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MEMORANDUM

TO: Secretary of State's Working Group

FROM: Herrick K. Lidstone, Jr., member, working group

DATE: September 21, 2022

SUBJECT: Comments for Upcoming Meeting

This is a follow-up to my September 7, 2022, memorandum and does not repeat the information in that original memorandum except where appropriate. This raises and provides my response to issues discussed at the working group meeting held on September 14, 2022.

As I see the issues before us, and as I noted at the September 14, 2022 meeting, we are dealing with "hijacked" Colorado entities and persons who use Colorado's ease of entity formation to form a large number of entities in a short period of time, perhaps for illegal or inappropriate purposes. As I noted, I believe that these are two different issues that should be addressed by the Secretary of State.

To repeat my conclusion stated at the end of this memorandum, I believe that the most important thing that has become apparent to me is that the Secretary of State must realize that, under the applicable statutes (primarily article 90), **the Secretary of State's role is more than merely being a repository for filings**. I believe that the statutes impose obligations on her to monitor and ensure that persons making filings with her office do so in accordance with the statute. While her office may not be obligated to inspect each and every filing, she must at least inspect filings when she becomes aware of possible statutory non-compliance or perjury in filings and be prepared to, and be able to, take protective action.

1. Hijacked Entities.

There are a number of built-in safeguards for hijacked entities, and the comment was made that these safeguards should be more highly publicized – perhaps on the periodic reports that Colorado entities must file each year (not including general partnerships that are not LLPs which have no filing requirement).

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- a. Any person making a filing on behalf of an entity has the option to password protect that entity from wrongful filings. Currently this is an “opt in” that can be made on the Secretary’s website. A number of issues were discussed about this:
 - i. Should this be an opt-out rather than an opt-in? My view is that it should not be an opt-out.
 - ii. Passwords can be forgotten by the users. Passwords can be recovered easily if the user remembers the email address used to create the password. This continuity may change on an entity-by-entity basis when people leave association with the entity. While the Secretary has other password recovery mechanisms, they take time and effort by both the entity personnel and the Secretary’s staff.
- b. Any person seeking information about any entity can sign up for text and email messages from the Secretary to notify that person whenever a document is filed with the Secretary for that entity’s record. That provides substantially immediate notice and, if a wrongful filing has been made, gives the recipient of such notice the opportunity to move quickly to a correction.
- c. Under S.B. 22-034 (with procedures to be effective February 1, 2023), reports of hijacking can be made to the Secretary of State and dealt with through a defined procedure involving the Secretary and the Attorney General.

I believe that those procedures are sufficient to deal with hijacked entities that are not hijacked dormant entities.

2. Hijacked Dormant Entities.

Hijacked dormant entities may be defined as existing entities formed in Colorado that are and have been non-compliant or delinquent for a period of time because the owners have failed to file entity reports, have failed to maintain a registered agent (C.R.S. §7-90-701), or have otherwise failed to comply with Colorado law.¹

If one of these entities is hijacked, there may be no one looking or interested in taking protective action. There have, admittedly, been active domestic entities who become delinquent

¹ Under Colorado law, these entities may be “noncompliant” and subject to penalties (C.R.S. § 7-90-501(7)) or “delinquent” (C.R.S. § 7-90-601.6, 7-90-901/2).

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because of a lack of attention and the resulting lack of legal compliance by the entity and its owners/managers to the Secretary of State's requirements.

Historically (since about 2005),² the Secretary has taken no action with respect to delinquent entities other than to identify in her records as being "delinquent" when she becomes aware that the entity is delinquent. That has been the Secretary's choice, notwithstanding her power to take other action. I believe that the Secretary could, without any changes to the statute being necessary:

- a. Freeze the files of delinquent entities so that any person attempting to resuscitate the delinquent entity would have to show the Secretary that the person has the right to make the filing.
- b. Cause the dissolution of the delinquent entity under C.R.S. § 7-90-908 coupled with a freezing of the files.

