RESOLVED, That the American Bar Association supports reasonable and necessary legislation and related regulations to detect and combat money laundering and terrorist financing that would:

(a) require every domestic business entity to designate either (i) a responsible individual who significantly participates in the control or management of the entity, or (ii) a records contact individual with responsibility for obtaining, maintaining, and taking reasonable measures to verify applicable beneficial or record ownership information for the entity, or both, and

(b) provide law enforcement agencies with timely access to adequate, accurate, and timely information regarding the entity’s responsible individual, or the entity’s applicable beneficial or record ownership, or both, in response to a valid subpoena, summons, or warrant; and

FURTHER RESOLVED, That the American Bar Association urges that any legislation and related regulations to detect and combat money laundering and terrorist financing be consistent with the following fundamental principles:

(1) constitutional rights and legitimate confidentiality interests must be protected;

(2) appropriate due process must be provided;

(3) the collection, maintenance, and verification of applicable responsible individual, beneficial ownership, or record ownership information must be an obligation of the entity;

(4) any definition of and reporting threshold for beneficial ownership must be clear, reasonable, and not unduly burdensome;
(5) information concerning an entity’s responsible individual, beneficial ownership, or record ownership, as applicable, should only be available to:
(i) law enforcement agencies promptly, but only in response to a valid subpoena, summons, or warrant; and
(ii) financial institutions, but only with the consent of the entity and subject to confidentiality protections when appropriate;

(6) all types of business entity structures, including corporations and limited liability companies, should generally be subject to the same requirements, with appropriate exemptions or variations to recognize differences in entity forms, risk levels, existing regulatory obligations, or other factors;

(7) any penalties for noncompliance must be calibrated to reflect the nature and degree of the noncompliance; and

(8) any new requirements must not undermine the attorney-client privilege, the confidentiality of lawyer-client communications, or the confidential lawyer-client relationship.
REPORT

Background

At its Midyear Meeting in 2003, the American Bar Association (the “ABA”) adopted Resolution 03M104 in response to efforts by the inter-governmental body known as the Financial Action Task Force (“FATF”)\(^2\) to develop and promote anti-money laundering (“AML”) policies at the national and international levels. Five years later, at its Annual Meeting in 2008, the ABA adopted Resolution 08A300 in response to legislation that had been introduced in the United States Congress that would have required those who form business entities to document, verify, and make available to law enforcement authorities the record and beneficial ownership of those business entities.\(^3\) Resolution 08A300 urged that the regulation of those involved in the formation of business entities should remain a matter of state and territorial law, and urged Congress to refrain from enacting legislation that would regulate lawyers in the formation of business entities and to defer to the states.

That proposed 2008 legislation was not enacted, but since 2008 there have been a variety of proposals requiring the disclosure of certain identifying information for certain owners of U.S. business entities. The most recent subsequent proposals that have been made in the U.S. or adopted in other countries are described in Appendix II to this Report. As a result of Resolutions 03M104 and 08A300, the ABA has opposed all Federal legislation requiring the disclosure of beneficial ownership information for U.S. business entities.

Proposed Resolution

The proposed Resolution (this “Resolution”) is to update and supplement Resolutions 03M104 and 08A300 and other existing ABA policies. It is expected that there will continue to be significant debate among many constituencies regarding proposals requiring the disclosure of ownership information for certain owners of U.S. business entities (which ownership information is hereinafter referred to as “beneficial ownership information” and which owners are hereinafter referred to as “applicable beneficial owners”), and the nature of any provisions ultimately considered cannot be accurately predicted at this time. Rather than attempting to address the provisions of particular proposals as they are introduced, this Resolution takes the approach of adopting a series

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\(^1\) This Report was prepared by the Committee on Corporate Laws and the Committee on LLCs, Partnerships and Unincorporated Entities, each of the Business Law Section, with input from the Task Force on Gatekeeper Regulation and the Profession.

\(^2\) The Financial Action Task Force is an inter-governmental body established in 1989 with the objective of setting standards and promoting effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

\(^3\) Resolutions 03M104 and 08A300, known informally as Resolutions 104 and 300, respectively, are available on the ABA Gatekeeper Task Force’s website at: https://www.americanbar.org/groups/criminal_justice/gatekeeper/.
of fundamental principles that any legislation or regulation must satisfy while preserving a degree of flexibility in the application of those principles to particular proposals. Those fundamental principles are described in this Report. This Resolution allows the ABA to respond as appropriate to future legislative and regulatory proposals and will enable the ABA to engage in constructive dialog around those proposals.

