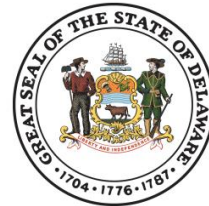


Encouraging Business While Fighting Fraud

States Focus on Changes Made and Changes to Consider

Prepared for the National Association of Secretaries of State (NASS)
Business Services Committee and Company Formation Task Force
in collaboration by the Secretaries of State of Delaware, Nevada and Wyoming



Presented at:

**NASS Annual Summer Conference
Anchorage Alaska
July 19, 2013**

As Updated for:

**IACA Annual Conference
Milwaukee, Wisconsin
Business Organization Section Meeting
May 20, 2014**

INTRODUCTION

In the late 1990's, a variety of federal and international government agencies began to focus attention on the misuse of legal entities and shell companies in the United States and around the world to facilitate illicit financial flows stemming from corruption, tax evasion and money laundering. In 2000, these agencies began issuing a series of reports (see Appendix A) that were critical of State company formation laws for failing to require companies to collect and disclose "beneficial ownership" information at the time of formation. Several media outlets have also published or broadcast reports echoing concerns about the potential misuse of legal entities and highlighting specific examples (see Appendix B).

In response to these reports, certain federal agencies and members of Congress proposed requiring state "company registries" to collect "beneficial ownership" information at the time of company formation and maintain this information throughout the life of the company. In response to these proposals, the National Association of Secretaries of State (NASS) began working in 2006 with the American Bar Association (ABA), the Uniform Law Commission (ULC), the National Conference of State Legislatures (NCSL), the International Association of Commercial Administrators (IACA), the U.S. Chamber of Commerce, and various other stakeholders to consider these proposals and discuss other approaches to combatting illicit business formations.

The task of identifying a company's beneficial owners is a complex undertaking, and policymakers have yet to agree on the details for gathering such data. NASS has opposed federal legislation that aims to radically transform the company formation process in the United States and that would result in expensive, unworkable regulatory and compliance burdens for states and legitimate businesses.

In 2007, NASS through its Company Formation Task Force endorsed 1) working with federal agencies such as the Office of Foreign Asset Control (OFAC) to ensure that businesses were aware of their obligation to not conduct business with prohibited persons; 2) developing a comprehensive survey of state laws including information on how law enforcement can access ownership information ; 3) asking the ABA and ULC to develop amendments to model and uniform business entity laws requiring entities to provide periodically updated information to include the name and address of a natural person in the United States with responsibility for providing access to the list of owners of record for a business entity while considering the historical precedent of confidentiality of company ownership; and 4) better clarifying existing state prohibitions on bearer shares.

In 2010, NASS endorsed efforts to collect comprehensive ownership information through enforcement of existing Internal Revenue Service (IRS) requirements. NASS has also endorsed a proposal that any federal legislation impacting the States be preceded by a formal analysis of the costs and economic impacts on states and businesses and that any federal mandate include a funding mechanism.

NASS's 2007 and 2010 recommendations were deemed unsatisfactory by certain members of Congress, including Senator Carl Levin, who introduced the *"Incorporation Transparency and Law Enforcement Assistance Act"* and the *"Stop Tax Haven Abuse Act"* during the 110th, 111th and 112th Congresses.

In recent years, significant steps have been taken at the federal level to collect legal entity ownership information.

- In July 2010, the IRS began promoting its revised Form SS-4, the application for an employer identification number. The SS-4 application actually collects information on the "responsible party" for a legal entity which provides beneficial ownership information to the IRS. The responsible party is *"the person who has a level of control over, or entitlement to, the funds or assets in the entity that, as a practical matter, enables the individual, directly or indirectly, to control, manage or direct the entity and the disposition of its funds and assets."* Federal law enforcement agencies currently have access to the information collected under the SS-4, when it is warranted.
- In May 2013, the IRS issued a final regulation on updating employer identification numbers (EIN). The rule requires any person with an EIN to provide the IRS with updated application information on the identity of the true responsible party. The IRS notes in the Federal Register that this updated information helps the IRS *"combat schemes that abuse the tax system through the use of nominees, which results in the concealing of the true responsible party for entities that hide assets and income."* The updated regulation strengthens the existing rules at the federal level for collecting information on beneficial ownership.
- The Treasury Department also enhanced its information collection by requiring U.S. persons with a financial interest in, or signature authority over, a foreign financial account to file an annual Report of Foreign Bank and Financial Accounts or "FBAR." An FBAR must be filed if the combined value of all the foreign financial accounts held by the U.S. person exceeds \$10,000 during the calendar year. The FBAR captures foreign-owned entities by requiring a U.S. taxpayer ID number or foreign identification. Importantly, the Treasury Department notes on its website that FBARs help investigators identify and track funds *"used for illicit purposes or to identify unreported income maintained or generated abroad."* While single member LLC's that do not conduct business in the United States or have any U.S. bank accounts are exempt from the IRS requirement to file an SS-4, all LLC's formed in the United States are subject to FBAR reporting if they meet the filing thresholds. FBAR effectively closed the SS-4 exemption loophole for U.S. legal entities that operate exclusively outside the United States.

