

NCCUSL RECORD OWNERS OF BUSINESS ACT

By: *Allan G. Donn (ABA Advisor to Record Owners of Business Act Drafting Committee)*
Willcox & Savage, P.C.
Norfolk, Virginia

In response to reports by federal and international law enforcement agencies that the lack of business entity ownership information in state filing records impeded law enforcement efforts to combat money laundering, terrorism, and other criminal activity, in 2006 bills were introduced in Congress that would have added "persons involved in forming new corporations, limited liability companies, partnerships, trusts, or other legal entities" to the list included in the definition of "financial institutions" under 31 U.S.C. § 5312(a)(2) that are required to establish anti-money laundering programs pursuant to 31 U.S.C. § 5318(h).

In response to those bills, the National Association of Secretaries of State ("NASS") prepared a report of recommendations, including a request to the American Bar Association and the National Conference of Commissioners on Uniform State Laws ("NCCUSL") to amend the Model Business Corporation Act and uniform unincorporated business entity acts to require entities to file with the Secretary of State a periodic report that includes the name and address and natural person in the United States that has responsibility for providing access to the list of owners of record of a business entity.

Pursuant to that recommendation, the Committee on Corporate Laws of the ABA Business Law Section ("CCL") and NCCUSL undertook the preparation of amendments to the acts for which they were responsible. NCCUSL appointed a Drafting Committee for the Record Owners of Business Act that would include amendments to all of the NCCUSL sponsored uniform unincorporated organization acts, and the CCL undertook similar amendments to the Model Business Corporation Act ("MBCA"). Bill Clark is the Reporter for both drafting committees. Harry Haynsworth is the Chairman of the NCCUSL Drafting Committee.

ABA representatives met with representatives of a number of federal law enforcement agencies at the Treasury Department on several occasions in late 2007 before undertaking the drafting.

Two representatives of the Treasury participated in the January 19, 2008 meeting of the NCCUSL Drafting Committee. The basic approach of the Drafting Committee was to add the following provisions to the Uniform Acts:

1. An entity formed by filing with the Secretary of State must maintain a list of the names and addresses of its record owners.
2. The list must indicate for an owner that is not an individual:
 - a. If the owner is an entity, the jurisdiction of organization.
 - b. If the owner is a trust, the names and addresses of its trustees.
 - c. If the owner is a decedent's estate, the name and address of the personal representative.
3. The name and address in the United States of an individual that has access to the list of record owners must be included in the public filing that creates the entity, and the entity must file an annual report that states the current name and address of the individual with access to the list.

The Treasury representatives at the meeting said that their principal concern was with a U.S. entity having non-U.S. entity members as to which the government cannot identify the individual owners. To address that concern the NCCUSL draft requires that a non-U.S. entity member of a U.S. entity must provide the U.S. entity with a certificate of the name and U.S. address of an individual U.S. resident who will have access to the ownership information of the non-U.S. entity. That information must include the voting power held by each record owner of the non-U.S. entity.

Under the Drafting Committee's approach each U.S. entity would be required to maintain information regarding its record owners that would enable law enforcement agencies to trace ownership, step by step, including through multiple tiers of entities, to the individuals who have ultimate control. It would not require each U.S. entity to file with the Secretary of State the identity of the ultimate individual beneficial owners through multiple tiers.

The Treasury representatives advised the Chairman in early February that the Justice Department did not agree with the approach taken

by the Drafting Committee and that it would recommend federal legislation.

On May 1, 2008 Senator Levin for himself and Senators Coleman and Obama introduced S.2956, "to prevent wrongdoers from exploiting United States corporations for criminal gain . . . and to assist law enforcement in determining, preventing, and punishing terrorism, money laundering . . ." In the accompanying statement, he said that many states had been reluctant to admit that there was a problem with established U.S. business entities with unknown owners and that the NASS recommendation, rather than curing the problem, was full of deficiencies. He went on to say that he was deeply disappointed that the states, despite the passage of more than a year, had been unable to design an effective proposal.

