

Keeping an Eye On: The Incorporation Transparency & Law Enforcement Assistance Act

by Charles Kolstad

On May 1, 2008 Senators Levin, Coleman and Obama, members of the US Senate Permanent Subcommittee on Investigations (Subcommittee), introduced the "Incorporation Transparency & Law Enforcement Assistance Act (Act)," which if enacted, will require the States to obtain and track information on the beneficial owners of all corporations and limited liability companies beginning no later than fiscal year 2011.

While the Act, if enacted, would impose significant new report obligations on US companies and LLCs, it would merely bring US corporate formation practice in line with the European Union and many other developed countries. In addition, the Act would require that formation agents establish anti-money laundering programs in accordance with rules adopted by the Secretary of the Treasury (in consultation with the Secretary of Homeland Security and the IRS).

This bill is the culmination of efforts that started in 2000 when Senator Levin requested that the Government Accounting Office conduct an investigation of an individual who had set-up over 2,000 Delaware corporations, together with bank accounts for those corporations, and then moved over \$1.4 billion through those bank accounts. This was followed in 2006 by a GAO report on the formation requirements in all 50 states, which found that most states did not request or collect beneficial ownership information when a company or LLC was being formed. The Department of Justice, the IRS, and the Treasury Department have all testified at various times in front of the Subcommittee that the failure of the States to collect and maintain beneficial owner information has hampered their investigations significantly, and that the use of US companies and LLCs has increased as registration requirements in other countries has been tightened.

The Financial Action Task Force (FATF) on Money Laundering, which is the leading international organization dealing with money laundering, issued a report in 2006 which strongly criticized the US for failing to comply with a FATF standard requiring its members to collect and maintain beneficial ownership information. While the US government has repeatedly urged the States to strengthen their incorporation practices, the States have largely failed to do so. All members of the European Union, and a number of tax havens such as Jersey, Guernsey, Barbados and the British Virgin Islands all require that beneficial ownership information be collected.

As drafted, the Act does not apply to partnerships, trusts or other business entities; although, the Act does require the GAO

to conduct a study as to whether similar beneficial ownership information requirements should apply to those entities as well.

The Act would require each State that receives funding from the federal government under the Homeland Security Act of 2002 to collect the following:

- a list of beneficial owners by name and current address, together with the name of each intermediary company or LLC, when a company is formed; this information would be provided by the formation agent;
- a list of beneficial owners on an annual basis, or upon a change of beneficial owners if no annual filing is required;
- in the case of a beneficial owner who is not a US citizen or lawful permanent resident, the formation agent would also be required to obtain a copy of the first page(s) of the beneficial owner's passport, including a copy of the photograph, and a verification of the name, address and identity of such beneficial owner;
- each State and formation agent would be required to provide that information to designated federal and state law enforcement officials pursuant to a subpoena.

All of the above information would have to be maintained until the end of the fifth year after the legal existence of corporation or LLC is terminated under the applicable state law.

A formation agent is any person who, for compensation, act on behalf of another person to form a company or LLC (this would include law firms, accounting firms, and corporate formation companies such as Parasec).

As noted above, each formation agent would be required to adopt, and comply with anti-money laundering programs under rules prescribed by the Secretary of the Treasury. A beneficial owner is each individual who has a level of control over the funds or assets of a corporation or LLC which enables the individual as a practical matter to control, manage or direct the corporation or LLC.

While there are significant implementation issues that will arise if the Act is enacted, the provisions of the Act will bring the US in line with the incorporation procedures of most developed nations.

Any tax advice contained in this communication (including any attachments) is neither intended nor written to be used, and cannot be used, to avoid penalties under the Internal Revenue Code or to promote, market or recommend to anyone a transaction or matter addressed herein.

©2009 Reish Luftman Reicher & Cohen, A Professional Corporation. All rights reserved. This bulletin is published as a general informational source. Articles are general in nature and are not intended to constitute legal advice in any particular matter. Transmission of this report does not create an attorney-client relationship. Reish Luftman Reicher & Cohen does not warrant and is not responsible for errors or omissions in the content of this report.