- The Foreign Account Tax Compliance Act (FATCA), enacted under the Hiring Incentives to Restore Employment (HIRE Act), further strengthens the U.S. government's effort to combat offshore tax evasion. FATCA requires foreign financial institutions to report to the IRS annually information on financial accounts held by U.S. taxpayers or by foreign entities in which U.S. persons have a substantial ownership interest. If a foreign financial institution fails or refuses to comply, it is subject to a 30% withholding tax on its income from U.S. sources. Foreign financial institutions must report annually for each of its U.S. accounts the name, address, and tax ID number of each account holder that is a U.S. person as well as the name, address, and tax ID number of any account holder that is a U.S. owned foreign entity. Under the law, U.S. taxpayers with foreign financial assets that exceed certain thresholds must also file Form 8938, which accompanies their federal income tax return.
- The requirements under Form 8938 go beyond those of FBAR by requiring the disclosure of other foreign financial assets and income, such as stock investments in foreign financial companies. Since the two forms do overlap, it ensures that a wide net is cast and that anyone not covered under one form could be covered under the other.

In short, the SS-4, FBAR and FATCA requirements complement each other and are effective tools for tracking beneficial ownership information. The federal government is well-equipped to handle the tracking of this information and it can be done at no additional cost to taxpayers or businesses. With company ownership data readily available to federal law enforcement via federal agencies and U.S. financial institutions, they are best-situated to take on the costly, legally intricate task of collecting and/or verifying beneficial ownership information.

- In February 2014, the Obama Administration unveiled its proposed FFY 2015 budget that included language acknowledging that “the IRS collects such [beneficial owner] information for many companies (those with an employer identification number or EIN)” but also acknowledging that not every company must currently get an EIN and the relevant information cannot readily be shared with law enforcement officials without a court order under Federal law. To address these challenges, the Administration proposed the adoption of federal legislation to 1) allow sharing of beneficial owner information under certain conditions without a court order and 2) require all companies formed in the U.S. to obtain an EIN or universal identifier.

The Administration's proposal supports the long-held view of NASS that the federal imposition of “beneficial ownership” collection requirements on the States is unnecessary in light of federal collection requirements. However, the Administration's proposal also recognizes that States and the private sector have an important role to play in deterring the formation of fraudulent businesses. Specifically, the Administration's proposals would also 1) authorize the Secretary of

Treasury to impose anti-money laundering obligations on persons in the business of forming companies and 2) establish standards for States to improve the regulation and oversight of the incorporation process.

State and local governments can and do play a productive role in helping deter the formation of fraudulent businesses through their traditional business licensing and permitting responsibilities. In addition, “company registries” around the world -- including the members of IACA and/or those operating under the aegis of Secretaries of State – should and do play an important role in this effort. The purpose of this paper is to highlight new developments in State company formation laws in the selected states of Delaware, Nevada and Wyoming and to set forth best practices of “company registries” in the United States. These best practices should be seriously considered by U.S. states that want to reduce their susceptibility to the formation of fraudulent businesses.

A BRIEF TIMELINE OF THE ISSUE

2000 – The U.S. General Accounting Office (GAO) publishes *“Suspicious Banking Activities – Possible Money Laundering by U.S. Corporations Formed for Russian Entities”*.

2003 – The Financial Action Task Force on Money Laundering (FATF) re-issues 40 Recommendations to Combat Money Laundering including Recommendation 33 as follows:

Countries should take measures to prevent the unlawful use of legal persons by money launderers. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. In particular, countries that have legal persons that are able to issue bearer shares should take appropriate measures to ensure that they are not misused for money laundering and be able to demonstrate the adequacy of those measures.

2006 – The Permanent Subcommittee on Investigations of the U.S. Senate Homeland Security and Governmental Affairs Committee (HSGAC) holds a hearing entitled *“Failure to Identify Company Owners Impedes Law Enforcement”* following the publication in 2006 of several reports criticizing the U.S. company formation process:

- *“U.S. Money Laundering Threat Assessment”* issued by the U.S. Government
- *“Company Formations – Minimal Ownership Information is Collected and Available”* issued by the Government Accountability Office (GAO)
- *“Mutual Evaluation of the United States”* issued by the FATF
- *“Role of Domestic Shell Companies in Financial Crime and Money Laundering – LLCs”* issued by the Financial Crimes Enforcement Network (FinCEN)

2007, 2009, 2011 – Members of Congress including lead-sponsor Senator Carl Levin introduce the *“Incorporation Transparency and Law Enforcement Assistance Act”* directing states to collect beneficial ownership information and the *“Stop Tax Haven Abuse Act”* directing the U.S. Treasury to regulate “company formation agents” are introduced in Congress.

2009 – The Uniform Law Commission (ULC) approves the *“Uniform Law Enforcement Access to Entity Information Act (ULEAIEA)”* suggesting a state-based model for collecting basic information on managers and record holders of legal entities and making it available to law enforcement.

2013 – The G-8 nations at their annual summit in Northern Ireland issue a Joint Declaration stating “*Companies should know who really owns them and tax collectors and law enforcers should be able to obtain this information easily.*” The Joint Declaration’s accompanying Communique states the following:

30. A lack of knowledge about who ultimately controls, owns and profits from companies and legal arrangements, including trusts, not only assists those who seek to evade tax, but also those who seek to launder the proceeds of crime, often across borders. Shell companies can be misused to facilitate illicit financial flows stemming from corruption, tax evasion and money laundering. Misuse of shell companies can be a severe impediment to sustainable economic growth and sound governance. We will make a concerted and collective effort to tackle this issue and improve the transparency of companies and legal arrangements. Improving transparency will also improve the investment climate; ease the security of doing business and tackle corruption and bribery. It will support law enforcement’s efforts to pursue criminal networks, enforce sanctions, and identify and recover stolen assets.

