not the same spelling.

**Vice Chairman Vedaa:** I personally have an LLC and an incorporated. For my LLC it is named Vedaa Properties LLC. What if one of my kids want to start one of these and he is wants to the "The" Vedaa Properties LLC? What would happen there with the new rules?

**Barbara Siegel:** Under the new standards, we would probably reject it. We will likely not consider words like "The, a, an, and" to make it distinguishable. However, you could give consent to your son.

**Vice Chairman Vedaa:** But if he put his first initial. If my son put S. Vedaa LLC, that would work?

**Barbara Siegel:** At the risk of us not having criteria, yes. With the phonetic part, in print it will be different. It might sound the same, but a software likely will not handle phonetic similarities.

**Senator Kreun:** 25 years ago I had Fert-L-lawn, the one in Bismarck was Fertile. It came up that it wasn't accepted. I asked the business and they didn't respond for a long time. My business was in MN, but I lived in ND. To get the county work I had to be registered in state. Finally the attorney wrote a letter telling me no. Now today seeing as they are spelled different, it would go through?

**Barbara Siegel:** That's correct.

**Chairman Klein:** It's not necessary to use an emergency clause or anything?

**Barbara Siegel:** We think it is written perfectly.

**Tony Weiler, Executive Director State Bar:** Testified in support of HB 1127. (No written testimony.) Bill Guy from Fargo couldn't be here today. He has worked closely with the Secretary of State's Office. He thinks this is a good step forward in legislation. He doesn't think it causes many problems and it would be very beneficial. He supports this legislation and so does the State Bar Association.

**Chairman Klein:** Called for further testimony. Closed the hearing on HB 1127.

**Vice Chairman Vedaa:** Moved a Do Pass on HB 1127.

**Senator Roers:** Seconded.

**A Roll Call Vote Was Taken:** 6 yeas, 0 nays, 0 absent.

**Motion Carried.**

**Senator Vedaa will carry the bill.**



**REPORT OF STANDING COMMITTEE**

**HB 1127, as engrossed: Industry, Business and Labor Committee (Sen. Klein, Chairman)** recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1127 was placed on the Fourteenth order on the calendar.

**2019 TESTIMONY**

**HB 1127**

Introductory Testimony for HB 1127

Good afternoon, Mr. Chairman and members of the IB&L committee.

I'm here today to introduce HB 1127 at the request of the ND SOS office. The bill as you see is quite long at 30 pages, but really just updates language in the present law. The law deals with the registering of cooperative and company names to avoid citizen confusion. Some of the old language - which I actually kind of like - says "deceptively similar". That may give you some idea for the reason of the law. Some organizations attempt to name their company in a very similar way as another to benefit their own business.

But rather than my trying to explain the detail, Mr. Chairman, I would like to step aside and allow Barbara Siegel of the SOS office to explain the bill and the reasons for it.

ALVIN A. JAEGER  
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## SECRETARY OF STATE

January 22, 2019

TO: Representative George Keiser and Members of the House Industry, Business and Labor Committee

FR: Barbara Siegel, Director of Business Services on behalf of Secretary of State Al Jaeger

RE: HB 1127 – Business Name Availability Standard

HB 1127 would change the standard for determining whether a name is available to a business from “deceptively similar” to “distinguishable in the record.” Passage will greatly enhance certainty for businesses and the timely processing of business registration documents by the Secretary of State.

The bill’s considerable length is due to the number of references to the “deceptively similar” standard within the Century Code. The standard applies to a significant number of business entity types as well as to trade names, fictitious partnership names, and trademarks.

The time for the change is now. The benefits of the Secretary of State’s new online business filing system, FirstStop, are diminished unless the name availability standard is changed. With the change, the software can be enhanced to allow businesses filing online to know with almost 100% certainty that the proposed name will be approved by the Secretary of State. It will be possible for staff processing the submittal to quickly review and approve the filing.

Based on our research, North Dakota is one of only five states currently using the “deceptively similar” standard. And, two of those five states do not have a conventional “deceptively similar” standard. Using the “deceptively similar” standard means that a proposed name of a business is rejected if the Secretary of State determines the name is “deceptively similar” to a name registered in the state.

