



NASS

National Association
of Secretaries of State



S.569 and Treasury Proposal Update

**PRESENTED BY LESLIE REYNOLDS
NATIONAL ASSOCIATION OF SECRETARIES OF
STATE**

**EXECUTIVE DIRECTOR
IACA 2010 CONFERENCE
WEDNESDAY, MAY 26, 2010
REYNOLDS@SSO.ORG**

Background

- NASS Company Formation Task Force (Feb –July 2007)
- Uniform Law Commission Drafting Committee (September 2007 – July 2009)
- Sen. Levin Introduces S.2956 Incorporation Transparency and Law Enforcement Assistance Act. Sponsored by Sen. Coleman (R-MN) and Sen. Obama (D-IL) (May 2008)
- NASS, NCCUSL, ABA, NCSL take positions in opposition to S.2956 at their 2008 Summer conferences (July/August 2008).
- 110th Congress adjourns. 111th begins in January 2009. Sen. Levin reintroduces S.569 Incorporation Transparency and Law Enforcement Assistance Act. Sponsored by Sen. Grassley (R-IA) and Sen. McCaskill (D-MO) (March 2009)
- HSGAC holds hearing on S.569 with federal and state officials and Chair of NCCUSL Drafting Committee (June 2009)
- Uniform Law Enforcement Access to Entity Information Act (July 2009)

Background

continued

- NASS members did not take an official position on the NCCUSL Uniform Law Enforcement Access to Entity Information Act. Sen. Levin did not support the NCCUSL approach and planned to move forward with S.569. NASS continues to promote state-based approach.
- Business community begins to become engaged on the issue and voicing their concerns about privacy, ability to maintain information.
- HSGAC Hearing in November 2009. Witnesses include Treasury and DOJ officials, an ABA representative, a private industry representative and an organization tracking money laundering issues (Global Financial Integrity) – Treasury agrees to work on alternative proposal.
- Treasury meets with stakeholder groups to learn of specific concerns regarding S.569. Stakeholders also begin to hear of Treasury's concerns. (December 2009 – January 2010)

Background

continued

- Discussions with Senate Banking Committee about jurisdictional Issues and possibility of S.569 becoming an amendment to the Restoring American Financial Stability Act of 2010 (Financial Regulations bill/Wall St. Reform bill.) (March/April 2010)
- Treasury submits their alternative proposal to Office of Management and Budget (OMB) for approval to make public and send to the Hill (April 16, 2010)
- S.569 markup scheduled in HSGAC on Wednesday, April 29, 2010.
- Six Senators on HSGAC write letter on 4/21/2010 to Chairman Lieberman asking him to remove S.569 from markup so they can review Treasury proposal.
- Treasury proposal released by OMB on 4/23/2010.
- S.569 pulled from markup on 4/24/2010.

Letter to Chair Lieberman from HSGAC Committee Members on April 21, 2010

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United States Senate
WASHINGTON, DC 20510

April 21, 2010

The Honorable Joseph Lieberman
Chairman
Committee on Homeland Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Lieberman:

We are concerned that the Homeland Security and Governmental Affairs Committee is considering taking up S. 569, the Incorporation Transparency and Law Enforcement Assistance Act at its business meeting on April 28, 2010.

As you recall, during the November 5, 2009 hearing entitled "Business Formation and Financial Crime: Finding a Legislative Solution," the Treasury Department's Assistant Secretary for Terrorist Financing, David Cohen, expressed concerns with the bill. Specifically, he noted that Treasury's support was contingent on changes that would "clarify and limit the definition of beneficial ownership and corresponding information disclosure requirements" under the bill. Assistant Secretary Cohen argued that without such changes, "the ambiguity and breadth of the definition of beneficial ownership, coupled with burdensome disclosure requirements makes compliance uncertain, time consuming and costly." The Assistant Secretary was clear that the focus of the bill must be more "straightforward and simple in application to work for the full range of covered legal entities," including "small start-up businesses."

