

**ARTICLE 72-03
BUSINESS**

**CHAPTER 72-03-02
NAME AVAILABILITY**

PROPOSED DRAFT RULES

SectionD

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72-03-02-01. Definitions.

1. "Key word" means any word, symbol, or abbreviation that is not:
 - a. The word "a," when used as an article of speech.;
 - (1) Example: "A" is not a key word in "Making A Living, LLC"
 - b. The word "an".;
 - c. The word "and" or symbol "&";
 - d. The word "the".;
 - e. The word "to".;
 - f. The word "with"; or
 - g. A word, phrase, or abbreviation that indicates a type of organized entity, including "Corporation", "Inc.", "LLC", "LP", "LLP", or "LLLP."
2. "Name" means a word or phrase in the secretary of state's records used to identify a domestic or foreign cooperative, limited liability company, corporation,

or real estate investment trust; a domestic or foreign limited liability partnership, limited liability limited partnership, or limited partnership, including a fictitious partnership name; a reserved name; a trade name; or a trademark.

3. "Proposed name" means a new or amended name included in a document submitted to the secretary of state for filing.

History: Effective

General Authority: NDCC 10-15-08.1(3), 10-19.1-13(2), 10-32.1-11(2), 10-33-10(2), 10-34-04(3)(a), 45-10.2-10(2), 45-11-01(4), 45-13-04.1(2), 45-22-04(2), 45-23-03(2), 47-25-03(2)

Law Implemented: NDCC 10-15-08.1, 10-19.1-13, 10-32.1-11, 10-33-10, 10-34-04, 45-10.2-10, 45-11-01, 45-13-04.1, 45-22-04, 45-23-03, 47-25-03

72-03-02-02. Applicability of Rules.

These rules apply to all filings submitted to the secretary of state that require name availability review and are received by the secretary of state on or after the date the secretary of state certifies to the legislative council that all necessary administrative rules and information technology components and systems are ready for implementation of the distinguishable-in-the-records name availability standard, including filings under North Dakota Century Code chapters 10-15, 10-19.1, 10-32.1, 10-33, 10-34, 45-10.2, 45-11, 45-13, 45-22, 45-23, or 47-25.

History: Effective

General Authority: NDCC 10-15-08.1(3), 10-19.1-13(2), 10-32.1-11(2), 10-33-10(2), 10-34-04(3)(a), 45-10.2-10(2), 45-11-01(4), 45-13-04.1(2), 45-22-04(2), 45-23-03(2), 47-25-03(2)

Law Implemented: NDCC 10-15-08, 10-19.1-13, 10-32.1-11, 10-33-10, 10-34-04, 45-10.2-10, 45-11-01, 45-13-04.1, 45-22-04, 45-23-03, 47-25-03

72-03-02-03. Role of Secretary of State.

1. If a proposed name is distinguishable in the secretary of state's records, the secretary of state shall file the proposed name unless an exception applies.
2. The secretary of state may not make a determination as to whether the use of a proposed name or a name constitutes unfair competition, unfair trade practice, or name infringement with other entities already in existence.

History:

General Authority: NDCC 10-15-08.1(3), 10-19.1-13(2), 10-32.1-11(2), 10-33-10(2), 10-34-04(3)(a), 45-10.2-10(2), 45-11-01(4), 45-13-04.1(2), 45-22-04(2), 45-23-03(2), 47-25-03(2)

Law Implemented: NDCC 10-15-08.1(d), 10-19.1-13 (1)(e), 10-19.1-13 (2), 10-19.1-13(3), 10-32.1-11 (1)(e), 10-32.1-11(2), 10-33-10(1)(e), 10-34-04(3)(a), 45-10.2-10(1)(f), 45-10.2-10(2), 45-11-01(3)(c), 45-11-01(4), 45-13-04.1(e), 45-13-04.1(2), 45-13-14.1(2), 45-22-04(1)(e), 45-22-04(2), 45-23-03(1)(f), 47-25-03(1)(c), 47-25-03(2)

72-03-02-04. Distinguishable Names.

