

Strategic Perspectives

New York Legislature Targets Real Estate Owners In Passing LLC Transparency Law

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Riding a wave of ownership disclosure laws begun with passage of the federal Corporate Transparency Act (CTA),¹ New York's legislature passed New York's own "LLC Transparency Act" (NY-LLCTA) on June 29, 2023, which currently awaits Governor Hochul's approval.² The NY-LLCTA would amend New York's Limited Liability Company Law³ and the New York Executive Law,⁴ requiring disclosure of beneficial owners of both domestic limited liability companies (LLCs) and LLCs formed outside New York and operated or qualified to do business in New York. If signed, the NY-LLCTA may throw yet another obstacle in the way of the New York City real estate community, where land sales have dropped 30% year-over-year in the first half of 2023, compared to the first half of 2022.⁵ This drop has been attributed to a number of factors including expiration of the 421a tax abatement program (which expired in 2022); New York's high taxes; New York's modification of its rent control laws (which has led to "ghost apartments" sitting empty);⁶ the

dramatic rise in hard and soft construction costs; high interest rates; and understaffed city offices leading to massive delays in gaining approvals - all of which has crippled one of the biggest industries in New York. While patterned after (and sharing certain attributes with) the CTA, the New York law is materially different than the CTA. This article outlines the NY-LLCTA and compares it to the CTA, highlighting their contrasting features, as well as considering its impact on the state's real estate community.

Purposes. The NY-LLCTA aims to end the practice of "anonymous" ownership of LLCs operating in New York, by defining beneficial ownership, requiring disclosure of human beneficial owner identities upon formation or registration, and publishing LLC beneficial ownership information in a publicly searchable business entity database.

Scope. When compared to the NY-LLCTA (which is limited to the LLC entity type),

the CTA applies more broadly to LLCs, corporations, limited partnerships, business trusts and certain other entity types⁷ operating in the United States, sweeping in a broad scope of beneficial interests.⁸ The CTA requires all non-exempt businesses to report direct and indirect, human beneficial ownership, control and service provider information into the FinCEN beneficial ownership secure system (BOSS), with BOSS to begin accepting reports on January 1, 2024.⁹ Business entities in existence as of December 31, 2023, will have until January 1, 2025, to make their initial BOSS filing (reporting their information as of January 1, 2024); and starting January 1, 2024, newly formed companies will have 30 days after entity formation to make their initial BOSS filing (note: there is a currently proposed rule amendment to extend this 30-day deadline to 90 days, but only for companies formed in 2024¹⁰). Entities excluded from the CTA's reporting requirements generally include

1 §§ 6401 – 6403 under Title LXIV of the National Defense Authorization Act for Fiscal Year 2021.

2 See New York 2023 -2024 Legislative Session State Assembly Bill A3484A and Senate Companion Bill S995B. S. S995B, N.Y. Legis. Assemb. Reg. Sess. 2023-2024 (2023), [https://www.nysenate.gov/legislation/bills/2023/S995/amendment/B#:~:text=2023%2DS995B%20\(ACTIVE\)%20%2D%20Sponsor%20Memo&text=Section%20three%20amends%20section%20203,LLC%20in%20New%20York%20State](https://www.nysenate.gov/legislation/bills/2023/S995/amendment/B#:~:text=2023%2DS995B%20(ACTIVE)%20%2D%20Sponsor%20Memo&text=Section%20three%20amends%20section%20203,LLC%20in%20New%20York%20State).

3 See <https://www.nysenate.gov/legislation/laws/LLC>.

4 See <https://codes.findlaw.com/ny/executive-law/>.

5 <https://www.forbes.com/sites/shimonshkury/2023/08/11/three-trends-impacting-new-york-city-commercial-real-estate/?sh=29edad625276>.

6 <https://therealdeal.com/new-york/2022/07/06/in-housing-starved-nyc-tens-of-thousands-of-affordable-apartments-sit-empty/>.

7 Entities created by the filing of a document with a secretary of State or any similar office under the law of a State or Indian tribe. See 31 CFR 1010.380(c).

8 See 31 CFR 1010.380(d)(2).

9 § 6403 under Title LXIV of the National Defense Authorization Act for Fiscal Year 2021.

