

MEMORANDUM

To: Colorado Secretary of State's Working Group on Fraudulent Filings

From: Herrick K. Lidstone, Jr., Member

Date: February 4, 2023

Re: Proposed changes

On Friday, February 3, 2023, Mr. Mike Fitzpatrick sent to the Working Group an updated "Report of the Fraudulent Filings Working Group" dated January 2023 prepared by Working Group member Carla Hoke.. That memorandum made a number of updates to her earlier memorandum based on our meetings of January 30 and February 1, 2023.

Other members of the working group have made comments prior to the February 1 meeting, including Charles Calvin, Greg Wertsch, and Herrick Lidstone. Many of those were included in Ms. Hoke's updated Report, based on conversations at the January 30 and February 1, meetings.

My intention with this memorandum is to update and correct the comments that I earlier suggested in my earlier memorandum. This is organized to start at Ms. Hoke's Section 4(b)(i). Section separations are highlighted in blue. This includes my proposal for a new section 9 relating to SB12-123 provisions which I believe Mr. Wertsch had included in his earlier comment.

As a result, my earlier January 31, 2023 memorandum can be ignored.

[HKL: This is a proposed amendment to Section 4(b)(i) of Ms. Hoke's memorandum.]

Sections 7-90-314(4)(g)(iv)(a) ~~and (v)~~; C.R.S., provide remedies upon an administrative law judge's finding that an entity (without specifying domestic or foreign) has been found to have been created without authorization or for fraudulent purposes, the administrative law judge is directed to make an additional finding as to whether: (A) An entity was created without authorization or for fraudulent purposes; or (B) An unauthorized filing was made. As noted, the complaint procedure does not limit the authority to take action under Section 7-90-314 to domestic entities; foreign entities may also be subject to the sanctions.

Section 7-90-314(4)(g)(v) then directs that, if the administrative law judge finds that, or if a conceded notice and demand sets forth that, an entity was created without authorization or for fraudulent purposes, the attorney general shall notify the secretary of state, who shall take certain actions as specified in the statute.

[HKL recommends that the legislative changes be moved to part 4.c.]

HKL recommends that part 4.c be modified as follows:

c. **Legislative changes:** This recommendation requires revision of certain provisions of § 7-90-314 and § 7-90-901. The Working Group does not believe that any change is needed to § 7-90-314(4)(g)(iv). The following potential statutory amendments could be made to § 7-90-314(4)(g)(v) and to § 7-90-901.achieve the Working Group’s recommendations:

7-90-314(4)(g)(iv) If the administrative law judge finds that subsection (1) of this section has been violated, the administrative law judge shall make an additional finding as to whether:

- (a) An entity was created without authorization or for fraudulent purposes; or
- (b) An unauthorized filing was made.

* * *

7-90-314(4)(g)(v) If the administrative law judge finds that, or if a conceded notice and demand sets forth that, and entity was created without authorization or for fraudulent purposes, the attorney general shall notify the secretary of state, who shall:

- (a) Mark the business record with a notice that the entity is unauthorized or fraudulent and delinquent under section 7-90-901;
- (b) Redact each address and name that was used without authorization from the entity’s filing and from any other relevant filings; and
- (c) Disable additional filing functionality of the entity’s records.

Section 7-90-901. Grounds for delinquency.

(1) A domestic entity that is a reporting entity may be declared delinquent under section 7-90-902 if:

- a. The domestic entity does not pay any fee or penalty imposed by this title when it is due;
- b. The domestic entity does not comply with part 5 of this article, providing for reports from reporting entities; ~~or~~

c. The domestic entity does not comply with part 7 of this article, providing for registered agents and service of process; ~~OR~~

e.d. THE DOMESTIC ENTITY HAS BEEN FOUND TO HAVE BEEN CREATED WITHOUT AUTHORIZATION OR FOR FRAUDULENT PURPOSES PURSUANT TO SECTION 7-90-314(4)(g)(v)

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(2) A foreign entity that is a reporting entity may be declared delinquent under section 790-902 if:

- a. The foreign entity does not pay any fee or penalty imposed by this title when it is due;
- b. The foreign entity does not comply with part 5 of this article, providing for reports from reporting entities;
- c. The foreign entity does not comply with part 7 of this article, providing for registered agents and service of process;
- d. The foreign entity does not deliver for filing an appropriate statement of change when necessary to make its statement of foreign entity authority true in all respects;
- ~~e.~~ THE FOREIGN ENTITY HAS BEEN FOUND TO HAVE BEEN CREATED WITHOUT AUTHORIZATION OR FOR FRAUDULENT PURPOSES PURSUANT TO SECTION 7-90-314(4)(g)(v); or
- ~~f.~~ The secretary of state receives a duly authenticated certificate from the secretary of state or other official having custody of entity records in the jurisdiction under the law of which the foreign entity was formed to the effect that it no longer exists as the result of a dissolution or merger or otherwise.

§ 7-90-902. Declaration of Delinquency

1. (a) If the secretary of state determines that one or more grounds exist under section 7-90-901 for declaring an entity delinquent and the entity does not correct each ground for declaring it delinquent or demonstrate to the reasonable satisfaction of the secretary of state that such ground does not exist within sixty days after the secretary of state makes such determination, the entity becomes delinquent following the expiration of such sixty days.

~~±~~ (b) If the grounds for such delinquency are as defined in section 7-90-901(1)(d) or section 7-90-901(2)(e), the entity becomes delinquent immediately upon such determination notwithstanding the sixty day period set forth in § 7-90-902(1)(a)..
2. (Deleted by amendment, L. 2010, (HB 10-1403), ch. 404, p. 1998, § 20, effective August 11, 2010.)

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[HKL – Make the following addition to Section 6.c – Suspend filing ability for delinquent entities – copied from HKL’s earlier proposal:]

Section 6.c Legislative changes: This recommendation requires changes to section 7-90-904, C.R.S., “Cure of delinquency”. The following potential statutory amendments could be made to § 7-90-904(1) to achieve the Working Group’s recommendations:

7-90-904(1) (a) A delinquent entity THAT HAS BEEN DELINQUENT FOR A PERIOD OF LESS THAN FIVE YEARS may cure its delinquency by:

(i) Delivering to the secretary of state, for filing pursuant to part 3 of this article, a statement SIGNED BY AN INDIVIDUAL UNDER PENALTIES OF PERJURY curing delinquency stating:

(A) The entity's principal office address; and

(B) The entity's registered agent's name and address.

(b) *Deleted by amendment, L. 2008, p. 23, §17, effective August 5, 2008.*

(c) A delinquent entity THAT HAS BEEN DELINQUENT FOR FIVE YEARS OR LONGER may cure its delinquency by:

(a) Delivering to the secretary of state, for filing pursuant to part 3 of this article, a statement SIGNED BY AN INDIVIDUAL UNDER PENALTIES OF PERJURY curing delinquency stating:

(I) The entity's principal office address; and

(II) The entity's registered agent's name and address; AND

(III) PROVIDING THE SECRETARY OF STATE ADEQUATE DOCUMENTATION INDICATING THAT THE INDIVIDUAL SIGNING THE DOCUMENTS TO BE DELIVERED TO THE SECRETARY OF STATE UNDER SECTION 7-90-904(4)(a) HAS THE AUTHORITY OF THE ENTITY TO SIGN AND DELIVER SUCH DOCUMENTS ON BEHALF OF THE ENTITY.

HKL – Make the following addition to Section 7.c – Suspend filing ability for delinquent entities – copied from HKL’s earlier proposal:

Section 7.c Legislative changes: This recommendation requires changes to section 7-90-1003, C.R.S., “articles of reinstatement”. The following potential statutory amendments could be made to § 7-90-1003. achieve the Working Group’s recommendations:

(1) In order to reinstate an entity under this part 10 THAT HAS BEEN DISSOLVED FOR A PERIOD OF LESS THAN TWO YEARS, articles of reinstatement shall be delivered BY AN INDIVIDUAL NAMED IN SUCH ARTICLES OF

