

# Corporate Transparency Act, NY LLC Transparency Act and Global KYC Regulations: A Comparative Analysis

By Stacie E. Trott and Allana N. Beddoe

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**T**he Corporate Transparency Act (CTA) and New York Limited Liability Company Transparency Act (NYTA) are two significant pieces of legislation designed to enhance corporate transparency and prevent unlawful activities such as money laundering and tax evasion.

The CTA applies to a broad range of domestic and foreign entities that report to the Financial Crimes Enforcement Network (FinCEN). (31 U.S.C. §5336(a)(11)).

The NYTA applies specifically to limited liability companies (LLCs) formed and qualified to do business in New York that report to the New York Department of State (NYDOS) (NY LLCL §§102(k), (m), 1106(b), 1107(a)). Entities that fall into any of 23 categories are exempt from reporting to FinCEN and NYDOS. (31 U.S.C. §5336(a)(11)(B); NY LLCL § 1106(c)).

While the NYTA is modeled on the CTA, their definitions of statutory terms and exemptions, noncompliance penalties and reporting timelines, amongst other items, differ.

The CTA (as adopted by the NYTA) defines 'beneficial ownership' as any individual who, directly or indirectly, either (1) exercises substantial control (i.e., ability to make important decisions on behalf of the entity) over a reporting company, or (2)



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**Allana Beddoe, left, and Stacie Trott, right, of DLA Piper.**

owns or controls at least 25 percent of the ownership interests of a reporting company. (31 C.F.R. §1010.380(d)(1)).

The NYTA requires beneficial owners to provide the following: (1) full legal name, (2) date of birth, (3) home or business address and (4) identification number from a government-issued ID. (NY LLCL §1107(a)). Under the CTA, beneficial owners are required to provide the same NYTA items (1), (2) and (4) stated in the foregoing sentence together with (a) residential address, and (b) an image of the government ID. (31 C.F.R. §1010.380(b)(1)(ii)).

In addition, the CTA requires reporting companies to provide the company's full legal name, trade name, business address, jurisdiction of formation, jurisdiction where it is registered to do business (only applicable to foreign entities) and IRS tax identification number (i.e., TIN or foreign EIN). (31 C.F.R. §1010.380(b)(1)(i)).

Beneficial ownership reports submitted to FinCEN and NYDOS are stored in a secure nonpublic database and are largely confidential unless requested by federal, state, local or tribal law enforcement agencies authorized by a court or to comply with legally required due diligence.

Once effective, the NYTA is expected to impose an added compliance hurdle on LLCs formed and/or operated in the State of New York which is compounded with the even more burdensome requirements under the CTA.

### **Impact on the NY Real Estate Industry**

One notable impact that the CTA will have on the real estate industry is the use of special purpose entities (SPEs), which are typically LLCs formed for the purpose of acquiring, operating, developing, financing and/or leasing property or for the purpose of limiting liabilities and/or obtaining certain tax benefits. The ownership of the SPE is often structured through a chain of additional entities.

Under the CTA, SPEs that are considered reportable must not only disclose specific details about their beneficial owners and certain company details, but they also must determine who is responsible for initial and ongoing filings.

Further, presently there is no way to easily apply or transpose the information that is submitted to FinCEN to the DOS. This means that the business owners and their legal counsel teams will be expanding their deal checklists to ensure that NY SPEs are not only CTA compliant but also NYTA compliant from incorporation through dissolution.

### **Global Markets**

Globally, long before the CTA and the NYTA, there has been a focus on the need for transparency in business transactions, especially with respect to ownership and tax requirements. Many governments have

translated the call for transparency into the implementation and enhancement of Know Your Customer (KYC) regulations that include formal reporting on beneficial ownership requiring companies to assess their structures and ensure that they are in compliance with all applicable local laws.

Although the specifics of these regulations vary at the local level, their Anti-Money Laundering (AML) and Counter-Terrorist Financing (CTF) regulatory framework have much in common.

The genesis of most KYC tests began with a *purely beneficial ownership* analysis with disclosures of owners above certain percentage thresholds (i.e., 10% to 25%) but over the years, KYC tests have morphed into many permutations that now include a control component that includes a test assessment of both *direct* and *indirect control*.