Names are distinguishable in the secretary of state's records and are therefore available for use if a comparison of the names reveals sufficient differences. Conditions that qualify as sufficient differences between names include:

1. There is a difference of at least one key word.
 - a. Example: "Mary's Babysitting" is distinguishable from "Mary's Babysitting Service"
 - b. Example: "Missouri River Cafe" is distinguishable from "Missouri River Restaurant"
 - c. Example: "Bright Window Washers of Bismarck" is distinguishable from "Bright Window Washers of Dickinson"
 - d. Example: "B and B Home Builders" is distinguishable from "B and B Home Contractors"
2. The key words are the same but are in a different order.
 - a. Example: "Fargo Auto Parts" is distinguishable from "Auto Parts of Fargo"
 - b. Example: "Williston Hotel" is distinguishable from "Hotel Williston"
3. A key word is abbreviated.
 - a. Example: "Main Avenue Restaurant" is distinguishable from "Main Ave. Restaurant"
 - b. Example: "Do It Yourself Handyman Services Limited" is distinguishable from "D.I.Y. Handyman Services Ltd."
4. There is a different spelling of a proper name.
 - a. Example: "Ami's Spa" is distinguishable from "Amy's Spa"
 - b. Example: "Olsen and Sons" is distinguishable from "Olson and Sons"
5. There is a unique or improper spelling of a key word.
 - a. Example: "Blu Sky Media" is distinguishable from "Blue Sky Media"

- b. Example: “Xpress Car Wash” is distinguishable from “Express Car Wash”
- 6. Although phonetically the same, a key word is spelled differently.
 - a. Example: “North Dakota Jeans” is distinguishable from “North Dakota Genes”
 - b. Example: “Capital Events” is distinguishable from “Capitol Events”
- 7. The key words are derived from the same root word.
 - a. Example: “Magic Productions” is distinguishable from “Magical Productions”
 - b. Example: “Johnson Organizers” is distinguishable from “Johnson Organization”
- 8. The presence or absence of a contraction.
 - a. Example: “Don’t Stop Oil Change” is distinguishable from “Do Not Stop Oil Change”
 - b. Example: “It’s All About The Pets” is distinguishable from “It Is All About the Pets”
- 9. A key word is singular in one name and plural in another name.
 - a. Example: “Bat for You” is distinguishable from “Bats for You”
 - b. Example: “Baby at Play” is distinguishable from “Babies at Play”
- 10. The use of roman numerals or number words in place of each other.
 - a. Example, “Marketing Properties IV”, “Marketing Properties 4”, and “Marketing Properties Four” are distinguishable from one another.

History:

General Authority: NDCC 10-15-08.1(3), 10-19.1-13(2), 10-32.1-11(2), 10-33-10(2), 10-34-04(3)(a), 45-10.2-10(2), 45-11-01(4), 45-13-04.1(2), 45-22-04(2), 45-23-03(2), 47-25-03(2)

Law Implemented: NDCC 10-15-08(1)(d), 10-15-08(3), 10-19.1-13(1)(e), 10-19.1-13(2), 10-32.1-11(1)(e), 10-32.1-11(2), 10-33-10(1)(e), 10-33-10(2), 10-34-04(3), 45-10.2-10(1)(f), 45-10.2-10(f), 45-11-01(3)(c), 45-11-01(4), 45-13-04.1(1)(e), 45-13-04.1(2), 45-22-04(1)(e), 45-22-04(2), 45-23-03(1)(f), 45-23-03(2), 47-25-03(3)(c), 47-25-03(2)

72-03-02-05. Indistinguishable Names.

Names that are not distinguishable in accordance with 72-03-02-04 are not available for use without written consent under section 72-03-02-10 or a court judgment. The existence of one or more of the following conditions does not make a name distinguishable.

1. The letter case of a key word is different.
 - a. Example: “Johnson’s Oil Change” is indistinguishable from “Johnson’s oil change”
 - b. Example: The “THE X FACTOR” is indistinguishable from “The x factor”
2. The presence or absence of spacing.
 - a. Example: “LMB Homes is indistinguishable from L M B Homes”
 - b. Example: “Any Time Loans” is indistinguishable from “Anytime Loans”

History:

General Authority: NDCC 10-15-08.1(3), 10-19.1-13(2), 10-32.1-11(2), 10-33-10(2), 10-34-04(3)(a), 45-10.2-10(2), 45-11-01(4), 45-13-04.1(2), 45-22-04(2), 45-23-03(2), 47-25-03(2)

Law Implemented: NDCC 10-15-08.1(2), 10-15-08.1(2)(a), 10-19.1-13(3), 10-19.1-13(3)(a), 10-32.1-11(3), 10-32.1-11(3)(a), 10-33-10(3), 10-22-10(3)(a), 10-34-04(3)(a), 45-10.2-10(3), 45-10.2-10(3)(a), 45-11-01(3)(c), 45-13-04.1(3), 45-13-04.1(3)(a), 45-22-04(3), 45-22-04(3)(a), 45-23-03(3), 45-23-03(3)(a), 47-25-03(3)(c)

72-03-02-06 Special Characters.