The fundamental difference between S.2956 and the proposed amendments to the MBCA and the uniform unincorporated organization acts is that under the federal bill, at the time an entity is formed, there must be filed with the Secretary of State a report of the beneficial owners of the entity. A beneficial owner is "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 ... company." (Proposed Sec. 2009(e)(1)). That information is required to be maintained currently, retained by the Secretary of State for five years after the entity terminates, and be made available to law enforcement agencies upon receipt of a subpoena or summons or written request by federal agencies on behalf of another country. If any beneficial owner is not a U.S. citizen or lawful permanent resident, the initial filing and each update must include a written certification by the formation agent that it has verified the name and identity of each beneficial owner and has obtained a copy of the government issued passport with a photograph of the beneficial owner. Excluded from the information filing requirement are entities that are registered under the Securities Exchange Act and any entity formed by them.

The NCCUSL Drafting Committee at its third meeting on June 7, 2008 continued its approach of drafting amendments to the uniform entity organization acts that would make record ownership information available to law enforcement agencies by identifying an individual who would be responsible for maintaining that information for each entity. That individual, to be designated the "Records Contact," will be identified in the filing upon the organization of the entity as well as in an annual report that will be filed. The draft does not require the filing of the identity of beneficial owners.

The requirement for the Records Contact will apply only to a "closely-held company," that is, a company of not more than 50 members.

The most recent NCCUSL draft includes two versions of the annual report requirement. One requires the filing with the Secretary of State of only the identification of the Records Contact. The second version, derived from the MBCA proposed amendments, requires a statement, either that the company is manager-managed and the names and addresses of the managers, or that the company is member-managed and the names and addresses of the governing members. In addition, the first annual report must be filed with the initial certificate of organization. Those different versions reflect the current difference between the MBCA, which requires the inclusion in an annual report of the names and addresses of directors and principal officers (§ 16.21(a)(4)), and RULLCA, which does not require comparable information (§ 209). The reason for the two versions is that the first was approved by only a 3-2 vote with several Commissioners absent.

A draft of the Records Owners of Business Act, including only the amendments to the Revised Uniform Limited Liability Company Act (2006), will be submitted for discussion, not adoption, at the NCCUSL annual meeting in July. Because the amendments to the other uniform acts will follow the same pattern, discussions of the LLC amendments should be sufficient to provide guidance to the Drafting Committee on the policy issues affecting all of the acts. A copy of the draft and an accompanying memo prepared by Harry Haynsworth are available on the NCCUSL website http://www.nccusl.org/Update/AnnualMeeting_General.asp.

Harry Haynsworth requests a study of the drafts and comments and recommendations by the members of the Partnership Committee. He hopes that the Committee will include the subject on its agenda for the August annual meeting, but if there is insufficient time for consideration at that meeting, he will request additional time for discussions at the Fall meeting.

WORTH READING

Rutherford B. Campbell, Jr., *Bumping Along the Bottom: Abandoned Principles and Failed Fiduciary Standards in Uniform Partnership and LLC Statutes*, 96 KENTUCKY LAW J. 163 (2007-2008).

Douglas R. Richmond, *Law Firm Partners as Their Brothers' Keepers*, 96 KENTUCKY LAW J. 231 (2007-2008).

Larry E. Ribstein, *An Analysis of the Revised Uniform Limited Liability Company Act*, 3 VIRGINIA. LAW & BUSINESS REV. 35 (Spring 2008).

Steven Grob & Norman J. Hannawa, *Federal Tax Status of a Series Limited Liability Company*, 10 BUSINESS ENTITIES 24 (Mar./Apr. 2008).

Patrick Henry Smith, *Taxation By States of Single-Member Limited Liability Companies*, 9 BUSINESS ENTITIES (Sept./Oct. 2007).