31. We are determined to take action to tackle the misuse of companies and legal arrangements. We will lead by example in our implementation of the Financial Action Task Force (FATF) standards. We today agreed to publish national Action Plans based on common principles (annexed). Subject to our different constitutional circumstances, these Action Plans set out the concrete action, with respect to money laundering and tax evasion, each of us will take to tackle this issue to ensure that companies know who really owns and controls them by requiring companies to obtain and hold information on their beneficial ownership, and to ensure that this information is available in a timely fashion to law enforcement, tax collection agencies and other relevant authorities as appropriate, including financial intelligence units, for example through central registries; and by ensuring trustees know the beneficial ownership information regarding the trust and that law enforcement, tax collection agencies and other relevant authorities as appropriate, including financial intelligence units, can access this information. We will work with our FATF partners to ensure ambitious progress at a global level, including by prioritising the assessment of relevant FATF recommendations.

The United States annexes an Action Plan to the G-8 Communique supporting legislation to require states to collect beneficial ownership information.

2014 – The Obama Administration’s FFY 2015 budget unveils a new proposal to “provide authority to readily share beneficial ownership information of U.S. companies with law enforcement” as follows:

Beneficial ownership of a company generally means the individual or individuals who have a level of control over, or entitlement to, the funds or assets of the company that, as a practical matter, enables the individual(s), directly or indirectly, to control, manage, or direct the company and the disposition of its funds and assets. Knowledge of beneficial owners can help law enforcement officials identify and investigate criminals who form and misuse U.S. companies to launder criminal proceeds and finance terrorism through the international banking system. But such information is not readily available, however, to law enforcement officials for several reasons. First, States do not collect all the relevant information at the time a company is formed. Second, while the IRS collects such information for many companies (those with an employer identification number or EIN), that information cannot be shared with law enforcement officials without a court order. The proposal would allow the Secretary of the Treasury or his delegate to share beneficial ownership information with law enforcement without a court order to combat money laundering, terrorist financing, and other financial crimes. Such sharing would advance criminal investigations and successful prosecution of money laundering and terrorist financing cases and assist in identifying criminal proceeds and assets. In addition, the proposal would require all companies formed in the United States to obtain an EIN, which would provide a universal identifier for these companies. Further, the proposal would provide the Secretary of the Treasury with the authority to impose anti-money laundering/countering the financing of terrorism obligations on persons in the business of forming companies. Lastly, the proposal would establish standards for States to improve their regulation and oversight of the incorporation process.

BEST PRACTICES AND CHANGES MADE

The G-8 Communique expressly recognizes that each nation needs to tackle this issue “subject to our different constitutional circumstances.” Similarly, each state in the U.S. has its own unique legal entity formation statutes and should adopt legislation that best fits the parameters of its own laws. In response to legitimate concerns that existing State company formation laws were inadequately deterring the formation of illicit business enterprises, the States of Delaware, Nevada and Wyoming have each enacted a series of reforms since 2002 addressing their unique issues and needs as described below:

DELAWARE (See Appendix C for Citations)

2002 - Prohibiting Bearer Shares

While Delaware corporate case law has long barred the issuance of stock certificates in bearer form, §158 of the Delaware General Corporation Law (DGCL) was amended to expressly state that Delaware corporations may not issue bearer shares. Similar amendments were enacted in 2007 barring partnership, limited partnership (LP) and Limited Liability Company (LLC) interests in bearer form.

2006 - Ensuring Law Enforcement Access to Company Contact Information

The State’s business entity laws were amended to require every company registered in Delaware to provide its agent with the current name, business address, and business phone number of a natural person who is “*an officer, director, employee, or designated agent of the company who is then authorized to receive communications from the registered agent.*” Combined with a requirement that the registered agent retain this information, this requirement ensures that law enforcement has access to current communications contact information when serving a subpoena upon a registered agent.

2006 - Increasing Oversight of Company Formation and Registered Agents

The State’s business entity laws were amended to enable the Secretary of State to better police the activities of company formation and registered agents by:

- 1) Requiring Commercial Registered Agents (CRAs) representing 50 or more entities to register with the Secretary of State and maintain a Delaware business license with the Delaware Division of Revenue;
- 2) Requiring all registered agents to retain communications contact information for every entity they represent;

- 3) Empowering the Secretary of State to audit firms for compliance with State laws requiring agents to be open during normal business hours, be available for service of process, retain communications contact information and barred from using mail drops or P.O. Boxes; and
- 4) Allowing the Secretary of State to discipline a registered agent by:
 - a. refusing to file documents for an agent that fails to meet minimum standards of conduct; and/or,
 - b. seeking to enjoin an agent or its officers from doing business in Delaware if the agent 1) fails to comply with minimum qualifications after notice and warning; 2) has been convicted of a felony or any crime involving dishonesty, fraud or moral turpitude, or 3) engages in conduct intended or likely to deceive or defraud the public.

2012 - Deterring Harmful Marketing Practices by Company Formation Businesses

The Secretary of State issued standards prohibiting any registered agent listed on the State's website from marketing or promoting "anonymity, secrecy, hidden ownership, shell, shelf or aged companies" or similar terms associated with illicit practices.