1. A name or proposed name may contain special characters if those special characters are printable characters in the American standard code for information interchange (ASCII) table (character code 32-127), including:
 - a. ! exclamation mark;
 - b. “ double quotes;
 - c. # number sign;
 - d. \$ dollar;
 - e. % percent;
 - f. & ampersand;

- g. ' single quote;
- h. (open parenthesis (or open bracket);
- i.) closed parenthesis (or close bracket);
- j. * asterisk;
- k. + plus;
- l. , comma;
- m. - hyphen (or minus);
- n. . period (or dot or full stop);
- o. / slash (or divide);
- p. : colon;
- q. ; semi colon;
- r. < less than (or open angled bracket);
- s. > greater than (or close angled bracket);
- t. = equals;
- u. ? question mark;
- v. @ at sign;
- w. [opening bracket;
- x.] closing bracket;
- y. \ backslash;
- z. ^ caret;
- aa. _ underscore;
- bb. ` grave accent;
- cc. { opening brace;

- dd. } closing brace;
 - ee. | vertical bar; or
 - ff. ~ equivalency similarity sign (or tilde).
2. The following special characters may be disregarded for the purpose of determining name availability if the proposed name is likely to mislead the public in accordance with section 72-03-02-09:
- a. ! exclamation mark;
 - b. * asterisk;
 - c. + plus;
 - d. < less than;
 - e. > greater than;
 - f. = equal sign; or
 - g. ~ equivalency similarity sign (or tilde).
3. A name or proposed name using a special character to represent a word is distinguishable from a name or proposed name using the actual word.
- a. Example: "Everything is \$1" is distinguishable from Everything is 1 Dollar"
 - b. Example: "Bargains at 20% Off" is distinguishable from "Bargains at 20 Percent Off"
 - c. Example: "Relax @ the Ritz" is distinguishable from "Relax at the Ritz"
 - d. Example: "Number 1 Home Store" is distinguishable from "#1 Home Store"

History:

General Authority: NDCC 10-15-08.1(3), 10-19.1-13(2), 10-32.1-11(2), 10-33-10(2), 10-34-04(3)(a), 45-10.2-10(2), 45-11-01(4), 45-13-04.1(2), 45-22-04(2), 45-23-03(2), 47-25-03(2)

Law Implemented: NDCC 10-15-08.1(1)(a), 10-19.1-13(1)(a), 10-32.1-11(1)(a), 10-33-10(1)(a), 45-10.2-10(1)(a), 45-11-01(3)(a), 45-13-04.1(1)(a), 45-22-04-(1)(a), 45-23-03(1)(a), 47-25-03(1)(a)

72-03-02-08. Exceptions.

The secretary of state may exercise discretion to determine names and proposed names to be indistinguishable when special characters or numbers are used in place of letters, including in the following circumstances:

1. ! used as the letter "i". For example, the secretary of state may determine that "L!VE Productions" is indistinguishable from "LIVE Productions"
2. @ used as the letter "a". For example, the secretary of state may determine that "M@XIMUM Retail" is indistinguishable from "Maximum Retail"
3. \$ used as the letter "s". For example, the secretary of state may determine that "CA\$H Made Easy" is indistinguishable from "Cash Made Easy"
4. A numerical zero used as the letter "o". For example, the secretary of state may determine that "0scars Restaurant" is indistinguishable from "Oscars Restaurant".

History:

General Authority: NDCC 10-15-08.1(3), 10-19.1-13(2), 10-32.1-11(2), 10-33-10(2), 10-34-04(3)(a), 45-10.2-10(2), 45-11-01(4), 45-13-04.1(2), 45-22-04(2), 45-23-03(2), 47-25-03(2)

Law Implemented: NDCC 10-15-08.1(2), 10-15-08.1(2)(a), 10-19.1-13(3), 10-19.1-13(3)(a), 10-32.1-11(3), 10-32.1-11(3)(a), 10-33-10(3), 10-22-10(3)(a), 10-34-04(3)(a), 45-10.2-10(3), 45-10.2-10(3)(a), 45-11-01(3)(c), 45-13-04.1(3), 45-13-04.1(3)(a), 45-22-04(3), 45-22-04(3)(a), 45-23-03(3), 45-23-03(3)(a), 47-25-03(3)(c)

72-03-02-09. Names Likely to Mislead the Public.