A “distinguishable in the record” standard means, with some exceptions, that a proposed name is distinguishable if it does not duplicate a name already on record.

Among the generally accepted reasons states have moved away from the “deceptively similar” standard is the belief that principles of unfair competition, and not state business entity laws, should provide the limits on the competitive use of similar names, and that it should not be the role of the Secretary of State to police the unfair competitive use of names.

The application of the “deceptively similar” standard by the Secretary of State’s staff demands that considerable time and judgment is used to make the determination that the submitted name is acceptable under the standard. There are over 120,000 active names registered with the Secretary of State. The registration staff must attempt to think of every possible “wild card” search to identify any possible conflicts. For example, the staff must think of searching for the initials “M T” when a name is submitted containing the word “Empty.” In many cases, there is not consensus as to whether a conflict exists. For example, does the word “Brown” conflict with “Braun?” Adding to the complexity is the fact that names are submitted that contain non-words; that is, words with creative spellings that staff cannot be expected to think of every time. For example, “Raisen” when there is an existing name containing “Rayzen.”

Despite a 25-page document of guidelines to assist staff in applying the standard, there are significant grey areas and points of contention. Quite frankly, making such determinations can be highly subjective. In speaking with another state that formerly had a “deceptively similar” standard, they reported that they had a panel of attorneys who would review name contests and there was often not consensus by the panel.

Texas was a “deceptively similar” state and changed to a “distinguishable in the record” standard on June 1, 2018. Following implementation, the Secretary of State’s office made contact to inquire as to how the change was going. They reported the number of phone calls and emails to check on name availability had gone down significantly as did name rejections, and that law firms and service providers had been the most vocal about how the statutory changes benefited their clients. They reported very few complaints. In addition, processing time by the Secretary of State was significantly reduced.

In any event, registration of a name with the Secretary of State does not provide businesses with the protection they may think. While registering a business name with the Secretary of State is required to do business under a particular name within the state, this registration does not provide assurances that the registered business name is not in conflict with the trademark rights of other parties. For example, other parties may already be using similar names or trademarks in the national marketplace that may take precedence over a business’s right to use a particular name.

The consent provisions in current law remain in the bill, allowing a business the right to a name if consent is received from the owner of the name that is indistinguishable in the record. The bill also continues to allow a business the right to a name with a judgment of a court establishing prior right to the use.

The bill would allow the Secretary of State to adopt administrative rules that are reasonable or necessary for making determinations under the “distinguishable in the record” standard. Rulemaking in this regard is necessary in order to address the details of application of the standard. This includes specifying the criteria used in the determinations. Examples of criteria that would be considered is attached to this testimony. As with any rulemaking, there would be a public comment period and the rules would need to be approved by the legislative Administrative Rules Committee.

The bill also contains other provisions that are of a housekeeping nature. These include correcting cross-references, text enhancements by Legislative Council, and ensuring all names are addressed in the application of the standard as appropriate.

Provisions of this bill would become effective upon certification that the applicable administrative rules and automated system changes are in place. (See Contingent Effective Date in Section 17.)

**Examples of criteria to be considered in rulemaking.** This is for illustration purposes only. The Secretary of State would carefully consider options prior to proposing the criteria in rulemaking.

Examples of what might be eliminated from the name when considering whether it is distinguishable:

- Words such as:
  - A (only if it appears as an article in the name, examples: "Making A Living, LLC" in which "A" is eliminated versus "A And C Construction, LLC" in which "A" is not eliminated)
  - An
  - And
  - The
  - To
  - With
- Symbols
- Punctuation marks
- Special characters
- Entity indicators such as "Incorporated", "Corporation", "Company", "Limited Liability Company", "Association", "Limited Partnership", "Limited Liability Partnership", "Limited Liability Limited Partnership", or any abbreviation thereof.

Examples of what would likely make a name indistinguishable:

- Whether capitalization makes a word distinguishable.
  - Example: "Don's Auto Repair" and "don's auto repair"
- Whether numbers are distinguishable from words representing the numbers.
  - Example: "10 Minute Oil Change, Inc." and "Ten Minute Oil Change, Inc."