2013 - Deterring the Sale of Aged Companies

The State's General Corporation Law was updated to deter the creation of "shelf corporations" that are held for several years and later sold for a premium. These amendments prohibited the practice of allowing an incorporator to never elect or appoint directors thereby limiting the incorporator's ability to "age" a corporation for a future sale.

2014 - Improving Law Enforcement Access to LLC Information

Legislation has been introduced to require LLC's to maintain a current record that identifies the name and last known address of each manager and member of an LLC. Further legislation will be introduced in Spring 2014 to require an LLC upon request by the Communications Contact of an LLC to provide the Communications Contact with the name, address and phone number of a natural person who has access to the current list of managers and members. These laws will provide a clear path for law enforcement to follow when seeking access to manager/member information.

NEVADA (See Appendix D for Citations)

2007 - Prohibiting Bearer Shares

While bearer shares were used in Nevada's territorial and early statehood days for the free transfer of ownership, Nevada's corporate laws never permitted or expressly barred bearer shares. Nevada corporate law was amended in 2007 to strictly bar the issuance of bearer shares by corporations.

2007 – Ensuring Law Enforcement Access to Owner of Record and/or Custodian of Record Information

Nevada amended its entity formation statutes to expand the collection of owner information and ensure the accuracy of entity filings by:

- 1) Requiring legal entities to maintain at their registered office or principal place of business in Nevada a list of owners of record or the name and location of the custodian of that record.
- 2) Requiring that the list of owners of record or custodian of record information be provided upon demand of the Secretary of State and that answers to any interrogatory submitted in the course of a criminal investigation be provided within 3 days of the request; and providing authority for the Secretary of State to suspend or revoke the charter of any business that fails to comply with such requests. (Nevada is currently developing processes requiring entities to disclose the location of the list of owners of record and the person acting as the custodian of the list as part of the initial and annual filing. This information will be available to law enforcement.)
- 3) Granting authority for policies and procedures to address forged and fraudulent filings and the correction of such filings on the public record. Entities that have had documents filed on their record by unrelated third parties may now file a complaint with the Secretary of State's Division of Commercial Recordings. If the complaint is founded or if there is no response by the filer, the forged or fraudulent filing is corrected through the filing of an officer's statement explaining the filing and the related correction. Disputes involving related parties (e.g., partners, spouses, shareholders, or any parties that have a business or personal relationship or a potential claim of right in the entity) are left to the courts.

2009 – Barring New “Corporation Sole”

A “corporation sole” is a legal entity consisting of a single incorporated office occupied by a single man or women – historically used to provide corporate and legal continuity between a religious officeholder and a successor. Regrettably, the corporate sole entity type has been misused by persons

seeking to evade taxes and other legal requirements. Nevada limited the creation of any new corporation sole with a full prohibition beginning in 2011. Existing corporations sole in place in 2011 were grandfathered.

2009 – Strengthening Enforcement and Penalties for Improper Registration

Legislation was enacted to improve Nevada’s ability to administer and enforce requirements that legal entities properly register in the State as follows:

- 1) Many businesses were conducting business in Nevada without filing the basic documents necessary to form an entity in Nevada or to qualify as a foreign corporation doing business in Nevada. After ample notice and opportunity to remedy a deficiency, a person doing business in Nevada that refuses to comply with the statutory filing requirements is subject to a fine of \$1,000 - \$10,000. Effective October 1, 2013 these requirements will also extend to sole proprietors, partnerships and other non-entity business types.
- 2) Authority for administration of the State Business License was transferred from the Department of Taxation to the Secretary of State. Nevada’s State Business License statutes require that every person doing business in Nevada or doing business as a Nevada entity to have a State Business License or Certificate of Exemption, as applicable.

2009 through 2012 – Promoting Best Practices Among Registered Agents and Deterring Harmful Marketing Practices

Much of the criticism of Nevada’s entity formation practices has been due to inappropriate promotional practices of certain registered agents in the State. Beginning in 2009, the Secretary of State worked with the Nevada Registered Agents Association to develop and support a best practices policy for Nevada registered agents. In 2011 and 2012, in response to continuing scrutiny and complaints, the Secretary of State adopted regulations and procedures addressing these issues as follows:

- 1) New regulations were adopted regarding registered agent practices that included maintenance of a proper location for service of process, prohibition of deceptive or illegal acts promoted in solicitations and other correspondence, and when a registered agent may not serve. The regulations also prohibit solicitations using the State seal or appearing to be official correspondence from the Secretary of State and must contain wording that solicitations are not from the Secretary of State.
- 2) New regulations were adopted regarding those doing business in Nevada without filing articles of incorporation or other registration documents consistent with the statutory authority granted in 2009.

- 3) The Secretary of State created a compliance division to investigate those persons doing business in Nevada without proper registration, to investigate and address prohibited registered agent practices and address forged and fraudulent filing complaints.

2012 – Implementing SilverFlume, Nevada’s Business Portal

SilverFlume allows for electronic filing of documents using existing online backend services; collects common business registration information for participating agencies; allows customers to better monitor entities and related filings using dashboard technology; and allows customers to register with multiple participating agencies and check out in single shopping cart. Wizard technology guides customers through a business checklist. The Digital Operating Agreement within SilverFlume allows for the

digital governance of limited liability companies. Approval of new or enhancements to existing operating agreements may be made via electronic simultaneous or sequential meetings.