REINSTATEMENT to the secretary of state, for filing pursuant to part 3 of this article stating:

- (a) The domestic entity name of the entity;
- (a.5) The domestic entity name of the entity following reinstatement, which entity name shall comply with [section 7-90-1004](#) ;
- (b) The date of formation of the entity;
- (c) The Colorado statute under which the entity existed immediately prior to its dissolution;
- (d) ~~The date of dissolution of the entity, if known;~~ ***HKL comment – how can a dissolved company meet the “less than two years” requirement if the date of dissolution is not known?***
- (e) Deleted by [Laws 2006, Ch. 192, § 65, eff. July 1, 2006.](#)
- (f) A statement that all applicable conditions of [section 7-90-1002](#) have been satisfied;
- (g) The principal office address of the entity's principal office; and
- (h) The registered agent name and registered agent address of the entity's registered agent.

[Add a new subsection 7-90-1003(2) and renumber the following subsection to be 7-90-1003(3):

(2) In order to reinstate an entity under this part 10 THAT HAS BEEN DISSOLVED FOR A PERIOD OF TWO YEARS OR MORE OR IF THE PERIOD THAT THE ENTITY HAS BEEN DISSOLVED IS NOT KNOWN BASED ON THE RECORDS OF THE SECRETARY OF STATE, articles of reinstatement shall be delivered BY AN INDIVIDUAL NAMED IN SUCH ARTICLES OF REINSTATEMENT to the secretary of state, for filing pursuant to part 3 of this article stating:

- (a) The domestic entity name of the entity;
- (a.5) The domestic entity name of the entity following reinstatement, which entity name shall comply with [section 7-90-1004](#) ;
- (b) The date of formation of the entity;

(c) The Colorado statute under which the entity existed immediately prior to its dissolution;

(d) The date of dissolution of the entity, if known;

(e) Deleted by [Laws 2006, Ch. 192, § 65, eff. July 1, 2006](#).

(f) A statement that all applicable conditions of [section 7-90-1002](#) have been satisfied;

(g) The principal office address of the entity's principal office; ~~and~~

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(h) The registered agent name and registered agent address of the entity's registered agent; AND

(i) PROVIDING THE SECRETARY OF STATE ADEQUATE DOCUMENTATION INDICATING THAT THE INDIVIDUAL DELIVERING THE DOCUMENTS TO THE SECRETARY OF STATE UNDER SECTION 7-90-1003(2) HAS THE AUTHORITY OF THE ENTITY TO SIGN AND DELIVER SUCH DOCUMENTS ON BEHALF OF THE ENTITY.

(3) If the constituent-filed document referred to in [section 7-90-1001](#) is no longer in the publicly-accessible electronic records of the secretary of state at the time articles of reinstatement are delivered to the secretary of state for filing, the entity shall cause a true and complete copy of its constituent filed document to be attached to its articles of reinstatement.

HKL – new provision addressing SB12-123 changes that have not yet been implemented.

9. FINANCING NECESSARY TO IMPLEMENT THE PROVISIONS ESTABLISHED BY SB 12-123.

a. **Proposal:** The Colorado General Assembly adopted SB 12-123 which includes a number of provisions in the Colorado Corporations and Associations Act that become effective 90 days after certification by the SOS. In order to accomplish the certification, the Secretary of State must implement the necessary computer system changes to implement the provisions of SB 12-123. Funding has not been obtained necessary to make these changes.

In anticipation of implementing the steps necessary to make the SB12-123 changes effective, the Secretary of State's office should consult with Commercial Registered

Agents and other business constituencies to determine whether there are any significant objections, whether those objections should be included in an amendment to some or all of the SB12-123 provisions, and where the filing fees should be increase.

b. **Basis:** These changes should be moved forward with funding approved by the legislature from the Secretary of State's filing fees. This may require an increase to filing fees.

c. **Legislative changes:** To be determined, if any.

d. **Costs:** Estimated in the several million dollar range, per our discussion.

e. **Benefits:** The Working Group understands that the SB12-123 provisions will update the secretary of state's procedures with respect to commercial registered agents.