

**Discussion information on
The Incorporation Transparency and Law Enforcement Assistance Act
2008 IACA Conference, Salt Lake City, Utah
Business Organization Section
May 20, 2008**

Federal Legislation S.2956 and Referral to Homeland Security and Governmental Affairs

Sen. Levin (D-MI) has introduced S. 2956 **The Incorporation Transparency and Law Enforcement Assistance Act**. This bill co-sponsored by Sen. Coleman (R-MN) and Sen. Obama (D-IL). The bill was referred to the Senate Committee on Homeland Security and Governmental Affairs. This committee is chaired by Sen. Lieberman (I-CT) and the ranking member is Sen. Collins (D-ME). As of this morning, no hearings are posted for this committee on this bill. It is very important when reviewing this legislation to read the floor statement made by Sen. Levin when he introduced the bill. It outlines the provisions within the bill in “plain English”. There is no House companion bill at this time.

NASS Company Formation Task Force Report and Recommendations

As we referenced in our email last week about this legislation, the NASS Company Formation Task Force issued a report and recommendations to address concerns outlined by Sen. Levin in 2006. At the time, Sen. Levin said he was most interested in finding a way to provide a list of shareholders, members or beneficial owners kept in the state of organization that would be available to law enforcement without a subpoena. In addition, during the company formation process, he wanted someone to be required to check the Office of Foreign Asset Control’s (OFAC) Specially Designated Nationals (SDN) list to ensure that none of the owners, members or shareholders were on this list. The NASS Task Force took on these two issues and crafted a proposal that the members saw as a balanced approach to accomplishing Sen. Levin’s goals without creating overly burdensome requirements for the business community and without altering the state government agency role – which is ministerial in nature.

In his floor statement introducing S.2956 last week, Sen. Levin said, “In July 2007, the NASS task force issued a proposal. Rather than cure the problem, however, the proposal was full of deficiencies, leading the Treasury Department to state in a letter that the NASS proposal “falls short” and “does not fully address the problem of legal entities masking the identity of criminals. Among other shortcomings, the NASS proposal does not require States to obtain the names of the natural individuals who would be the beneficial owners of a U.S. corporation or LLC. Instead, it would allow States to obtain a list of a company’s “owners of record” who can be, and often are, offshore corporations or trusts. The NASS proposal also doesn’t require the States themselves to maintain the beneficial ownership information, or to supply to law enforcement upon receipt of a subpoena or summons. The proposal also fails to require the beneficial ownership information to be updated over time. These and other flaws in the proposal have been identified by the Treasury Department, the Department of Justice, myself, and others, but NASS has given no indication that the flaws will be corrected.”

The task force recommended that among other things NASS would formally ask ABA and NCCUSL to “develop language to amend Model and Uniform Business entity laws requiring entities to file a periodic report that includes a name and address of a natural person in the U.S. that has responsibility for providing access to the list of owners of record for a business entity.” This would provide law enforcement with the name and address of a natural person in the US who would be responsible for providing that list of owners of record to law enforcement and that name would be a part of the public record and therefore no subpoena would be necessary for law enforcement to begin their investigation.

Summary of S.2956

- By October 1, 2010
- Each state that receives funding under Homeland Security Act of 2003, Sec.2004 -State Homeland Security Grant Program (SHSGP) – (currently all of the states receive funding) MUST:
 - Require those forming corporations or LLCs to provide the State with a list of beneficial owners
 - Include name and current address
 - If beneficial owner is another legal entity (like a corporation, partnership or trust) then the beneficial owners of that legal entity must all be named as well and include current addresses.
 - Require those forming corporations or LLCs to update the list of beneficial owners in an annual filing or if the state doesn't require an annual filing – each time a change is made in beneficial ownership.
 - State must maintain all of this information for at least 5 years after the corporation or LLC terminates under state law.
 - State must provide beneficial ownership info upon receipt of a subpoena or summons from a state or federal agency, a congressional committee or subcommittee or a written request by a federal agency on behalf of another country under international treaty, agreement or convention.
 - If ANY beneficial owner of a corporation or LLC is not a US Citizen, a State must collect during the formation process and annual filing (or the alternative addressed above) a written certification from a formation agent residing in the US that the formation agent has verified the name, address and identity of each beneficial owner that is not a US citizen or legal resident and has obtained for a copy of the passport with photo page and will provide proof of the verification upon request and will retain this information for 5 years beyond the when corporation or LLC terminates.
 - Providing false beneficial ownership information or failing to provide information (including updates) will carry (in addition to state civil and criminal penalties) a federal civil penalty of not more than \$10,000 and imprisonment for not more than three years.
- SHSGP funding would not initially be withheld for non-compliance by a state. However, by June 1, 2012 the Comptroller General of the US will report to the Homeland Security Committee on which states are complying and those not in compliance and what must be done by those states to comply.
- Definition of beneficial owner is an individual who has a level of control over or entitlement to the funds or assets that enables the individual directly or indirectly to control, manage or direct the corporation or LLC. Corps and LLC's are defined by state law.
- EXEMPTIONS – publicly traded companies or any corp or LLC formed by those publicly traded companies. Businesses formed by a state, political subdivision, interstate compact, department or agency of the US, or under the laws of the US are also exempt. States can also submit individual businesses or class of businesses exemption requests to the US Attorney General.
- Definition of formation agent is a person who, for compensation, acts on behalf of another person to assist in the formation of a corporation or LLC.
- It would NOT be inconsistent with this bill for State law to require more information than currently required in this bill and nor would it be inconsistent for the states to verify this info.
- It would NOT be inconsistent with this bill for states to impose additional limits on public access to the beneficial ownership information.