10 Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024, 88 FR 66730 (September 28, 2023), at <https://www.federalregister.gov/documents/2023/09/28/2023-21226/beneficial-ownership-information-reporting-deadline-extension-for-reporting-companies-created-or#:~:text=Under%20this%20proposed%20amendment%20to,reports%2C%20instead%20of%2030%20days>.

heavily regulated business entities¹¹ and “large operating company” businesses¹².

By contrast, the NY-LLCTA will only apply to LLCs formed or operating in New York and to membership interests in LLCs,¹³ but not to other business entity types or to other possible indicia of ownership or control interests. “Beneficial owner” and “reporting company” are both defined under the NY-LLCTA with reference to the corresponding CTA definitions¹⁴; and “exempt company” under the NY-LLCTA is defined to mean an LLC that is not otherwise defined as a reporting company under the CTA or that meets one of the CTA exemption conditions.

Required Disclosure. The NY-LLCTA will require that LLCs include an initial report (including a beneficial owner list) submitted to the New York Department of State (DoS) when organizing an LLC or amending its Articles of Organization in New York. The NY-LLCTA will establish a new Section 215 to the New York LLC Act pertaining to disclosure of LLC beneficial ownership of New York domestic LLCs, and a parallel new Section 810 to the New

York LLC Act with mirrored provisions for foreign qualified LLCs. These disclosure requirements will include the following personal identifying information (PII) for each direct or indirect beneficial owner: (1) full legal name; (2) birthdate; (3) current business street address¹⁵; and (4) a unique identifying number from an acceptable identification document as established under the CTA.¹⁶ Alternatively, Sections 215 and 810 will allow a reporting company to submit to the DoS a copy of its “BOSS” report filed with FinCEN under the CTA, in compliance with and in lieu of the foregoing beneficial ownership disclosure.¹⁷ This alternative could prove problematic, as a filer of a BOSS report will receive a filing confirmation but not a copy of the report (and the filer may not request a copy). Further, the NY-LLCTA provides for submitting a CTA report to the DoS **only where the CTA report contains the information required by the NY-LLCTA**, which will not be the case absent adjustments made in the CTA filing requirements – and such adjustments are not expected. For example, the CTA requires disclosure of an owner’s residential street address, whereas the

NY-LLCTA requires disclosure of the owner’s business street address. The NY-LLCTA also is ambiguous as to whether supplemental reporting in New York would be required to cover any disclosure gaps created between the CTA and the NY-LLCTA (e.g., the NY-LLCTA collects information as to all direct and indirect beneficial owners of **all** LLC member interests, not just those owning a 25% or greater interest).¹⁸ The NY-LLCTA may require a domestic LLC to include the information in its Articles and a foreign LLC to include the information in its application for authority (requiring a foreign-qualified LLC to amend its application for authority upon a beneficial ownership change).

Exemptions. While New York has generally adopted much of the CTA nomenclature and approach in its own NY-LLCTA, it has not adopted the “self-executing” nature of exemptions found in the CTA. The NY-LLCTA will require an LLC relying on “exempt company” status to file with the DoS a signed statement (under penalty of perjury) indicating the provision(s) that exclude the LLC from the reporting company definition (and thereby from

11 See 31 U.S.C. §5336 (a)(11)(B). Heavily regulated entities include those such as SEC reporting issuers and registered broker/dealers; certain registered public accounting firms; certain types of venture capital fund advisers; utilities, financial institutions, insurance providers, commodity exchanges, pooled investment vehicles, Internal Revenue Code §501(c) registered nonprofits; governmental and quasi-governmental entities.

12 Large operating companies are businesses that meet all three of the following criteria: (i) have a physical street address in the U.S., (ii) have 21 or more full-time employees (i.e., employees averaging 30 hours per week or 130 hours per month) and (iii) have more than \$5 million in annual U.S. gross receipts or sales as reported on their prior year’s federal tax filing.

13 For purposes of the NY-LLCTA and the term “beneficial owners,” the term “limited liability company” includes foreign limited liability companies and authorized foreign limited liability companies. See NY-LLCTA § 2.

14 Such reference to CTA definitions is subject to the NY-LLCTA’s reduced scope of covered companies solely to New York formed and qualified LLCs. We note five CTA “beneficial owner” exceptions for: a minor child (so long as a parent or guardian’s information is reported); an individual acting as a nominee, intermediary, custodian or agent on behalf of another individual; an individual acting solely as an employee of a reporting company in specified circumstances; an individual whose only interest in a reporting company is a future interest through a right of inheritance; and a creditor of a reporting company.” See 31 CFR § 1010.380 (printed page 59533), referencing 31 CFR 1010.380(d)(4).

