

Honorable Norm Coleman, Chairman
Honorable Carl Lever, Ranking Minority Member
Permanent Subcommittee on Investigations
Committee on Homeland Security and Government Affairs
United States Senate

November 14, 2006

Re: The Collection of Beneficial Ownership Information for Non-publicly Traded
Corporations and Limited Liability Companies

Honorable Chairman and Committee Members:

Thank you for the opportunity to present information to you regarding the business formation process in Massachusetts. I applaud the committee for providing a national forum to discuss the adequacy of public disclosure in the business entity formation process. I am hopeful that Massachusetts' recent deliberations and resulting resolutions will assist the subcommittee in its effort to balance the need for beneficial ownership information with the privacy concerns of legitimate business interests.

By way of background, Massachusetts recently adopted a new business corporations law, Chapter 156D of the General Laws. The Act, the first comprehensive revision of the corporate laws in Massachusetts in over one hundred years, was prepared by a joint task force of the Boston Bar Association and the Massachusetts Bar Association, aptly named the Task Force on the Revisions of the Massachusetts Business Corporation Law. The Task Force consisted of over fifty (50) experienced corporate practitioners, members of the legislature and representatives of the Office of the State Secretary. The Task Force chose the American Bar Association's Model Business Corporation Act as the basis for its corporate statute because the Act had been adopted in a substantial majority of states. However, Massachusetts deviated from the Model Act in a number of relevant areas, including the role of the state secretary in the entity formation process and the information disclosed in business organization documents. Such differences reflect a carefully crafted balance between public interest in adequate disclosure and the privacy concerns of the business community.

With regard to the role of the secretary of state, Massachusetts retained the authority of the state secretary to review documents for compliance with law. Such provision is the basis for the secretary's ability to hold administrative hearings if the information provided in organizing documents is inaccurate or otherwise fails to comply with law. The Model Business Corporation Act relegates state authority in the business formation process to a ministerial function.

Second, the new Act authorizes the secretary to require more information in the formation process than is collected in model act states. In Massachusetts, the articles of organization contain supplemental information that includes a description of the business activity, the name and address of the president, treasurer, secretary and each of the directors, the name and address of the registered agent, the location of the corporation's principal office, and the location of the office in the commonwealth where the records required to be maintained by the Act are kept. Required records include a list of the names and addresses of all shareholders, in alphabetical order, by class of shares, showing the number and class of shares held by each.

The new Act does not authorize the issuance of bearer shares, nor does it permit the use of nominee directors and/or officers. With regard to nominee shareholders, though, Massachusetts' corporate law recognizes registered and beneficial holders. Nevertheless, the corporations statute contemplates that standard bylaws contain explicit statements to the effect that the corporation will only recognize the registered holder for purposes of voting, dividend distribution and other shareholder actions or entitlements. The exception that proves the rule are the appraisal provisions of Chapter 156D (section 13.01) under which beneficial holders may assert statutory appraisal rights if the registered holder has filed a nominee certificate with the corporation.

The Massachusetts Limited Liability Company Act (Chapter 156C) and the Massachusetts Revised Uniform Limited Partnership Act (Chapter 109) contain similar provisions. Each requires the secretary to review documents for compliance with law and requires the disclosure of managers or authorized principals and general partners. Each statute also requires the entity to keep a list of members or limited partners in the state at the statutorily required office. Further, the limited partnership statute requires that such list be made available to the state secretary within five business days of receipt of a written request by the secretary stating that such information is required in connection with an investigatory or enforcement proceeding.

These provisions, the ability to review for compliance with law, the identification on the public record of officers, directors, managers or principals, and the requirement that shareholder, member or partnership lists be maintained in the commonwealth accessible to the state secretary, reflect Massachusetts' attempt to balance the public interest in disclosure with the anonymity demanded by institutional and individual investors in today's capital markets. As I have not yet received any complaints from law

enforcement officials or the business community, and very few complaints from the public, I assume we have been successful.

Finally, I offer the additional information requested by the subcommittee in its letter dated November 3, 2006.

1. The number of non-publicly traded corporations and limited liability companies for the period requested is as follows:

	2004	2005
Number of non- publicly traded corporations formed in Massachusetts	11,484	10,953
Number of foreign corporations registered to do business in Massachusetts	3,095	3,087
TOTAL number of non-publicly traded corporations organized in or registered to do business in Massachusetts	219,252	232,169
Total number of limited liability companies formed in Massachusetts	10,980	12,446
Total number of foreign limited liability companies registered in Massachusetts	2,222	2,537
TOTAL number of limited liability companies organized in or registered to do business in Massachusetts	53,902	67,493

In order to form a corporation in Massachusetts, an incorporator submits articles of organization to the state secretary. The articles include the name of the corporation, the number of authorized shares, a description of the relative rights and preferences of each class if more than one class of shares was authorized, any restrictions on transfer of stock contained in the articles, any other lawful provisions, a description of the business activity, the name and address of the president, treasurer, secretary and director(s), the name and address of the registered agent, the location of the principal office, and the location in the commonwealth where records required to be maintained by the Act are kept. The incorporator(s) must sign the articles of organization. They may be submitted in person, by mail, facsimile or electronically. The minimum fee for incorporation is \$275 if submitted in person or by mail. It is \$250 if submitted by facsimile or electronically. A clerk examiner and an attorney review each document. If the document is found to comply with law, the document is filed. Documents received in proper order during regular business hours are filed the same day.

Limited liability companies are formed in the same manner except the fee for forming a limited liability company is five hundred dollars (\$500).

2. Massachusetts does not collect beneficial ownership information during or subsequent to the incorporation. Massachusetts corporate law does not authorize the issuance of bearer shares.

3. Massachusetts law does not provide for “third party agents”. The only role of a registered agent under Chapter 156D is to accept service of process in legal proceedings involving the entity. Consequently, the state secretary does not regulate such agents, nor are they required to obtain and verify beneficial ownership information.
4. Massachusetts common law and Chapter 156D permit the use of nominee shareholders as noted above. Neither common law, nor Chapter 156D, permits the use of nominee directors or officers.
5. Massachusetts has not received any requests from law enforcement for beneficial ownership information in the last five years.
6. Massachusetts does not have any information concerning the extent to which lack of beneficial ownership information in state records has impeded domestic and international law enforcement investigations apart from the material provided by the subcommittee.
7. Massachusetts defers to the expertise of the agencies involved with respect to the merits of (a) the GAO report; (b) Chapter 8 of the December 2005 report, U.S. Money Laundering Threat Assessment issued jointly by the Departments of Justice, Treasury, Homeland Security and others; and (c) Section 5.1 of the 2006 Financial Task Force Report, Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: United States of America.
8. The state secretary will file legislation before January 2007, which will require limited liability companies and corporations to disclose members and shareholders to the state secretary as in his judgment the public interest may require within forty-eight hours of written demand. Failure to provide such information may subject the entity to involuntary dissolution and/or the imposition of fines and penalties.

Respectfully submitted,

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