2013 - Increasing Oversight of Company Formation and Registered Agents and Enhancing Law Enforcement Access to Information

New legislation recently signed by the Governor includes the following provisions that significantly improves law enforcement access to information and boosts state oversight of registered agents. The legislation:

- 1) Allows the Secretary of State to provide law enforcement or agencies with access to State Business License information in the course of any enforcement action. Previously State business license information was considered confidential and available only through subpoena.
- 2) Further defines who may serve as a registered agent and imposes penalties on those not maintaining filings required by law.
- 3) Requires that any registered agent with 10 or more represented entities is a Commercial Registered Agent (CRA) that must register and provide additional information to the Secretary of State.
- 4) Prohibits felons from serving as a CRA, allows the Secretary of State to enjoin a person from serving as a registered agent in certain circumstances such as felonies, allows the Secretary of State to audit a registered agent to ensure compliance with certain requirements, and issue fines for violations.
- 5) Prohibits the naming of officers to conceal the identity of officers and directors/members/managers for unlawful purposes. This addressed

the concern that “nominee officers” are being used to shield unlawful activity.

- 6) Prohibits the creation of entities for the purpose of creating a false history of for unlawful purposes including provisions for “shell” and “shelf” companies.
- 7) Gives the Secretary of State interrogatory authority in investigations of business registration compliance.
- 8) Prohibits the reinstatement or revival of a Nevada entity without proper authorization from the duly appointed board of directors or by a court of competent jurisdiction.

2014 – Increasing Disclosure and Identifying Information for Nonprofit Corporations Soliciting Charitable Contributions

On January 1, 2014, statutory provisions went into effect requiring all nonprofit corporations soliciting charitable contributions in or from the State of Nevada to disclose certain identifying and financial information on the public record. These statutes also require all nonprofit organizations to make certain disclosures pertaining to the deductibility of contributions solicited.

2014 – Implementing Document Preparer Registration Statutes

Document preparers, excluding attorneys and commercial registered agents, are required to register with the Secretary of State, similar to notaries. These requirements are designed to curtail abuses in the filing of legal documents in all areas, but also apply to business documents filed with the Secretary of State.

2014 – Ramping Up Compliance Efforts

The Secretary of State’s Office has begun audits of Commercial Registered Agents for compliance with the minimum CRA requirements, including hours, staffing and location for proper service of process. Entities and CRA’s may be referred to the Attorney General for action relating to noncompliance.

WYOMING (See Appendix E for Citations)

2007 - Prohibiting Bearer Shares

Wyoming statutes were silent on whether bearer shares were permitted causing the Secretary of State to take the position that they were not permitted. However, many registered agents took the opposite position and were marketing bearer shares. In 2007, Wyoming definitively banned bearer shares in the statute.

2008 – Deterring the Use of Fraudulent Addresses, Increasing Oversight of Registered Agents, and Ensuring Law Enforcement Access to Company Contact Information

Legislation that took effect in 2009 directly attacked the problem of companies using fraudulent addresses. The legislation required registered agents to maintain a physical presence in Wyoming and the use of drop box locations and mail boxes as registered offices was no longer permitted. Legislation provided the Secretary of State the authority to scrutinize registered agents more closely. Registered agents representing 10 or more entities are now required to register as commercial registered agents (CRA's). These CRA's are monitored more closely because of the volume of entities they tend to form and represent. For example, the Secretary can track how many entities a registered agent represents, when and how often they change addresses (usually a red flag), and the volume of entities they form (another red flag). This bill also made registered agents the face of the companies they represent in Wyoming. Records regarding a communications contact person and key individual (i.e. member/manager, officer/director) are now required to be kept on every entity a registered agent represents. This information must be provided to the Secretary of State's Office or law enforcement upon request. Additionally, the Secretary of State was given authority to audit registered agents for compliance and issue fines/penalties for violations of this bill.

2008 – Cracking Down on Delinquent Entities and False Documents

Legislation was adopted that gave the Secretary of State significant authority regarding delinquent entities. Before the bill's passage, entities that failed to file an annual report became delinquent but often remained in that status for a period of 5-17 months. During those 5-17 months, entities could be perpetrating fraud and taking advantage of Wyoming's good name without consequence. The amount of time an entity remained delinquent was trimmed from 5-17 months to 60 days. Today, if an entity fails to file their annual report within 60 days of becoming due, that entity is administratively dissolved by the Secretary of State and becomes inactive. It is much more difficult to perpetrate a fraud with an inactive entity. A felony provision was also added to this bill. Any person filing a false document with the Secretary of State can now be charged with a felony.

2012 – Authorizing Commercial Registered Agent Renewal Penalties

This legislation gives the Secretary of State the authority to assess a late fee and recover notification costs from commercial registered agents who fail to renew. Prior to the passage of this legislation, a pattern developed in which commercial registered agents would let their registration expire which left the entities they represented without a registered agent. The commercial registered agents subsequently filed a late renewal, appointed themselves back to the entities they wanted to continue representing and removed the entities they no longer wanted using the state system as a means of "dropping their clients."

The issue: when a commercial registered agent lets their registration expire, the Secretary of State must send a certified letter to each entity represented by that commercial registered agent informing the entity it is without a valid registered agent. Many commercial registered agents represent hundreds to thousands of entities which causes the Secretary of State to incur great cost in sending certified notifications. This statute allows the Secretary of State to recover the costs of the notification and assesses a \$500 late renewal fee against the commercial registered agent.