15 By contrast, the CTA non-public database requires a current *residential* street address.

16 NY LLC Act § 215(a) and § 810(a), with reference to CTA § 5336 (a)(1). Note the NY-LLCTA’s absence of the CTA’s requirement that an image of the identification document itself (and derivatively a photography of the associated person) be included in the filing.

17 31 U.S.C. § 5336; NY LLC Act § 215(b) and § 810(b).

18 The CTA’s “ownership” concept is also more expansive than the concept of LLC member interest ownership contained in the NY-LLCTA. For example, the CTA categorizes option rights, puts/calls, convertible debt instruments and phantom / synthetic equity rights as constituting ownership interests.

the filing obligation), separately from the Articles of Organization.^{19,20} Presumably, once exemptions are achieved, LLCs will be able to file reports acknowledging the exemption. After a CTA triggering event, existing LLCs would need to amend their reports to accommodate NY-LLCTA disclosure obligations pertaining to the information change.

Confidentiality of Information. It bears note that any personal or identifying information of a beneficial owner provided to the DoS that is not required to be included in the New York business entity database pursuant to Section 100-b of the Executive Law, is deemed confidential – except for the purposes of law enforcement, or as otherwise required to be disclosed pursuant to a court order.²¹ And if the confidential information associated with a beneficial owner is held electronically, such records must be encrypted or protected in a substantially similar manner.²² Further, when beneficial ownership disclosure is filed with the DoS, the Department will assign each beneficial owner an anonymized unique identifying number, that is not based on any personally identifying number (such as a social security number or taxpayer identification number).²³

Potential Consequences of Non-Compliance.

The CTA imposes steep, escalating fines (\$500 per day, up to \$10,000 per violation) and up to two years of jail time for those failing to timely or properly comply with the CTA.²⁴ New York’s NY-LLCTA would impose less severe consequences for non-compliance: a \$250 civil penalty and loss of good standing.²⁵ A prolonged delinquent N.Y. filer (delinquent for two years, followed by a notice from the DoS, and an additional 60-day cure period) would be converted to “delinquent” status (preventing it from receiving a good standing certificate – a requirement to consummate certain business transactions) and could expose the LLC to possible involuntary dissolution by proclamation.²⁶ Good standing status could be restored by making the delinquent filing(s) and paying associated fees.

Information Sharing and Security. The CTA’s BOSS will be accessible only by law enforcement and certain financial institutions – and importantly, not the public.²⁷ The NY-LLCTA, in contrast, contemplates creation of a publicly searchable database of LLC beneficial ownership (including the LLC’s name, filing date, filing history, name change history and dissolution date (as applicable), together with the current business street

address and county and full name of each beneficial owner), with certain limited exclusions (e.g., birthdate and government-issued identification number), and the ability to request and be granted certain disclosure waivers.²⁸ As referenced above, the NY-LLCTA collects information as to all (not just 25% or greater) beneficial owners.

Implementing Rules. New York has not yet proposed or finalized implementing rules and regulations to clarify the NY-LLCTA’s meaning or provide guidance on the NY-LLCTA’s implementation. Such rulemaking will likely garner close attention from the New York business community.

Other New York Legislation

As an additional data point on emerging trends toward business entity transparency, we note that in September 2023, the Town of Clarkstown, New York, passed a local law that requires business entities that own residential properties locally (including properties of varying sizes, from single family homes to residential apartment complexes) to disclose personal information to the town’s Building Department, including each beneficial owner’s full legal name, street address, birthdate, phone number and

19 NY LLC Act § 203(e)(7).

20 31 U.S.C. § 5336(a)(11)(B).

21 NY LLC Act § 215(c) and § 810(c).

22 *Id.*

23 For example, a social security or tax identification number. It is unclear whether each natural person will receive a single such number issued by the NY Department of State to be used for all ownership disclosures of the individual, or if a unique number will be assigned to each LLC beneficial owner.

24 31 U.S.C. §§ 5336(h)(1), 5336(h)(3)(A).