### **The Netherlands**

In the Netherlands (since early 2020), legislation implementing the Fourth EU Money Laundering Directive was passed that required companies to maintain an Ultimate Beneficial Owner Register (UBO Register) which includes the application of beneficial ownership and control tests that aim to identify the individuals who ultimately own or control more than 25% of a company's shares or voting rights, or who otherwise holds a controlling interest in the company.

Ultimate beneficial owners (UBOs) are required to provide (1) their full name, (2) residential address, (3) date of birth, (4) place of birth, (5) citizen service number or tax identification number, (6) nationality, (7) a copy of a valid identity document and (8) where the UBO is located outside of the Netherlands, a utility bill.

The Netherlands has also adopted a concept of "pseudo-UBO" whereby if after a thorough analysis is done on the company, no UBO is found (and provided that there are no grounds for suspicion) all board members or general partner for the entity as provided in such entity's articles of association or other governing document are deemed as UBOs.

Following a ruling by the Court of Justice of the European Union, data from the UBO Register is no longer accessible to the public which is a

stark difference compared to the public Register of Persons with Significant Control in the neighboring United Kingdom which contains personal information of controllers (e.g., address, date of birth, country of residence, etc).

### Hong Kong

In Hong Kong (since mid-2018), the Companies Ordinance requires all Hong Kong companies to maintain a Significant Controller Register (SCR), which records individuals or legal entities that exercise significant control over the company. Like the Netherlands, the CTA and the NYTA, the disclosure threshold for SCR is 25% and it allows for certain exemptions.

The SCRs must contain the following for each controller: (1) full name, (2) date of becoming a significant controller, (3) nature of control, (4) for individuals, correspondence address and identity card number, (5) for entities, legal form, registration number, place of incorporation and address, and (6) the name and contact details of a designated representative.

The SCR regime also requires companies to follow a series of steps which includes delivering notices to relevant parties determined to be significant controllers and having such relevant parties confirm the determination.

SCRs are private and are kept at the registered office of the company or another location within Hong Kong.

### British Virgin Islands

Under the Beneficial Ownership Secure Search System (BOSS) Act (since late 2017), companies and limited partnerships in the British Virgin Islands (BVI) are required to provide registered agents with detailed information about their beneficial owners (subject to certain exemptions), including their name, date of birth, residential address and nationality. This information is stored in a secure, searchable system that can only be accessed by competent authorities for law enforcement purposes. There is currently no register requirement like the Netherlands or Hong Kong but the disclosure threshold is 25%.

### Looking Ahead: Impact on NY-Based Global Investors and Others

While many NY based global investors may have already acclimated themselves with the stringent requirements of KYC regimes around the world, having gotten comfortable with providing their personal information on the basis that they are deemed a beneficial owner, investors now have even more diligence and disclosure requirements to look forward to when they invest in the NY market.

As a precondition to obtaining new loans, banks and lenders will now require borrowers to be in full compliance with the implementation of the CTA and the NYTA (or any other similar state specific transparency act). We should expect lender requirements for both domestic and international lenders to be expanded to also include compliance with local laws. This will require businesses to reassess their internal AML/KYC protocols. Due diligence will inevitably become more complex and burdensome especially for businesses with intricate ownership structures that do not fall under an exemption.

### Conclusion

The CTA, the NYTA and similar KYC regulations across the globe all share the common objective to enhance corporate transparency and prevent money laundering and terrorist financing. In contrast to the U.S. quasi-private database that the CTA and NYTA tout, Europe, Asia and other jurisdictions have long required businesses, regardless of the entity type, to have and maintain corporate registries that include information on beneficial owners and controlling persons.

This area is proven ripe for discussions on data privacy and, as this area continues to evolve here in the United States, it is only a matter of time before the CTA and the NYTA begin to allow certain information on beneficial owners to become public.

**Stacie E. Trott** is co-chair of DLA Piper's Global and New York Real Estate Practices. **Allana N. Beddoe** is an associate at the firm.