2012 – Adopting Cease and Desist Authority Against Individuals and Entities
Legislation was adopted giving the Secretary of State the authority to refuse filings from an individual or entity for up to five years and to issue a cease and desist order against an individual or entity:

- that files a fraudulent statement;
- that uses any false writing or document knowing it contains a materially false, fictitious or fraudulent statement; or
- is the subject of, an agent of, or acting on behalf of the subject of any order of the Secretary of State or any similar order issued in another jurisdiction.

This law provides Wyoming the authority needed to stop entities or individuals that intentionally file false or fictitious documents with the Secretary of State's office.

2013 – Dissolving Delinquent Commercial Registered Agents

This legislation gives the Secretary of State the authority to dissolve a business entity that is a commercial registered agent or to refuse filings from an individual who is a commercial registered agent if they fail to pay any penalties that have been imposed against them by the Secretary of State.

The issue: commercial registered agents, who were found to be in violation of the Wyoming Registered Agent Act, were assessed penalties and chose to walk away from paying the penalty giving up the right to be a commercial registered agent. However, if that commercial registered agent was a business entity, the statutes did not preclude them from continuing to operate in Wyoming. This law allows the Secretary of State to dissolve the entity or refuse filings from an individual who is a commercial registered agent who fails to pay any penalties assessed.

IS IT WORKING?

As detailed above, the Delaware, Nevada, and Wyoming Secretaries of State have each taken action to reduce fraudulent filings, improve law enforcement access to information, increase oversight of registered agents and deter harmful marketing practices by company formation businesses.

There is ample anecdotal evidence that the States' efforts are having a positive impact. Although a ban on bearer shares is largely symbolic, the prohibition of bearer shares in Delaware, Nevada, and Wyoming has been viewed favorably by the Financial Action Task Force. Delaware's 2006 amendments requiring Communications Contact information has virtually eliminated complaints from law enforcement that some registered agents were unable to provide basic contact information on their clients when served with a subpoena. Nevada has found that the potential of a fine for failure to properly register a business has resulted in a significant increase in compliance. In Wyoming, more than 4,300 entities chose to be administratively dissolved rather than find a legitimate registered agent and address.

U.S. Treasury officials have supported increased standards for Corporate Service Providers (CSP's) similar to the laws establishing standards for Commercial Registered Agents (CRA's) adopted in Delaware (2006), Wyoming (2008), and Nevada (2013). Enhanced scrutiny of CRA's and registered agents in general is having the desired effect with the states having collectively taken actions against 37 agents (21 in Delaware, 13 in Wyoming and 3 in Nevada). "Bad apples" have been fined, penalized, served with cease and desist orders, and in some cases have voluntarily left the State or been enjoined from doing business by State courts. Audits of registered agents have resulted in the closing down of drop boxes and mail forwarding services. Audits in Delaware have been an effective tool in ensuring that agents are keeping and retaining communications contact information.

In Nevada, a registered agent was found to have improperly claimed a home-based business exemption on behalf of almost all of their 500 represented entities. The agent, based in Taiwan, had opened an office in Las Vegas but had no staff available to accept service of process. The agent was ultimately fined more than \$50,000 and required to pay late fees and reinstatement penalties to bring the represented entities back into active status.

In Delaware, 14 CRA's ran afoul of the State's new listing standards. Most quickly modified their websites to eliminate references to secrecy and shell companies and that are harmful to consumers and the State's reputation. In one notable example, a company based on the West Coast with an office in Delaware refused to alter its marketing and was taken off of Delaware's website. Within months the firm was appealing for reconsideration due to the loss of business.

Importantly, these new laws, regulations and policies have put legal entities and corporate service providers on notice that States will take action against persons violating the State's business formation laws. Commercial Registered Agents, in particular, closely watch the implementation of new CRA requirements and are changing their business practices accordingly in all three States.

Regrettably, these deterrent measures stop at the state's borders -- there is no effective way for a State with an active CRA enforcement program to prevent a company formation business that is operating in another state from continuing to engage in fraudulent practices in other states.

WHAT ARE THE NEXT STEPS?

While there is widespread consensus within NASS, the ABA, ULC, IACA, the U.S. Chamber of Commerce and others opposing beneficial ownership disclosure, there are further measures that every state could consider that would go a long way toward deterring money laundering and assisting law enforcement while not creating undue burdens for States or legitimate businesses.

The vast majority of states already have in place the following "best practices" each of which provides an incremental deterrent to the formation of illicit businesses:

- 1) Requiring periodic statements listing information about an entity including its registered office, place of business, and officers and directors including managers, members and/or partners.
- 2) Requiring companies to pay a periodic fee or tax to keep a legal entity in good standing.
- 3) Providing for annual administrative cancellation by the State for legal entities that fail to file a periodic report, renewal, fee or tax.
- 4) Requiring every legal entity to have a registered office in the state with a street address.
- 5) Requiring review by a State employee of each document filing submitted to the State to ensure compliance with statutory requirements and flag entities that are suspicious on their face (e.g., a business filing that is blatantly fraudulent, a business operating from a prohibited country such as Iran, etc.).