Examples of what would likely make a name distinguishable:

- Whether the plural form of a word or a word is distinguishable from the singular word.
  - Example: "Cat Grooming, LLC" and "Cats Grooming, LLC"
- Whether a different spelling of a proper name makes a word distinguishable.
  - Example: "Amy's Spa" and "Ami's Spa"
- Whether a unique or improper spelling makes a word distinguishable.
  - Example: "Blu Sky Media, LLC" and "Blue Sky Media, LLC"
- Whether a word is distinguishable if it is different and is not a copy.
  - Example: "John's Construction" and "John's Builders"
- Whether a combination of words is distinguishable if in a different order.
  - Example: "Bismarck Hotel" is distinguishable from "Hotel Bismarck"
- Whether an abbreviation of a word is distinguishable from a non-abbreviated word.
  - Example: "Broadway Ave. Restaurant" and "Broadway Avenue Restaurant"
- Whether a different spelling of a word is distinguishable even if phonetically it is similar or the same.
  - Example: "North Dakota Jeans" and "North Dakota Genes"
- Whether a word in a foreign language will not be translated for purposes of considering whether the name is distinguishable.
  - Example: "Hello Restaurant" is distinguishable from "Hola Restaurant"
- Whether some symbols would not be permitted in a name, for example:
  - Caret ^
  - Back slash \
  - Tilde ~
  - Pipe or Vertical Bar |
  - Ellipsis . . .
  - Horizontal Bar \_\_\_\_\_
  - Underscore \_\_\_\_\_

HB 1127

Attachment 2  
Jan 22, 2019  
Page 4

Other considerations include treatment of:

- Spacing
- Roman numerals
- Geographical locations
- Contractions

Considerations of prohibited words:

- Unless otherwise allowable: examples: "Insurance" "Bank"
- Offensive connotations
- Suggestion of illegal purposes

TESTIMONY OF WILLIAM L. GUY III  
IN SUPPORT OF  
HOUSE BILL NO. 1127

January 21, 2019

Mr. Chairman and members of the Committee, I am presenting this testimony on my own behalf and on behalf of the State Bar Association of North Dakota (SBAND) in support of House Bill No. 1127.

This Bill is a housekeeping measure to unify the provisions pertaining to entity names in Chapter 10-15 (Cooperatives), Chapter 10-19.1 (Business Corporations), Chapter 10-32.1 (Limited Liability Companies), Chapter 10-33 (Non-profit Corporations), Chapter 10-34 (Real Estate Investment Trusts); Chapter 45-10.2 (Limited Partnerships), Chapters 45-11 and 45-13 (General Partnerships), Chapter 45-22 (Limited Liability Partnerships), Chapter 45-23 (Limited Liability Limited Partnerships) and Chapter 47-25 (Trade Names).

In general the Bill contains largely grammatical changes to the sections in each of the above chapters that deal with the name of the entity. A quick review of this Bill will reveal no substantive changes to these chapters. With the exceptions of the suggestions set forth below, I fully support this Bill.

Most of my recommended changes focus on the word "record" which is a defined term used identically in all of the above chapters with the exception of Chapters 10-15 and 10-34. For instance, the following definition appears in Subsection 45 of Section 10-19.1-01:

"Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable and in perceivable form.

That definition should be made a part of this Bill for Chapters 10-15 and 10-34. Also, as you can see it is a generic definition that could refer to the records of the entity in question or to those of the Secretary of State . . . depending on context.

It is my recommendation that the words "the records" be changed to "its records" in numerous places (where the sentence has a prior reference to the Secretary of State) because I believe that doing so is more grammatically correct and less likely to result in confusion as to whose records are being referenced (i.e., the records of the entity or those of the Secretary of State). In each case my recommended reference of "its records" refers to the records of the Secretary of State.