This Resolution does not advocate the adoption of a particular legislative or regulatory approach, nor does it seek to interfere with traditional state and territorial law governing the formation of business entities. Instead, it supports reasonable Federal laws, state uniform laws, or other measures that would require every domestic business entity to designate a responsible individual who helps control or manage the entity, or a records contact individual responsible for obtaining and verifying beneficial or record ownership, or both, and that would allow law enforcement agencies timely access to such information upon satisfaction of appropriate protections. This Resolution also states that any such legislation and related regulations must be consistent with certain stated principles and thus meet certain minimum and uniform requirements. However, if Federal legislation or regulations are adopted consistent with this Resolution, states and territories could supplement those requirements if desired for the reasons described in this Report. Federal legislation or regulation has the advantage of uniformity, but if such measures are adopted, they should be designed as to not unduly burden the states and territories, which may lack the financial and personnel resources to establish or enforce any such reporting system.

Without advocating for the adoption of a particular legislative or regulatory approach, Appendix I to this Report sets forth a series of core considerations that should inform the development of legislation or regulations. Those include, among others, a framework that could provide that:

- Each entity must provide to a designated governmental authority or office (such as the secretary of state or similar governmental authority that regulates entity formation) the name and address of a records contact in the United States, who should be designated as such at the time of entity formation and who must be an individual U.S. citizen who has agreed to provide beneficial ownership information in response to an appropriate request from an authorized recipient.
- The records contact would maintain the following information (which is referred to herein as “beneficial ownership information”):
  - The name and address of each “applicable beneficial owner” (as defined in accordance with the fundamental principles discussed below).
  - For each applicable beneficial owner that is not a natural person, (i) the jurisdiction under which each such beneficial owner was formed, and (ii) the name and address of a natural person who has access to such beneficial owner’s records.
  - For each applicable beneficial owner that is not resident in the United States, the name and address of a natural person resident in the United States who has access to such beneficial owner’s records (including for each applicable non-U.S. beneficial owner that is not a natural person,
the name of each record owner of such beneficial owner).

- The definition of applicable beneficial owner must be clear across all business forms so that entities can determine what information to collect and maintain.
- The information maintained by the records contact should be updated promptly (at least annually).
- The beneficial ownership information would be made available by the records contact only to specified recipients upon a proper showing.
- Federal civil penalties would be applicable to any entity that, after appropriate due process, fails either to maintain a records contact or to produce the information that the records contact is required to maintain.
- Federal criminal and/or civil penalties could be imposed for willful violations.
- Public entities and their controlled affiliates should be exempt from beneficial ownership disclosure requirements. In addition, private business entities engaging in active businesses at a physical location within the United States should be exempt from beneficial ownership disclosure requirements.

The goal of the framework described in this Report is “smart” enforcement, where the compelling interests of law enforcement in having prompt access to a natural person who controls an entity are balanced against valid confidentiality interests and the burdens of compliance with reporting requirements, especially if the requirements are unreasonable or are not clear. As a matter of enforcement, expanding the focus and increasing the amount of information actually benefits those who commit the illegal acts by diverting enforcement resources to the pursuit of record-keeping violations and validation of voluminous amounts of reported information. In addition, broader measures impose costs on capital formation, including by creating significant compliance costs, and reduce the wealth-creation potential of legitimate entities.

Each of the fundamental principles that will guide and shape the ABA’s response to legislative and regulatory proposals mandating some form of disclosure of beneficial ownership information is discussed below.

**Principle 1: Constitutional Rights and Legitimate Confidentiality Interests Must Be Protected**

Legislation contemplating a central database containing personal information, accessible without a warrant, would run the risk of violating Constitutional protections and thus should be opposed. By collecting and maintaining beneficial ownership information at the entity level and not in a central database, numerous valid interests in maintaining confidentiality are protected, including:

- Personal and data privacy represents a valid interest entitled to recognition and protection.
- Public disclosure could create public safety issues for elected officials, judges, public figures and vulnerable individuals such as seniors and minors.
• Public disclosure creates an increased risk of identity theft or fraud.\(^4\)
• Philanthropic donors and donees have a legitimate interest in confidentiality.
• Legitimate commercial business interests, such as property acquisition, are also valid interests to protect with confidentiality.
• Ease of engaging in business transactions for planning, lending, investment, and joint venture relationships.

