

DRAFT

COMPARISON OF UNIFORM LAW ENFORCEMENT ACCESS TO ENTITY INFORMATION ACT AND THE LEVIN-GRASSLEY-MCCASKILL INCORPORATION TRANSPARENCY AND LAW ENFORCEMENT ASSISTANCE ACT (S.569)

Uniform Act

Coverage: Conventional privately held entities (CPE) defined as an entity with no more than 50 interest holders (e.g., shareholders) that must file an initial public organic record to be formed as a legal entity.

Entities otherwise qualifying as a CPE in which an entity with more than 50 interest holders holds more than 25% of the outstanding interests, entities that are generally classified as "regulated" industries such as banks and other depository institutions, trust companies, insurance companies, public utilities, and securities and commodities brokers or dealers, investment companies and investment advisors are exempt.

Entities in existence at the time the Act is effective have 2 years to comply.

Compliance. A filing entity must include in its initial public organic record a statement as to whether or not it is a CPE. A CPE must also file in the office of the Secretary of State an "entity information statement" (EIS) at the time the initial public organic document is filed. The EIS contains the name and address of a "responsible individual" (RI), defined as an individual who directly or indirectly participates in the control or management of the entity, and the name and address of a records contact (RC), defined as an individual whose principal residence is in the United States who has access to and can produce on a timely basis ownership and control

S.569

Coverage: Initially only corporations and limited liability companies (LLCs); possibility of additional legislation to cover partnerships, trusts and other legal entities on the basis of a report by Comptroller General 1 year after enactment.

Corporations and LLCs that have issued securities registered under Section 12 or that are required to file reports under Section 15 of the 1934 Securities Exchange Act, and entities formed by state or the United States are exempt. Other exemption must be jointly approved by the Attorney General and the Administration of the Department of Homeland Security.

Only Corporations and LLCs formed after the effective date of the Act are subject to the Act.

Compliance. Corporations and LLCs must file with the State (no office, e.g. Secretary of State is designated) during the "formation process" (an undefined term) a list of the names and current addresses of all "beneficial owners" and must update the list annually if the state requires an annual filing. If no annual report is required, then the CPE must file updates at the time there are any changes in the list.

"Beneficial owner" is defined 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

information about the entity.

The records that the CPE must provide the RC upon an appropriate request are:

(1) a list of the name and last known address of each interest holder and transferee and if the interest holder or transferee is an entity, the name of the state or country where it was formed;

(2) name and address of each governor (e.g., director);

(3) any records the CPE maintains regarding the process by which its governors are elected or otherwise designated;

(4) the voting power of each interest holder or a description of the manner in which each interest holder's voting power in the entity is determined;

(5) the names of the individuals responsible for preparing the information; and

(6) a certificate that the information accurately reflects the current records of the CPE.

Appropriate Request: The RC contacts the CPE for the above information upon service of a civil, criminal or administrative subpoena or summons from a federal law enforcement authority, federal agency or committee or subcommittee of the US Congress (states can expand the list to include state and local law enforcement authorities, state agencies and state legislatures); and a written request made by a federal agency on behalf of another country under an international treaty, agreement, or convention or 28 U.S.C. § 1782.

corporation or limited liability company." An individual who controls an entity that is a record owner of a corporation or LLC is a beneficial owner of the corporation or LLC if that entity is in a position to exercise control of the corporation or LLC.

Appropriate Request: The state must provide the beneficial ownership information pursuant to a civil or criminal subpoena or summons from a state or federal agency or congressional committee or subcommittee; and a written request made by a federal agency on behalf of another country under an international treaty, agreement or convention, or 28 U.S.C. § 1782.

Special Requirements for Non-US Entities/Citizen/Residents.

A CPE must have in its records and deliver to the RC: (1) a certification from a non-US entity that is an interest holder or transferee stating the name and address of a RI for the Non-US entity; (2) a copy of a passport, driver's license, or other photo ID for any RI whose principal residence is outside the US; and (3) a copy of a passport, driver's license or other government-issued photo ID for each governor whose principal residence is outside the US at the time the individual becomes a governor.

Penalties and Sanctions

(1) the State's civil and criminal penalties for violation of a subpoena or summons.

(2) the entity and the person signing any document filed in the office of the Secretary of State that contains false information is subject to the state remedies for perjury.

(3) the RI and RC certify, under penalties of perjury that they meet the statutory qualifications for their positions; and the signature of both the RI and the RC in the EIS and any change in the RI or RC must be notarized.

(4) the person signing the certification that the records provided to the RC accurately reflect the current records of the entity is subject to penalties or perjury.

Special Requirements for Non-US Entities/Citizen/Residents.

Beneficial owners who are not US citizens or lawful permanent residents of the US must provide to the formation agent (defined as a "person, who, for compensation acts on behalf of another person to assist in the formation of a corporation or limited liability company") a copy of a page of the government-issued passport on which a photograph of the beneficial owner appears. The formation agent must certify that he or she has verified the name, address and identity of each of these beneficial owners and has obtained the required photo ID in the document containing the beneficial ownership information filed with the state. The formation agent must also provide proof of the verification and the photograph as part of the response to the subpoena or summons.

Penalties and Sanctions

In addition to any civil or criminal penalty that may be imposed by a state, any person who "knowingly" provides fake beneficial ownership information to a state or "intentionally" fails to provide beneficial ownership information (1) shall be liable to the United States for a civil penalty or not more than \$10,000; and (2) may be fined under title 18, US Code, imprisoned for not more than 3 years, or both.

(5) the certificates filed by a non-US entity designating a RI must be signed under penalties of perjury; and the non-US entity cannot maintain any proceeding in the state with respect to its interest in the CPE until it files the certificate.

(6) an enacting state's attorney general can bring an action to dissolve a CPE for material failure to comply with an appropriate request for information or for issuing bearer certificates. The court can issue appropriate injunctions and appoint a receiver for the entity.

(7) The secretary of state must administratively dissolve an entity for (a) failure to comply with the requirement that the entity state whether or not it is a CPE in its initial public organic document filing; or (b) the secretary of state's records do not show a current RC or RI for a period of 60 consecutive days.

(8) The RC is liable for "recklessness, intentional misconduct; or criminal conduct" for failure to perform his or her responsibilities.

Confidentiality. An enacting state has the option of designating the EIS which names the RI and RC and any document indicating changes in the RI and RC confidential and available only to (1) law enforcement agencies and others who have the right to make an appropriate request, (2) the current RI or RC or (3) a governor or officer of the entity.

Bearer Interests. No filing entity can issue bearer equity interests in the entity.

Confidentiality. S.569 does not address the issue of confidentiality.

Bearer Interests. S.569 does not address bearer interests. The equivalent bill introduced in congress in 2008 did prohibit bearer interests.

Funding. Filing fees for the various documents that must be filed pursuant to the Act are authorized and are required to be held in a restricted account for use only in the administration of the act.

Compliance Date. Each enacting state determines the effective date of the Act. All CPEs formed after the effective date must comply with the Act at the time of formation. Each one formed before the effective date must be in compliance no later than from 2 years after the effective date.

Funding. The administration of the Department of Homeland Security may allocate DHS funds "to enable a State to obtain and manage" beneficial ownership information for corporations and LLCs, including funding to "assess, plan, develop, test, or implement relevant policies, procedures, or systems modifications."

Compliance Date. Every state that receives DHS funding must "use an incorporation system" that meets the requirements of S.569 by no later than the beginning of fiscal year 2012.