

Memorandum in Opposition Business Law Section

July 13, 2023

S. 995-B
A. 3484-A

Sponsor: Senator Hoylman-Sigal
Sponsor: M. of A. Gallagher
Senate: Passed
Assembly: Passed

Effective Date: 365 days after enactment

AN ACT to amend limited liability company law and the executive law, in relation to the disclosure of beneficial owners of limited liability companies.

LAWS & SECTIONS REFERRED TO: Sections 102, 203, 211, 215 (new), 802, 804, and 810 (new) of the limited liability company law and 100-b (new) of the executive law.

THE BUSINESS LAW SECTION OPPOSES THIS LEGISLATION AND URGES

THE GOVERNOR TO VETO S. 995-B / A. 3484-A

Summary of Act.

The LLC Transparency Act (the “Act”), would define beneficial ownership of limited liability companies (“LLCs” or “companies”), require the disclosure of the identities of beneficial owners upon company formation or registration, and publish personal information about beneficial owners of limited liability companies in a publicly searchable business entity database. The Act largely follows the beneficial ownership reporting requirements established in the recently adopted federal Corporate Transparency Act (together with implementing regulations promulgated by the US Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”), the “CTA”), but with material deviations. Below is a description of the CTA, a discussion of the material deviations in the Act, and the basis for this Section’s opposition to the Act.

CTA.

As of February 1, 2024, the CTA will require reporting companies formed or registered to do business in any US state or jurisdiction to report to FinCEN certain information regarding the reporting company and its beneficial owners, subject to 23 exceptions for regulated and certain other types of entities. Beneficial owners are defined to include individuals who own 25% of the ownership interests, or who exercise substantial control, of reporting companies, subject to certain exceptions, including for minor children.

The CTA is the culmination of years of efforts by Congress, the Treasury Department and other law enforcement agencies to increase beneficial ownership transparency in order to fight money laundering, corruption, terrorism financing and other crimes.

While the CTA will impose significant compliance burdens on certain organizations, the CTA requires the information reported to FinCEN to be confidential and maintained in a secure, private database. As a US government agency, FinCEN is subject to strict security and privacy laws, regulations and other requirements that will protect the security and confidentiality of beneficial ownership and applicant information. Access will be limited to authorized uses including national security, intelligence, law enforcement, as well as financial institutions' compliance with anti-money-laundering ("AML") laws and similar requirements. The information reported under the CTA will be subject to stringent use and security protocols. FinCEN has stated that protecting the security and confidentiality of the information reported to it under the CTA is a critical priority.

Under FinCEN's proposed access rules, the database will only be accessible to five categories of recipients: (1) US federal, state, local and tribal government agencies for specified purposes, (2) foreign law enforcement agencies, judges, prosecutors, central authorities and competent authorities, (3) financial institutions to facilitate compliance with customer due diligence ("CDD") requirements under applicable law, (4) federal compliance with CDD requirements and (5) the US. Treasury.

The Act's Material Deviations from the CTA.

In stark contrast to the confidential federal database, the NY database will publicly disclose information about reporting LLCs' beneficial owners' names and places of business.

Entities covered by one of the 23 exemptions will have to file a report under the Act demonstrating their exemption whereas exempt entities have no filing obligations under the CTA.

The penalties for failure to comply with the Act are less severe than the penalties for failure to comply with the CTA.

Basis for Opposition.

Given the impending implementation of the CTA, the Act is unnecessary. The CTA appropriately recognizes the need for privacy regarding beneficial ownership information. Under the proposed CTA access rules, the private database that will be maintained by the Treasury will be accessible to legitimate state and local law enforcement agencies in NY. There is no need for a NY database at all or for any portion of this database to be public. It is redundant with the CTA and burdensome in requiring additional filings, including additional burdensome filings required to demonstrate exempt status.

The public disclosure of legitimate NY LLC owners is likely to lead to many undesirable outcomes. The beneficial owners could become targets of various crimes, including identity theft, as well as physical and property-related crimes, such as robberies. Beneficial owners may be subject to protests from fringe groups and targeted by unwanted and harassing sales and other solicitations.

For the foregoing reasons, the Business Law Section of the New York State Bar Association **OPPOSES** this legislation and respectfully recommends its veto as described above.

Vice Chair of the Business Law Section: Michael A. de Freitas, Esq.