That modification (i.e., "the records" to "its records") should be made in the following places within this Bill:

- Page 2, line 30
- Page 4, line 28
- Page 5, line 2

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Attachment 3  
Jan 22, 2019  
Page 2

- Page 8, lines 9 and 13
- Page 11, lines 19 and 23
- Page 14, line 6
- Page 15, line 30
- Page 16, line 4
- Page 19, line 12
- Page 20, lines 18 and 21
- Page 23, lines 11 and 14
- Page 26, lines 24 and 28
- Page 30, line 4

Finally, on page 18, line 1 and on page 28, line 28, the word "indistinguishable" should be inserted prior to the word "name" so as to properly identify the name of the document being filed with the Secretary of State.

I have appreciated the opportunity to make this presentation to your committee. If you have any questions, I would be happy to answer them . . . either by cell phone (701.238.2500) during your hearing or by email at a later time.

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65732171.1

Introductory Testimony for HB 1127

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But rather than my trying to explain the detail, Mr. Chairman, I would like to step aside and allow Barbara Siegel of the SOS office to explain the bill and the reasons for it.

HB 1127 3/6/19 Att #2 p.1

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SECRETARY OF STATE  
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March 6, 2019

TO: Senator Jerry Klein and Members of the Senate Industry, Business and Labor Committee  
FR: Barbara Siegel, Director of Business Services on behalf of Secretary of State Al Jaeger  
RE: HB 1127 – Business Name Availability Standard

HB 1127 would change the standard for determining whether a name is available to a business from “deceptively similar” to “distinguishable in the record.” Passage will greatly enhance certainty for businesses and the timely processing of business registration documents by the Secretary of State.

The bill’s considerable length is due to the number of references to the “deceptively similar” standard within the Century Code. The standard applies to a significant number of business entity types as well as to trade names, fictitious partnership names, and trademarks.

The time for the change is now. The benefits of the Secretary of State’s new online business filing system, FirstStop, are diminished unless the name availability standard is changed. With the change, the software can be enhanced to allow businesses filing online to know with almost 100% certainty that the proposed name will be approved by the Secretary of State. It will be possible for staff processing the submittal to quickly review and approve the filing.

Based on our research, North Dakota is one of only five states currently using the “deceptively similar” standard. And, two of those five states do not have a conventional “deceptively similar” standard. Using the “deceptively similar” standard means that a proposed name of a business is rejected if the Secretary of State determines the name is “deceptively similar” to a name registered in the state.

A “distinguishable in the record” standard means, with some exceptions, that a proposed name is distinguishable if it does not duplicate a name already on record.

Among the generally accepted reasons states have moved away from the “deceptively similar” standard is the belief that principles of unfair competition, and not state business entity laws, should provide the limits on the competitive use of similar names, and that it should not be the role of the Secretary of State to police the unfair competitive use of names.

The application of the “deceptively similar” standard by the Secretary of State’s staff demands that considerable time and judgment is used to make the determination that the submitted name is acceptable under the standard. There are over 120,000 active names registered with the Secretary of State. The registration staff must attempt to think of every possible “wild card” search to identify any possible conflicts. For example, the staff must think of searching for the initials “M T” when a name is submitted containing the word “Empty.” In many cases, there is not consensus as to whether a conflict exists. For example, does the word “Brown” conflict with “Braun?” Adding to the complexity is the fact that names are submitted that contain non-words; that is, words with creative spellings that staff cannot be expected to think of every time. For example, “Raisen” when there is an existing name containing “Rayzen.”

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Despite a 25-page document of guidelines to assist staff in applying the standard, there are significant grey areas and points of contention. Quite frankly, making such determinations can be highly subjective. In speaking with another state that formerly had a "deceptively similar" standard, they reported that they had a panel of attorneys who would review name contests and there was often not consensus by the panel.

Texas was a "deceptively similar" state and changed to a "distinguishable in the record" standard on June 1, 2018. Following implementation, the Secretary of State's office made contact to inquire as to how the change was going. They reported the number of phone calls and emails to check on name availability had gone down significantly as did name rejections, and that law firms and service providers had been the most vocal about how the statutory changes benefited their clients. They reported very few complaints. In addition, processing time by the Secretary of State was significantly reduced.