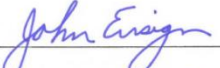


We share the concerns of Assistant Secretary Cohen. It is extremely difficult to start and grow a business. It is certainly more difficult in today's economic environment. We fear that this bill will result in significant regulatory and compliance costs that may have a chilling effect on the creation of new business and new jobs at a time when our economy can least afford it.




Assistant Secretary Cohen testified that any legislation would require that five issues be addressed: 1) definition of beneficial ownership; 2) documentation requirements; 3) transfer; 4) liability; and 5) funding. We have been told that Treasury and the Department of Justice has had several meetings with private and public sector interests to examine these issues and identify potential solutions. As a result of these discussions, Treasury and DOJ have been drafting an alternative to S. 569, which is currently in the OMB clearance process.

Letter to Chairman Lieberman
April 21, 2010
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It is our hope that we can work together on this very important issue to ensure that the needs of law enforcement are adequately met, while not overburdening our states or legitimate business interests. However, we feel that it is important that we receive those amendments and recommendations from OMB so that we can have ample time to review and discuss with stakeholders in our states prior to taking up this legislation in the Committee. We respectfully ask that you consider removing S. 569 from the Committee's agenda on April 28, 2010. Thank you for your consideration.

Sincerely,

Treasury Proposal Summary

- Effective October 1, 2012
- All entities currently filed with the state must be compliant by October 1, 2014.
- All legal entities formed in the state must have either a documentation agent or a licensed documentation agent (LDA). Certain entities are exempt from some provisions of the bill, but still must file information with the state through a documentation agent or file with a LDA.
- States can decide whether to have one or both options.
- Covered entities with a documentation agent must provide state with beneficial ownership info (including address and photo ID) and that, along with doc agent contact info and notarized signature must be filed with the state. If a non-US owner, documentation agent must collect and file passport photo and ID number.
- If the state holds the info, it must be kept confidential until an appropriate request (subpoena, state/federal summons, FinCEN request, foreign country request) is submitted. Request for info must also be kept confidential.

Treasury Proposal Summary

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continued

- Covered Entities with a LDA must provide agent with beneficial ownership info (including address and photo ID). Entity must file LDA statement with the state that contains LDA name, address and notarized signature. Entity must provide LDA with a statement of B.O. that is signed by each beneficial owner.
- If a non-US owner, LDA must collect and file passport photo and ID number. LDA must sign and have notarized and on file for five years after entity dissolves or LDA resigns.
- Appropriate requests submitted to LDA's must also be kept confidential.
- No funding has been identified for this bill.
- No agency of jurisdiction is identified.

Treasury Proposal – Exempt & Covered Entities

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- **Legal entities**
 - Corporation
 - LLC
 - LP
 - LLP
 - Non-US entity qualified to do business in any state
- **Covered legal entities** are all legal entities that are not exempt.
- **Exempt Legal Entity**
 - An **exempt legal entity** includes an entity that issues securities and registers with the SEC, entities formed by governments, 501(c)3's, a financial institution, bank regulated by state bank regulators or insurance companies regulated by state insurance department, an entity that has more than 20 employees and more than \$10 million in annual receipts with a US operating presence and physical address, any entity where any of these entities would be considered a B.O.

Treasury Proposal – Exempt & Covered Entities

continued

- Exempt entities must provide their documentation agent or LDA with a notarized certificate from an officer of the company stating their basis for exemption, and copy of government issued photo ID.
- Documentation agent or LDA must provide an exempt entity statement to the state. Must be signed with contact info for documentation agent (notarized) or LDA stating that requirements have been met.
- Any exempt entity must have a documentation agent or LDA within the US at all times.

Treasury Proposal - LDA

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Licensed Documentation Agents

- If a state allows for licensed documentation agents, then the state will have to establish a licensing program which would require registration, minimum “fit and proper” licensing requirements for managers and beneficial owners of the LDA (filing of ID, verification and physical presence requirements, and absence of certain convictions), effective and regular monitoring and penalties for non-compliance.