States that have not adopted these practices should consider them. States might also consider adopting Delaware and Wyoming's communications contact requirement to ensure that law enforcement has access to the name of a real person for every entity in their state. States might also consider expanding the duties of the contact person to include having possession of or access to the companies list of "holders of record" so that law enforcement has a path to access such information with a subpoena. Alternatively, states might consider adopting Nevada's requirement to identify both the location of the list of owners of record and the name and location of the custodian of such list and making such information directly available to law enforcement.

Those states that don't currently require manager or member information from LLCs might consider requiring LLCs to provide manager information (or in the absence of a manager, the name of a top member) and having that information held either by the State or a Corporate Service Provider (CSP) in the State or made accessible to a Communications Contact person.

States might also consider adopting the basic structure of ULEAEIA by requiring all legal entities to provide the name, address and phone number of the top natural person responsible for managing the entity and the name of the top Holder of Record. Such information could be held by the State as either a public record or a non-public record or held by a CSP as a non-public record.

In light of recent proposals, if federal agencies take on the role of tracking beneficial owner information for every legal entity through the EIN application process, States should consider enacting complementary legislation requiring all legal entities to demonstrate that the entity has secured an EIN or similar unique identifier required by federal law. Such a filing could presumably be made confidentially either at the time of formation or soon thereafter.

At a minimum, States should collaborate in the policing of activity by CSP's whose actions appear to promote or encourage illicit practices. A starting point for this effort is to establish clear and enforceable standards, audit and investigatory procedures, and clear sanctions as is being done in Delaware, Nevada and Wyoming.

All three States stand ready to assist in these efforts. For more information, please contact:

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APPENDIX A

Selected Government Agency Reports

- Abuse of state company formation laws has been a focus of the Senate Permanent Subcommittee on Investigations of the U.S. Senate Homeland Security and Government Affairs Committee (HSGAC) since 2000. A report by the U.S. General Accounting Office for the Subcommittee identified a variety of Delaware corporations alleged to have been used to launder money through U.S. banking institutions by Russian nationals.
<http://www.gao.gov/assets/240/230932.pdf>
- The HSGAC concerns culminated in a November 16, 2006 hearing that highlighted the practices of registered agents promoting anonymity through the use of nominee officers, and offering “shelf” entities as a means of lending credibility to a company that in reality has just formed.
<http://www.hsgac.senate.gov/subcommittees/investigations/hearings/failure-to-identify-company-owners-impedes-law-enforcement>.
- In 2006, the U.S. Government Accountability Office and the U.S. Treasury Department’s Financial Crimes Enforcement Network (FinCEN) published two reports that concluded that U.S. states collect minimal ownership information and that when companies are serviced by corrupt or unwitting service providers, several states provide an appealing jurisdiction for the creation of shell companies, particularly LLCs, to be used for illicit purposes.
<http://www.gao.gov/new.items/d06376.pdf>
http://www.fincen.gov/news_room/rp/files/LLCAssessment_FINAL.pdf
- The Financial Action Task Force (FATF) report on “The Misuse of Corporate Vehicles, Including Trust and Company Service Providers” states that “shell corporations and nominees are widely used mechanisms to launder the proceeds from crime...”
<http://www.fatf-gafi.org/media/fatf/documents/reports/Misuse%20of%20Corporate%20Vehicles%20including%20Trusts%20and%20Company%20Services%20Providers.pdf>
- The United States’ National Action Plan on Transparency of Company Ownership and Control was issued in response to a commitment made at the June 2013 G-8 Summit in Ireland
<http://www.whitehouse.gov/the-press-office/2013/06/18/united-states-g-8-action-plan-transparency-company-ownership-and-control>

APPENDIX B

Selected Media Reports

- The Wall Street Journal in 2011 reported on FATF identification of the states of Nevada, Wyoming and Delaware as “secrecy havens” and the FATF’s concerns that registered agents are being used to shield unlawful practices.
<http://blogs.wsj.com/corruption-currents/2011/06/28/fatf-weighing-changes-to-corporate-transparency-standards/>
- Forbes Magazine’s “Shell Games” in 2007 highlighted several jurisdictions for the ease of setting up anonymous entities and the use of shelf entities and nominee officers and highlights registered agent Wayne Andre in Nevada who was convicted of fraud. <http://www.forbes.com/forbes/2007/0212/096.html>
- A Reuters special report in 2011 identified convicted felons serving as registered agents and that had built “thriving” businesses that helped people set up shell companies. <http://www.reuters.com/article/2011/09/26/us-shell-games-nevada-idUSTRE78P1Y020110926>
- CNBC’s Investigations, Inc. reported on “The Filthy Rich” in 2012. The report identified Robert Harris as a registered agent in a Fernley, Nevada home with some 2,400 Nevada corporations. Harris stated “I don’t do any investigative work on the people. If they want to spend money, I take their business.” There were no “know-your-customer” safeguards in place.
http://www.cnbc.com/id/45553238/Investigations_Inc_Filthy_Rich
- A recent study out of Brigham Young University, the University of Texas at Austin and Griffith University focused on registered agents practices and the ease by which a shell company may be created using a registered agent without proper “know your customer” safeguards in place; even when requests may have indicated that the business might be unlawful. Nevada was ranked as the easiest place to form such a shell company. <http://www.economist.com/node/21563286>
http://www.griffith.edu.au/_data/assets/pdf_file/0008/454625/Oct2012-Global-Shell-Games.Media-Summary.10Oct12.pdf
- Nevada news outlets have also reported on shell companies used for unlawful purposes.
<http://www.lvrj.com/news/money-laundering-crackdown-should-put-nevada-on-notice-175128631.html>