3. The Secretary of State's Authority

It is important to understand that the Secretary of State is not merely a passive entity for accepting filings. She has authority to act under the entity laws should she choose to do so. It is true that she has not so acted and may need budget, staffing, or other modifications were she to take on a more active role. Nevertheless, the Secretary of State clearly has the authority to take on a more active role should she choose to do so. For example:

- C.R.S. § 7-90-301 and the forms themselves require that each filing contain accurate names and addresses, and other information.
- C.R.S. § 7-90-601(1) requires that the Secretary ensure that the name of any entity submitted for filing "not contain any term the inclusion of which would violate any statute of this state" and (§ 601(2)) ensure that "each entity name shall be distinguishable on the records of the secretary of state".
- C.R.S. § 7-90-501 requires each reporting entity to file periodic reports that meet certain requirements. Where the entity fails to deliver an accurate report, the Secretary of State can (and does) charge a fee (Section 501(7)), but I believe has administrative authority to take additional action (such as freezing the file).

²² Prior to 2005, the Secretary of State's office reviewed and made certain decisions about filings, most (if not all) of which were in paper form.

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- C.R.S. § 7-90-701 requires (“shall maintain”) that every domestic and foreign entity “continuously maintain in this state a registered agent” that meets the stated requirements. Section 702 requires prompt amendment when registered agent information changes.
- C.R.S. § 7-90-301.5 states that each document filed with the secretary of state “shall constitute the affirmation or acknowledgement of each individual . . . under penalties of perjury,” subjecting the filer to possible criminal sanctions where the information is wrong.

The fact that the Secretary looks at her role as passive is her choice – not the direction of the statute. The statute gives her authority to investigate and act where appropriate. The Secretary may also accept complaints and information from the public and act on that information – including by referral to the Attorney General. The fact that the Secretary has not acted has been her choice (and her predecessors’ choices) not to do so.

4. Recommendations for the Secretary of State’s Actions for Discussion

I suggest the following items for discussion.

- a. Publicize more clearly and more broadly (in the body of the documents that may be filed with the Secretary of State for any entity, such as articles or periodic reports) that the filer may (if she or he has the entity authority to do so) password protect the entity’s right to file.
- b. Publicize more clearly and more broadly (in the body of the documents that may be filed with the Secretary of State for any entity, such as articles or periodic reports) that each individual has the right to obtain email or text notices when documents are filed in the entity’s records.
- c. Publicize the availability of the remedies under C.R.S. § 7-90-314 when they become available.
- d. Dormant entities should have their files blocked, and can be reopened only for filing upon proof (satisfactory to the Secretary of State) that the person doing so has the entity authority to do so, and pays an appropriate fee for the process. Dormant entities can be defined as entities that:

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- Have been delinquent for more than [two] years³ or
 - Have been dissolved for more than [one] year.
- e. Accept information from other parties who have information about possible violation of the legal requirements to be enforced by the Secretary of State, especially from law enforcement agencies, and work with those agencies when they identify issues such as pointed out by Mr. Wertschle of DHS.

5. Multiplicitous Entities

Accepting Mr. Wertschle's admonition that the entities registered with the Secretary of State under "GNAME" may be perfectly legitimate and without any intention to make any accusation, I note:

- a. The Secretary's records contain 150 corporations named GNAME 001 Inc. (ID# 20211017162; formed on January 6, 2021) through GNAME 150 Inc. (ID# 20221714006; formed on July 25, 2022).
- b. The registered agent for many (001-050) is GNAME.COM PTE.LTD. at various addresses in Colorado.⁴
 - i. GNAME.COM PTE.LTD. is not an entity organized in Colorado, nor is it a foreign entity qualified to do business in Colorado. Under C.R.S. § 7-90-701(1), it is clearly not suitable to be a registered agent for

³ Note that C.R.S. § 7-90-905 provides a right for an entity to appeal a declaration of delinquency to the applicable state district court.

⁴ Each of the following entities (GNAME) were incorporated on the same day (January 6, 2021) and stated that its registered agent was GNAME.COM PTE.LTD. In each of the filings the address of the registered agent was different – a surprising result when most registered agents use their business address as required in C.R.S. § 7-90-701. Also, GNAME.COM PTE.LTD. is not a Colorado entity, and it is not a foreign entity "authorized to transact business or conduct activities in this state that has a usual place of business in this state." C.R.S. § 7-90-701.