Treasury Proposal – Beneficial Owner Definition

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Two components to the definition of “beneficial owner”

1. An individual who, directly or indirectly, has or shares the power to vote or direct the voting of “at least as much of any interest in such covered legal entity as any other individual.” Interest includes equity security, a voting interest, or voting right. Total amount of interest is determined by combining an individual’s direct/indirect interests, including interest held by another legal entity.
2. The individual with the greatest responsibility for managing or directing the regular affairs of the entity.

Treasury Proposal – Updating Info and Compliance

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• **Updating Information and Compliance**

- Each covered legal entity must update its B.O. statement with an amended statement (including updated ID) within 60 days of any change to the documentation agent (then the state) or LDA.
- Legal entity (covered and exempt) must within 30 days of a change in documentation agent or LDA, provide an amended statement to the state.
- Non-US entities qualified in any state are only required to comply with these requirements in one state
- Any person who has formed and controlled ten or more covered legal entities prior to bill's passage and then transfers an interest in the covered entity, that is considered a formation of an entity subject to immediate filing of all requirements of the bill.
- Any person who affects interstate or foreign commerce in any of these ways is liable for civil penalties (\$10K and three years in jail); providing false B.O. info, providing false ID, willfully failing to provide updated info, willfully failing to obtain credible, legible copies of ID, disclosing an appropriate request.
- Comptroller General of US must submit a report to Congress by June 1, 2013 indicating which states are not compliant and what those states need to do.
- Penalty for state non-compliance would be withholding of federal funds

What Now?

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- Treasury Proposal would need to be introduced as legislation.
- S.569 is still pending before the HSGAC Committee and Sen. Levin still wants a markup.
- If Treasury proposal language is used as a substitute amendment, regardless of funding stream it will stay with HSGAC. Not certain who would introduce it as a substitute.
- If language is introduced as a separate bill, it will be referred to the committee that is associated with regulatory authority or a funding stream.
- HSGAC staff says next markup hearing could be as early as June 16, 2010.
- We have been clearly told that this issue is not over.
- If S.569 gets a markup, it could be added to any Senate vehicle moving on the Senate floor (watching all funding vehicles.) Without a markup, less likely.
- Other groups have not come out with public positions on Treasury's proposal yet.
- Big questions are funding stream and regulatory agency.
- NASS has no position on Treasury p so individual states need to comment.
- Some groups are asking if Treasury's proposal is constitutional.

Summary of S.569

- Beginning FY 2012, each State that receives funding from the U.S. Department of Homeland Security must use an incorporation system that meets the following requirements:
- Each applicant to form a LLC or corporation must provide a list beneficial owners. The list must also identify any legal entity (corporation, trust, partnership) that a beneficial owner will use to exercise control over the LLC or corporation.
- Defines “beneficial owner” as an individual who has a level of control over, or entitlement to, the funds or assets of a corporation or limited liability company that, as a practical matter, enables the individual, directly or indirectly, to control, manage, or direct the corporation or limited liability company.
- Each corporation or LLC must update the list of beneficial owners in an annual filing, or if no annual filing is required in the state, each time there is a change in beneficial ownership.
- Beneficial ownership information must be maintained by the state for five years.
- The state must provide beneficial ownership information on each LLC or corporation in response to a civil or criminal subpoena or written request from a Federal agency on behalf of a foreign country.

Summary of S.569 continued

- If any beneficial owner is not a U.S. citizen or resident of the U.S., each application must include written certification by a formation agent in the U.S. that the agent has verified the beneficial owner's name, address, and identity, and has obtained a copy of the beneficial owner's passport photo.
- Any person who provides false beneficial ownership information to a state is subject to civil and criminal penalties.
- No later than June 1, 2013, the Comptroller General of the U.S. must prepare a report identifying which states are in compliance with the requirements of the bill, and for those that are not compliant, what measures must be taken by the state to achieve compliance.
- One year after the date of enactment of the Act, the Comptroller must prepare a report identifying: procedures in each state for registering as a partnership, trust, or other legal entity; determination of whether such procedures require the submission of beneficial owner information; determination of whether the *lack of procedures requiring this information raises concerns about* terrorism, money laundering, tax evasion, etcetera, and;
- Determination of whether the failure of the U.S. to require beneficial ownership information for partnerships and trusts has elicited international criticism.