25 NY-LLCTA §5, proposed new §215(c)(3) of the LLC Act.

26 *Id.*

27 See 31 U.S.C. NY LLC Act § 5319; 31 CFR 1010.960.

28 The NY-LLCTA requires the DoS to establish rules to allow owners to apply for confidentiality waivers, based on significant privacy interests, with specific protections for whistleblowers to file false claims act lawsuits and individuals participating in an address confidentiality program. The NY-LLCTA would require the DOS to issue a waiver on a demonstration that a significant privacy interest exists (and would provide website guidance as to what documentation is acceptable proof for waiver purposes). If the DoS grants a waiver, it will need to disclose the anonymized unique identifying number assigned to such owner. The DoS also will need to provide website information as to compliance with beneficial ownership disclosure requirements and how and where such information may be used and disclosed. Proposed New §100-b(2)(B) under NY-LLCTA §9.

driver's license or passport number within 90 days of the law's effective date (i.e., the law's filing date with the Secretary of State)²⁹. Basic information about the entity also needs to be provided, including principal place of business, formation jurisdiction and trade name. Changed information needs to be provided to the Building Department within 30 days after the change occurs. A beneficial owner that also is an entity must disclose its beneficial owners to reach the level of identities of natural persons who own or control the relevant entities. A filing form will be provided by the town's Building Department and accompanied by a set fee to be determined. The Clarkstown law allows public access to filings through Freedom of Information Law (FOIL) requests. "Beneficial owner" is defined as an individual that owns or controls at least 5% of the ownership interests or otherwise exercises substantial control, with the same five exclusions as contained in the CTA (e.g., minor children; creditors; nominees/agents; persons with inheritance rights; and mere employees). Covered entities include corporations, partnerships, LLCs and other entities created by filing a document with a state or jurisdiction. The law imposes a fine for non-compliance between \$3,500 to \$5,000 plus attorney's fees and costs (with unpaid penalties

being added to collection similar to town taxes). Discussions surrounding the new law related to anonymous ownership and leasing of residential real property correlating to code violations and hampering of routine code enforcement.³⁰

In addition, New York City's TP-584-NYC form already requires certain LLC reporting on transfers (of 50% or more of the ownership) of buildings with up to four family dwelling units to or from an LLC, to identify on the form names and business addresses of LLC members and managers (and, if any LLC member or manager is itself an entity (with exceptions including for public companies, REITs and mutual funds) additional entity owners, directors, managers and officers until the disclosure reaches the ultimate ownership by individuals.³¹

Other Proposed State Legislation

California also has pending ownership disclosure legislation³², with California's proposal (like the NY-LLCTA) relating to both California and non-California entities. Both the New York law and the proposed California law may be part of a burgeoning trend toward state-driven transparency, so as to bring the U.S. more into line with many other countries' transparency requirements.

Takeaways

While the CTA applies to all business entities operating in the U.S., the NY-LLCTA applies only to LLCs operating in New York. The federal CTA goes into effect on January 1, 2024. The NY-LLCTA is expected to be submitted to Governor Hochul for signature before year-end 2023. Once the NY-LLCTA becomes effective, there is a one-year grace period for initial compliance.³³ This staggered implementation effectively gives LLCs formed or doing business in New York up to two years to begin NY-LLCTA filings without experiencing negative consequences for non-compliance. As a result, New York will have the benefit of the CTA rollout and ensuing companies' compliance as a guide in its own implementation and rollout. While the New York business community has generally reacted negatively to the proposed NY-LLCTA disclosure requirements (with certain exceptions), increasing ownership transparency clearly continues to be the trend.

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29 See <https://www.clarkstown.gov/clerk/downloads/> (Legal Notices – August 30, 2023 – Proposed Local Law to Amend Chapter 157).

30 See <https://clarkstownny.iqm2.com/Citizens/calendar.aspx> (September 12, 2023 – Town Board – Regular Meeting).

31 See <https://nycadmincode.readthedocs.io/t11/c21/#:~:text=%C2%A7%2011%2D2105%20Returns,the%20recording%20of%20such%20deed.> (N.Y.C. Code §11-2105) and <https://www.nysenate.gov/legislation/laws/TAX/1409> (N.Y. Tax Law §1409(a)).

32 California Senate Bill SB 594. SB 594, Ca. Legis. Reg. Sess. 2023-2024 (2023), <https://fastdemocracy.com/bill-search/ca/2023-2024/bills/CAB00029571/>.

33 This is the 365th day after the NY-LLCTA becomes law (noting that 2024 is a leap year). See NY-LLCTA §9.