- Amends anti-money laundering obligations of formation agents currently cited under Sec. 5312 (a)(2) of title 31 , US Code and adds “any person involved in forming a corp, LLC, partnership, trust or other legal entity.” Secretary of Treasury, within 90 days of enactment, will publish a proposed rule on these requirements and indicate those who will be impacted. Within 9 months, the final rule will be published.
- Within one year of enactment, GAO will report on each state and their laws for partnerships, trusts, and other legal entities including the requirement to provide beneficial ownership. GAO will report on whether or not these types of business entities raise concerns about involvement in terrorism, money laundering, securities fraud or other misconduct and if these types of entities have impeded investigative efforts. GAO will also evaluate the if the lack of beneficial ownership collected for trusts and partnerships has resulted in international criticism and what steps if any the US is taking to address that.

Federal Funding Referenced in S.2956

There is no dedicated funding for the requirements in this bill. The bill simply states that the funding would come from an existing federal grant program called the State Homeland Security Grant Program (SHSGP). According to Mike Smith, Legislative Policy Analyst for the National Emergency Management Association (NEMA, the state emergency managers), SHSGP it is a competitive grant program that supports State homeland security efforts to address the identified planning, organization, equipment, training and exercise needs for acts of terrorism and other catastrophic events. For example, States are authorized to use SHSGP funds to hire intelligence analysts or to conduct training related to community preparedness. The Implementing 9/11 Commission Act of 2007 established minimum allocation thresholds for the grant program. In FY2008, each state would receive .375 percent of the total funds appropriated. This percentage decreases annually until FY2012 at which time the minimum threshold for each state is .35 percent. The remaining appropriations are allocated based on risk, which according to DHS is defined as the likelihood of an attack occurring, and the relative exposure and expected impact of an attack. Mr. Smith of NEMA went on to explain that Congress appropriated about \$950 million for SHSGP in FY08. However the States must allocate no less than 25% of the total funds appropriated through this grant for law enforcement terrorism prevention activities. These activities may include information sharing, threat recognition, etc. In addition, DHS also authorizes states to use up to 20 percent of all SHSGP funds for REAL ID implementation. However, this becomes a real issue when the law requires that States distribute 80% of all SHSGP funds to local governments within 45 days of receiving the grant.

News articles on the bill

Other than press releases posted by the sponsor and co-sponsors of this bill, we can only find two articles on this legislation – both from the Las Vegas Review-Journal. If there are others, please forward them to us as they are not coming up in our searches.

<http://www.lvrj.com/business/18481494.html>

<http://www.lvrj.com/business/18544189.html>

Other Organization Activities

After agreeing to the NASS Task Force request to draft amendments to the Uniform Business Entity Acts, **National Conference of Commissioners on Uniform State Law (NCCUSL)** held several drafting sessions, the next session will be June 7, 2008 in Chicago. These sessions have been open to observers (Sec. Marshall-NC) attended a November 2007 drafting session and Sec. Rokita- IN attended their January 2008 session.) The first reading of this drafting product is still scheduled for the NCCUSL Summer meeting in July 2008.

The **Corporation Committee of the American Bar Association (ABA)** had their most recent drafting session in April 2008 in TX. They are working on amendments to the Model Business Entity Acts.

The **International Association of Commercial Administrators (IACA)** will hold their annual conference in Salt Lake City the week of May. This legislation and the NASS Task Force Report and Recommendations will be addressed during the Business Organization Section of the conference. Sec. Elaine Marshall (NC), NASS Company Formation Task Force co-chair and Sec. Matt Dunlap (ME), NASS Business Services Committee Vice Chair are both attending this conference and will participate in the Business Organization Section discussions. NASS staff, Leslie Reynolds, will also attend and participate. NCCUSL Reporter and ABA Committee Chair Bill Clark will also be present and will update the session attendees on the ABA and NCCUSL work product and status.

The **National Conference of State Legislatures (NCSL)** convened a Corporate Formation Task Force and has had two meetings (November 2007 and April 2008). Sec. John Gale (NE), NASS Company Formation Task Force co-chair has given presentations at both meetings on the activities and work product of the NASS Company Formation Task Force. The next meeting of the NCSL Task Force is in Wilmington, DE on Friday, May 17, 2008. NASS staff will attend that one-day session. NCSL Task Force is charged with making a report and providing a recommendation at their summer conference in July to the NCSL Executive Board.

NASS staff met with the **U.S. Chamber of Commerce** in April 2008. Now that there is legislative language to address, several divisions (Homeland Security, Regulatory, Capital Markets, Mid-Sized Markets, etc.) will review and weigh-in on the various components of the bill relevant to them. They have assigned a point person within the Chamber to serve as liaison. NASS staff will stay in contact with that liaison. They will also discuss other organizations that they could engage – National Federation of Independent Businesses (NFIB), Business Roundtable, etc.

The **National Association of Emergency Managers (NEMA)** held a legislative committee conference call and this bill will be an item of discussion for them. This legislation (and another bill introduced on a different topic but same funding source) authorizes that funds can come from the SHSGP grant funding which further reduces the resources that would be available for the state emergency management programs they work on.