northwest
REGISTERED AGENT

Confined by Ministerial Acts:

HOW STATES CAN GET BY WITH A LITTLE HELP FROM THEIR FRIENDS

Few feelings are worse than that of powerlessness; that one is not in control of their own actions and subject to the whims and capriciousness of another force or entity. Unfortunately, this is where many state employees, especially those examining filings in business services or equivalent divisions, find themselves. State examiners who process business filings are predominantly constrained to "Ministerial Acts," which is generally defined as "an act performed in a prescribed manner and in obedience to a legal authority, without regard to one's own judgment or discretion."[1] More succinctly, state examiners must approve business filings if they conform to statute. Though the need for Ministerial Acts is readily apparent, the absence of examiner discretion creates easily exploitable holes in which bad actors may thrive by providing fraudulent information that appears to conform to statutory requirements. However, by leveraging preexisting relationships with registered agents, business services divisions can actively combat fraud despite the trappings of a ministerial role.

THE BUSINESS BALANCING ACT: EFFICIENCY VERSUS EXPLOITABILITY

One of the core components in fostering a business friendly environment is a clear, concise and, most importantly, expedient business formation and filing process. To that end, states have generally made the review of business filings a ministerial act so applicants know that, if they submit what is required, there should be no administrative roadblocks to forming and maintaining their business. If formation and filing statutes did not prescribe ministerial duties to examiners, they would be subject to examiner discretion and individual fiat; filings could then be rejected for almost any reason. Does the examiner not like your business name? Rejected. Does your nonprofit support a cause contrary to the examiner's beliefs? Rejected. Is it a Monday? Rejected. Obviously, no individual should be the gatekeeper of a state's business formation and filing process. Applicants need to know exactly what is required, and ministerial acts achieve that purpose and promote efficiency.

1 "Ministerial Act" *Wex Legal Information Institute*. Available at: https://www.law.cornell.edu/wex (Accessed: 07 June 2024).

However, legislation is about balance, and, while making examiner review of formations a ministerial act does help eliminate the potential bias noted above, the robotic nature of a ministerial act presents its own set of issues.

Consider this scenario: An examiner is reviewing a business formation filing. All of the necessary fields are complete, but the addresses listed for the entity and its registered agent are a vacant lot and gas station, respectively. While these facts point towards fraud, under most state business formation statutes the examiner would be forced to approve the filing because the provided addresses are presumably valid and the examiner lacks discretion and investigative authority. With many filings now completed instantaneously online, individual discretion is removed even beyond the ministerial act.

Another consideration that must be balanced is that of state resources. Any level of investigation associated with a business filing would incur costs. Any level of post-investigative enforcement would incur additional costs and possibly raise due process considerations. The digitalization of business has decreased the importance of physical location and put states in competition with each other to attract new businesses. If State A slows their business formation process to allow for the full investigation of provided information, entities will flock to State B that allows instantaneous online flings.

While fraudulent business filings are a major concern across the country, the vast majority of business filings are legitimate. Thus, states have rightfully chosen to prioritize efficiency rather than committing their finite resources to investigation and enforcement. So the question then becomes, what can be done to stymie fraudulent filings without sacrificing filing efficiency? How can states foster business creation but also prevent fraudulent entities from propagating? The answer may lie in a separate set of statutory business requirements: Registered Agents.

WHY REGISTERED AGENTS?

Before being allowed to do business, most states require that an entity appoint a registered agent. Such appointment, however, is rarely verified and usually just another piece of information on a business filing subject to ministerial acts. As such, registered agents are often victims of these fraudulent business filings. Registered agents have a vested interest in preventing such fraud, as it protects their brand, saves money, and reduces potential liability.

Registered agents are usually appointed in one of three filings: entity formation, annual report, or change of agent/information. Nationally, very few of these filings require anything more than an attestation that the agent has consented to this appointment. For bad actors, the “under penalty of perjury” language found on most of these filings is hardly a deterrent. The name and address of a registered agent can easily be found online and listed on any of the three filings stated above, providing a guise of legitimacy. The filing would be subject to a ministerial act and therefore approved. This puts the registered agent in a position where they are unknowingly providing service to a fraudulent entity. Such appointment may go unnoticed

until someone tries to serve the fraudulent entity via their unconsenting agent. Then, the only recourse the agent usually has is to resign, at their own expense.

FILLING IN THE STATUTORY GAPS RELATED TO MINISTERIAL ACTS

Generally, the function of a registered agent is to accept service of process and government communications on behalf of client entities, and then forward these documents onto said entities. While this duty is fairly minimal, the information maintained by a registered agent puts it in a unique position to help states combat fraud. All registered agents maintain some point of contact with their client entities. This ensures that, in the event the entity is served via the registered agent, the entity can easily be informed of that fact. By opening up communication channels between state business services divisions and registered agents, this client contact information (or lack thereof in the case of an unauthorized appointment) can then be leveraged and utilized in a variety of ways to combat fraudulent filings, some of which could be implemented immediately with others needing either legislative or administrative adoption.

One simple solution would be for states to periodically send registered agents a list of all the business entities that have appointed them and allow agents to deny consent on fraudulent appointments. Registered agents need to know who is appointing them and when to properly address instances of fraud. If states and registered agents work together, the problem could be curtailed more efficiently without sacrificing efficient business formation or diverting finite state resources to combating the issue. Registered agents could opt into receipt of these lists and states could provide them under the “prescribe procedures that are reasonably necessary to perform the duties required of the secretary of state” language found in business divisions’ enabling statutes.

A key component to the above proposed solution is the ability for registered agents to deny their appointment if made without their consent. Several states have implemented procedures for such denial, but they need to be adopted on a much larger scale. Resignation of the registered agent is simply not an efficient enough vehicle to address the situation given that most states allow a 30-day grace period before the resignation is approved and another 30 days before the entity is administratively dissolved. Bad actors are allowed too much time to regroup and reappoint under resignation statutes. In some states, the creation of a denial of registered agent consent filing would be permissible under the same type of enabling statute referenced above. In other states, such a filing may need to go through the appropriate administrative procedures.

Another potential solution is for all states to adopt a mechanism that allows or requires a registered agent to accept their appointment by an entity. Louisiana currently implements such a system. Rather than just making the appointment of a registered agent another line on the filing form, Louisiana sends an email to the newly appointed registered agent that must be responded to in the affirmative to accept the appointment. Failure to respond causes the filing to be rejected. So long as these emails are responded to promptly, filings proceed efficiently, and the risk of fraud is greatly reduced. The process could be inverted as well to reduce filing

rejection and re-submission rates. Registered agents could be informed of their appointment and have a short window to reject the appointment and nullify the filed document. Unfortunately, though this is the most secure option, it more than likely would require legislative changes.

SUMMATION

Fraudulent filings are an increasingly escalating issue across the country, yet state examiners are confined by ministerial acts. However, states may utilize private entities, such as registered agent providers, to help shore up some of the necessary gaps in oversight and investigation created by statutory schemes. Registered agents and state business services divisions each have a vested interest in combating fraudulent business filings. By working together, neither will be powerless.