In any event, registration of a name with the Secretary of State does not provide businesses with the protection they may think. While registering a business name with the Secretary of State is required to do business under a particular name within the state, this registration does not provide assurances that the registered business name is not in conflict with the trademark rights of other parties. For example, other parties may already be using similar names or trademarks in the national marketplace that may take precedence over a business's right to use a particular name.

The consent provisions in current law remain in the bill, allowing a business the right to a name if consent is received from the owner of the name that is indistinguishable in the record. The bill also continues to allow a business the right to a name with a judgment of a court establishing prior right to the use.

The bill would allow the Secretary of State to adopt administrative rules that are reasonable or necessary for making determinations under the "distinguishable in the record" standard. Rulemaking in this regard is necessary in order to address the details of application of the standard. This includes specifying the criteria used in the determinations. Examples of criteria that would be considered is attached to this testimony. As with any rulemaking, there would be a public comment period and the rules would need to be approved by the legislative Administrative Rules Committee.

The bill also contains other provisions that are of a housekeeping nature. These include correcting cross-references, text enhancements by Legislative Council, and ensuring all names are addressed in the application of the standard as appropriate.

Provisions of this bill would become effective upon certification that the applicable administrative rules and automated system changes are in place. (See Contingent Effective Date in Section 17.)

**Examples of criteria to be considered in rulemaking.** This is for illustration purposes only. The Secretary of State would carefully consider options prior to proposing the criteria in rulemaking.

Examples of what might be eliminated from the name when considering whether it is distinguishable:

- Words such as:
  - A (only if it appears as an article in the name, examples: "Making A Living, LLC" in which "A" is eliminated versus "A And C Construction, LLC" in which "A" is not eliminated)
  - An
  - And
  - The
  - To
  - With
- Symbols
- Punctuation marks
- Special characters
- Entity indicators such as "Incorporated", "Corporation", "Company", "Limited Liability Company", "Association", "Limited Partnership", "Limited Liability Partnership", "Limited Liability Limited Partnership", or any abbreviation thereof.

Examples of what would likely make a name indistinguishable:

- Whether capitalization makes a word distinguishable.
  - Example: "Don's Auto Repair" and "don's auto repair"
- Whether numbers are distinguishable from words representing the numbers.
  - Example: "10 Minute Oil Change, Inc." and "Ten Minute Oil Change, Inc."

Examples of what would likely make a name distinguishable:

- Whether the plural form of a word or a word is distinguishable from the singular word.
  - Example: "Cat Grooming, LLC" and "Cats Grooming, LLC"
- Whether a different spelling of a proper name makes a word distinguishable.
  - Example: "Amy's Spa" and "Ami's Spa"
- Whether a unique or improper spelling makes a word distinguishable.
  - Example: "Blu Sky Media, LLC" and "Blue Sky Media, LLC"
- Whether a word is distinguishable if it is different and is not a copy.
  - Example: "John's Construction" and "John's Builders"
- Whether a combination of words is distinguishable if in a different order.
  - Example: "Bismarck Hotel" is distinguishable from "Hotel Bismarck"
- Whether an abbreviation of a word is distinguishable from a non-abbreviated word.
  - Example: "Broadway Ave. Restaurant" and "Broadway Avenue Restaurant"
- Whether a different spelling of a word is distinguishable even if phonetically it is similar or the same.
  - Example: "North Dakota Jeans" and "North Dakota Genes"
- Whether a word in a foreign language will not be translated for purposes of considering whether the name is distinguishable.
  - Example: "Hello Restaurant" is distinguishable from "Hola Restaurant"
- Whether some symbols would not be permitted in a name, for example:
  - Caret ^
  - Back slash \
  - Tilde ~
  - Pipe or Vertical Bar |
  - Ellipsis . . .
  - Horizontal Bar \_\_\_\_\_
  - Underscore \_\_\_\_\_

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Other considerations include treatment of:

- Spacing
- Roman numerals
- Geographical locations
- Contractions

Considerations of prohibited words:

- Unless otherwise allowable: examples: "Insurance" "Bank"
- Offensive connotations
- Suggestion of illegal purposes