001- 745 N. Sherman Street, Denver, CO 80203
002- 8821 E. Hampden Ave., Denver, CO 80231
003- 4700 Oakland St, Bldg 10, Denver, CO 80239
004- 5076 List Drive, Colorado Springs, CO 80919
005- 7101 Julian St., Westminster, CO 80030
006- 1011 S.Huron St., Denver, CO 80223
007- 14241 E. 4th Ave., Bldg 5, Aurora, CO 80011
008- 7077 Winchester Cir., Boulder, CO 80301
009- 1812 Valtec Ln., Boulder, CO 80301
010- 4600 E. Bijou St., Colorado Springs, CO 80909

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entities formed under Colorado law. Consequently, those GNAME entities do not have a registered agent that meets the requirements set forth in C.R.S. § 7-90-701 and should not be “in good standing” under Colorado law.

- ii. The Website, GNAME.COM, identifies GNAME.COM PTE.LTD with a telephone number of +65-65189986 and an address at 6, Battery Road, #29-02, Singapore.
- c. Some of the records name Yansheng Zhang at 6547 N. Academy Blvd #2266, Colorado Springs, CO 80918 as the registered agent. See records for GNAME 051 INC through GNAME 150 INC incorporated on various dates in July 2022. A google search for Mr. Zhang identifies a number of persons with that name, but none in Colorado. At least two are located in Shanghai.
- d. Interestingly, Mr. Zhang was the incorporator (under penalties of perjury) for most (if not all) of the 150 GNAME entities.
- e. For the GNAME entities that have filed a periodic report, it appears that Angie Ortega, 4788 Sugarloaf Pkwy, Suite 102, Lawrenceville, GA 30044 was the individual “causing the document to be delivered for filing” under penalties of perjury.

Some research could be accomplished to determine whether addresses are accurate, but just from the record itself, should the Secretary of State choose to do so, I believe that she could probably find that none of the GNAME entities have met their obligations under Colorado statutes.

That would likely be the case for a large number of other multi-filed entities.

6. Recommendations

To repeat my recommendations from above and my earlier email, I suggest the following for consideration.

- a. The Secretary of State better publicize the protective measures that they already have in place, including the email and text messaging about filings affecting businesses in which they are interested, and password protecting the ability to file documents against organizations that they control.

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- b. The working group should discuss whether the password protection plan for filings should be the default that customers can opt out of, or whether it should continue to be a program that customers of the secretary of state's office can opt into. I believe it should continue to be an "opt-in," but I believe that the discussion should be had.
- c. I also believe that the secretary of state should better publicize the issues that we have been and will be discussing as being problematic with the existing filing system – including the hijacking of existing organizations and the possibility of similar (although not in the terms of § 7-90-601 "deceptively similar") names that can be used.
- d. I also believe that the secretary of state should change her guidance for what names are "deceptively similar" with the understanding that I believe it should be broader. Exactly how it should be changed should be discussed. That is regulatory, not statutory.
- e. I believe that the secretary of state should publicize the upcoming procedures under S.B. 22-034 (that is, § 7-90-314) that will be established by rulemaking to be effective by February 1, 2023. I have not seen any proposed rulemaking on that topic yet.
- f. To protect dormant entities (whether delinquent or dissolved) from being hijacked, I believe that the Secretary should after a period of time lock their files to prevent anyone from making filings to reactivate the entities.
- g. **I believe that the Secretary should recognize that her office is more than a repository for filings, but that the statute allows her to take definitive actions, either based on her own investigation or knowledge, or upon information provided by others.**
- h. **I further believe that the Secretary of State has an obligation to advertise and make easily accessible the ability of owners to password protect their filings and to receive text or email messages when new filings are made.**
- i. **Similarly, when the provisions of C.R.S. 7-90-314 become effective, I believe that it is the Secretary of State's responsibility to make the public aware of these new capabilities and make it easily accessible on the Secretary's website.**

I am open to discuss other suggestions by others, but I believe that it remains important for Colorado to maintain its filing system as it is, without significant delays. As noted above, I believe that there are other ways to deal with the issues.