1. The secretary of state may reject a proposed name if the name indicates a purpose that would be unlawful for the entity to engage in, including:
 - a. A corporation or limited liability company proposed name may not contain the word "farm", "ranch", or words of like meaning unless:
 - (1) The proposed name is associated with a farming or ranching corporation, farming or ranching limited liability company, authorized livestock farm corporation, or authorized livestock farm limited liability company incorporated or organized under North Dakota Century Code chapter 10-06.1; or
 - (2) The proposed name contains a word or words qualifying that farming or ranching is not the entity's purpose; for example, "farm supply" or "farm equipment".

- b. A proposed name may not contain the word “bank”, “trust”, or words of like import, unless the filing is accompanied by written approval from the North Dakota Department of Financial Institutions granting use of the word in accordance with North Dakota Century Code sections 6-02-01 and 6-05-02.
- c. A proposed name may not contain a word or words indicating the entity provides insurance unless:
 - (1) The proposed name is associated with an insurer; or
 - (2) The proposed name contains a word or words qualifying that the entity’s purpose is not that of an insurer; for example, “insurance agent”, “insurance agency”, or “insurance broker”.
- 2. The secretary of state may reject a proposed name if the name falsely implies an entity is a government organization or authority or has a government affiliation.
- 3. The secretary of state may reject a proposed name if the name falsely implies an entity is a professional association or is associated with a specific profession.

History:

General Authority: NDCC 10-15-08.1(3), 10-19.1-13(2), 10-32.1-11(2), 10-33-10(2), 10-34-04(3)(a), 45-10.2-10(2), 45-11-01(4), 45-13-04.1(2), 45-22-04(2), 45-23-03(2), 47-25-03(2)

Law Implemented: NDCC 6-02-01, 6-05-02, 10-15-08(1)(c), 10-19.1-13(1)(d), 10-32.1-11(1)(d), 10-33-10(1)(d), 45-10.2-10(1)(e), 45-13-04.1(1)(d), 45-22-04(1)(d), 45-23-03(1)(e)

72-03-02-10. Form and Manner of Consent.

- 1. The secretary of state may determine an indistinguishable name or proposed name to be available for use with written consent of the owner of the name to which the proposed name has been determined to be indistinguishable or a court judgment. Proof of consent must be submitted to the secretary of state on a form provided by the secretary of state or on a self-drafted form or letter containing the following:
 - a. The exact name in the secretary of state’s records to which the proposed name has been determined to be indistinguishable;
 - b. The name of the owner of the name provided in subdivision a.]
 - c. The proposed name to which consent is being granted;

- d. Express consent to the use of the proposed name;
 - e. The name of the party to whom consent is given;
 - f. The signature of a person authorized to grant consent; and
 - g. If there are limitations to the consent, a commitment that the consenting party will monitor and enforce those limitations.
2. The secretary of state shall determine the sufficiency of the consent form or letter provided under subsection 1.
 3. In the event there is more than one name existing in the secretary of state's records that is indistinguishable from a proposed name, the proposed name may not be used unless consent is obtained from the owners of all of the indistinguishable existing names.
 4. Consent to use a proposed name that is indistinguishable from a name existing in the secretary of state's records must be obtained regardless of the number of times an owner previously may have consented to other names that are indistinguishable or the number of other existing names that are indistinguishable. Consent by the owner of a name to the use of a proposed name may not be construed as consent to the use of any other proposed name that is indistinguishable.
 5. When consent to use a proposed name is required of multiple related or subsidiary parties, all parties may be included in a single consent form or letter with a single consent filing fee if one party is authorized to sign the consent for all of the parties.
 6. If an owner of a name cannot be contacted for consent, an indistinguishable proposed name may not be filed.
 7. If an entity existing in the secretary of state's records is changing its name, dissolving, converting to another form of organization, or merging out of existence, a proposed name that is indistinguishable from the name of the existing entity may not be filed until the change of name, dissolution, conversion, or merger is filed with the secretary of state, unless the document including the proposed name is accompanied by consent to use the name.