APPENDIX C

Delaware Legislative Hyperlinks and Citations

2002 Bearer Shares Law:

<http://delcode.delaware.gov/sessionlaws/ga141/chp298.shtml>

8 Del. C., § 158

2006 Company Contact Information and Registered Agent Law:

<http://delcode.delaware.gov/sessionlaws/ga143/chp306.shtml>

8 Del. C., § 132

<http://delcode.delaware.gov/sessionlaws/ga143/chp416.shtml>

6 Del. C., § 15-111

<http://delcode.delaware.gov/sessionlaws/ga143/chp414.shtml>

6 Del. C., § 17-104

<http://delcode.delaware.gov/sessionlaws/ga143/chp317.shtml>

6 Del. C., § 18-104

2007 Bearer LLC and Partnership Interest Law:

<http://delcode.delaware.gov/sessionlaws/ga144/chp106.shtml>

6 Del.C., § 15-503(h)

<http://delcode.delaware.gov/sessionlaws/ga144/chp104.shtml>

6 Del.C., § 17-702(b)

<http://delcode.delaware.gov/sessionlaws/ga144/chp105.shtml>

6 Del.C., § 18-702(c)

2012 Delaware Registered Agent Listing Standards:

<http://www.corp.delaware.gov/agtwebreq.pdf>

2013 “Aged Company” Deterrence Law:

<http://delcode.delaware.gov/sessionlaws/ga147/chp072.shtml>

8 Del.C., § 312(b) and § 502(a)

2014 “Member and Manager” Proposed Legislation:

<http://legis.delaware.gov/LIS/lis147.nsf/2bede841c6272c888025698400433a04/3459270725d02bed85257c70004ea582?OpenDocument&Highlight=0,limited,liability,company>

House Bill 242 of the 147th General Assembly

APPENDIX D

Nevada Legislative Hyperlinks and Citations

2007 Bearer Share Legislation:

<http://www.leg.state.nv.us/NRS/NRS-078.html#NRS078Sec235>

NRS 78.235

2007 Owner of Record List, Custodian and Interrogatory Legislation:

<http://www.leg.state.nv.us/NRS/NRS-078.html#NRS078Sec152>

NRS 78.152

2007 Forged and Fraudulent Filing Legislation:

<http://www.leg.state.nv.us/NRS/NRS-225.html#NRS225Sec083>

NRS 225.083 and 225.084

<http://www.leg.state.nv.us/NAC/NAC-225.html#NAC225Sec100>

NAC 225.020 – 225.130

2009 New Corporations Sole Prohibition Legislation:

<http://www.leg.state.nv.us/NRS/NRS-084.html#NRS084Sec0065>

NRS 84.0065

2009 Business License Legislation and Enforcement Legislation:

<http://www.leg.state.nv.us/NRS/NRS-076.html>

NRS Chapter 76

<http://www.leg.state.nv.us/NRS/NRS-078.html#NRS078Sec047>

NRS 78.047

2009 Registered Agent Provisions and 2011 Regulations:

<http://www.leg.state.nv.us/Register/2011Register/R067-11A.pdf>

<http://www.leg.state.nv.us/NRS/NRS-077.html>

NRS 77.400 - 77.430

2013 Registered Agent and Anti-Fraud Legislation:

http://www.leg.state.nv.us/Session/77th2013/Bills/SB/SB60_EN.pdf

2014 Charitable Solicitation Registration and Disclosure:

<http://www.leg.state.nv.us/NRS/NRS-082.html#NRS082Sec382>

<http://www.leg.state.nv.us/NRS/NRS-598.html#NRS598Sec1305>

2014 Document Preparer Legislation:

<http://www.leg.state.nv.us/NRS/NRS-240A.html>

APPENDIX E

Wyoming Legislative Hyperlinks and Citations

2007 Bearer Shares Legislation:

<http://legisweb.state.wy.us/2007/Enroll/HB0009.pdf>

W.S. 17-16-625

2008 Registered Agent Legislation:

<http://legisweb.state.wy.us/2008/Enroll/SF0026.pdf>

W.S. 17-28-101 through 111

2008 Felony and Administrative Dissolution Legislation:

<http://legisweb.state.wy.us/2008/Enroll/SF0018.pdf>

W.S. 6-5-308

W.S. 17-15-112

W.S. 17-16-1420 through 1422, 1530 and 1531

W.S. 17-19-1420 through 1422, 1530 and 1531

2012 - Commercial Registered Agent Renewal Penalties:

<http://legisweb.state.wy.us/2012/Enroll/SF0003.pdf>

W.S. § 17-28-106

2012 - Cease and Desist Authority Against Individuals and Entities:

<http://legisweb.state.wy.us/2012/Enroll/SF0004.pdf>

W.S. § 9-1-308

2014 - Dissolution of a Commercial Registered Agent that is a Business Entity:

<http://legisweb.state.wy.us/2014/Enroll/HB0015.pdf>

W.S. § 9-1-305

W.S. § 17-14-209

W.S. § 17-16-120

W.S. § 17-16-1420

W.S. § 17-16-1530

W.S. § 17-19-120

W.S. § 17-19-1420

W.S. § 17-19-1530

W.S. § 17-21-1101

W.S. § 17-21-1104

W.S. § 17-28-109

W.S. § 17-29-205

W.S. § 17-29-705