History:

General Authority: NDCC 10-15-08.1(3), 10-19.1-13(2), 10-32.1-11(2), 10-33-10(2), 10-34-04(3)(a), 45-10.2-10(2), 45-11-01(4), 45-13-04.1(2), 45-22-04(2), 45-23-03(2), 47-25-03(2)

Law Implemented: NDCC 10-15-08.1(2), 10-15-08.1(5), 10-19.1-13(3), 10-19.1-13(8), 10-32.1-11(3), 10-32.1-11(7), 10-33-10(3), 10-33-10(8), 10-34-04(3)(a), 45-10.2-10(3)(a), 45-10.2-10(8), 45-11-01(3)(c), 45-13-04.1(3)(a), 45-13-04.1(8), 45-22-04(3)(a), 45-22-04(7), 45-22-04(7)(a), 45-23-03(3)(a), 45-23-03(7), 45-23-03(7)(a), 47-25-03(1)(c), 47-25-03(1)(d)

72-03-02-11. Matters Not Considered.

1. In determining the availability of a proposed name, names not in active status in the secretary of state's records are available for use.
2. Among the matters that may not be considered in determining the availability of a proposed name are the following:
 - a. Whether the purposes or activities of the parties are similar;
 - b. Whether the parties will be carrying out activities in the same or nearby locations;
 - c. Whether a comparable situation has previously been acted upon by the secretary of state;
 - d. Whether an employee of the secretary of state shared views as to the availability prior to the final determination; or
 - e. Whether the party proposing the name has already used the proposed name or has spent money using the name in the expectation that the name would be available.

History:

General Authority: NDCC 10-15-08.1(3), 10-19.1-13(2), 10-32.1-11(2), 10-33-10(2), 10-34-04(3)(a), 45-10.2-10(2), 45-11-01(4), 45-13-04.1(2), 45-22-04(2), 45-23-03(2), 47-25-03(2)

Law Implemented: NDCC 10-15-08.1, 10-19.1-13, 10-32.1-11, 10-33-10, 10-34-04, 45-10.2-10, 45-11-01, 45-13-04.1, 45-22-04, 45-23-03, 47-25-03

72-03-02-12. Conditions Not Exclusive.

The conditions provided in this chapter are not exclusive. When a situation presents that is not provided for in this chapter, the secretary of state has the discretion to make the determination whether the proposed name is distinguishable and thus available.

History:

General Authority: NDCC 10-15-08.1(3), 10-19.1-13(2), 10-32.1-11(2), 10-33-10(2), 10-34-04(3)(a), 45-10.2-10(2), 45-11-01(4), 45-13-04.1(2), 45-22-04(2), 45-23-03(2), 47-25-03(2)

Law Implemented: NDCC 10-15-08.1, 10-19.1-13, 10-32.1-11, 10-33-10, 10-34-04, 45-10.2-10, 45-11-01, 45-13-04.1, 45-22-04, 45-23-03, 47-25-03

72-03-02-13. Final Determination of Name Availability.

1. The final determination on the availability of a proposed name must be made by the secretary of state and may be made only after the filing containing the proposed name is submitted to the secretary of state.
2. An opinion given by an employee of the secretary of state on the availability of a name before submission is advisory only and is not a final determination that the proposed name is available for use at the time the filing is submitted.
3. A party may use the online business and trademark records search function hosted by the secretary of state to help choose a name that may be acceptable. However, a party's verification that a proposed name does not exist within the business and trademark records search function is not a determination that the proposed name is available for use.
4. A party that does not agree with the secretary of state's determination that a name is not available for use may request reconsideration of that determination by submitting a written request for reconsideration to the secretary of state that includes the reasons for the disagreement.

History:

General Authority: NDCC 10-15-08.1(3), 10-19.1-13(2), 10-32.1-11(2), 10-33-10(2), 10-34-04(3)(a), 45-10.2-10(2), 45-11-01(4), 45-13-04.1(2), 45-22-04(2), 45-23-03(2), 47-25-03(2)

Law Implemented: NDCC 10-15-08.1(3), 10-19.1-13(2), 10-32.1-11(2), 10-33-10(2), 10-34-04(3)(a), 45-10.2-10(2), 45-11-01(4), 45-13-04.1(2), 45-22-04(2), 45-23-03(2), 47-25-03(2)