Although the creation of new central databases should be opposed, the information required to be included in existing databases or in new databases created in the United States or abroad notwithstanding this Resolution (e.g., a passport, driver’s license or government issued photo identification document for each individual resident outside the United States) should be limited only to information directly related to the specific objective for collecting the information. Collection and production of personal data should be limited to reduce the potential harm resulting from identity theft or fraud in the event of a data breach.\(^5\)

While law enforcement needs may be compelling and financial institutions’ compliance obligations are critical in supporting law enforcement, the public does not need and should not have access to the beneficial ownership information. Most states and territories currently require annual reporting of certain governing persons (which may include natural persons), including board members of a corporation and the managers, members or partners who constitute the equivalent in other forms of entities.\(^6\) The reporting of governing persons (especially if those governing persons are natural persons) has multiple benefits, including:

• it achieves many of the objectives for reporting by entities in a cost-effective way, without the burdens of broad beneficial ownership reporting; and
• it is a valuable tool for law enforcement to (i) discourage formation of entities that desire to avoid reporting by governing persons and (ii) to obtain readily available information.

Beneficial ownership reporting should include or supplement, and not displace, governing persons reporting.

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\(^4\) Under the EU’s Fifth Anti-Money Laundering Directive, EU Member States may, in exceptional cases, deny access to the central register where such access would expose beneficial owners to disproportionate risks, to risks regarding fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or if the beneficial owner is a minor or otherwise legally incapable.

\(^5\) In jurisdictions with public ownership registers (such as the United Kingdom), beneficial owners are provided advance notice of the public disclosure of their personal information. That advance notice should not be necessary if information is held confidentially and produced only in limited circumstances.

\(^6\) At the Federal level, since 2010 the Internal Revenue Service (“IRS”) has required every business that obtains an Employer Identification Number to submit IRS Form SS-4, which includes the name of a “responsible party” within the business—i.e., an individual who is able to “control, manage, or direct the entity and the disposition of its funds and assets.”
In addition to the general privacy concerns regarding public databases outlined above, public access to beneficial ownership information could have a negative impact on legitimate commercial business interests, including:

- Competitors, investors, suppliers or consumers may decide not to do business with a particular company because of its beneficial owners or because the access to the information may disproportionately influence prices and other business terms.
- Public access to beneficial ownership information may compromise employee confidentiality in situations where equity interests are given as compensation.
- Private parties may use this information to allege that others have or do not have an ownership interest in an entity, and this may conflict with or be confused with stock ledgers and other official records of company ownership.
- Compliance may be difficult where ownership can be created and transferred quickly and frequently.
- If the information is not confidential or is sought for other purposes, entities may be encouraged to run the risk of penalties for non-compliance. If information is collected and maintained confidentially and tailored for use with appropriate law enforcement purposes (e.g., pursuing money laundering, tax evasion and terrorist financing upon a proper showing), better compliance should be achieved.

Consistent with limiting access to beneficial ownership information to that necessary to achieve specific law enforcement and financial institution compliance objectives, beneficial ownership information should be excluded from state or territory law record inspection rights and statutory provisions providing for interrogatories by a secretary of state.

If, despite the principles adopted in this Resolution and the points set forth above, persons other than law enforcement and financial institutions are granted access to beneficial ownership information, that access should be subject to judicial oversight. In many states and territories, state and territorial law have a framework with procedural safeguards for granting inspection rights of information on ownership held by the business entity. If persons or entities other than law enforcement and financial institutions are granted access to applicable or appropriate beneficial ownership information, a similar framework should be adopted to ensure that a compelling need for the information is demonstrated before disclosure occurs. For example, the process should ensure that the beneficial ownership information is not being used for political lobbying or private litigation purposes. In addition, where there is a serious risk that production of beneficial ownership information could be used for intimidation or violence, a process for suppressing applicable or appropriate beneficial ownership information should be available.

**Principle 2: Appropriate Due Process Must be Provided**

Given the valid interests in maintaining the confidentiality of beneficial ownership
information, appropriate due process must be provided before any persons can gain access to beneficial ownership information.

Rather than maintaining beneficial ownership information in a centralized database at either the Federal or the state level, with attendant risks of unintended disclosure, the requirement should be a framework in which the information is collected and maintained at the entity level with obligations that it be produced promptly to law enforcement, but only in response to a valid subpoena, summons or warrant. Maintaining records of beneficial ownership information on a Federal or state level exposes that information to possible confidentiality breaches.

- Confidentiality may be compromised if beneficial ownership information is shared among government entities or used by financial institutions for unrelated purposes and may be further compromised if information is shared with foreign authorities in the context of international investigations.
- Confidentiality and data breaches are inevitable and expose beneficial owners to the risk of identity theft or fraud.7
- Freedom of Information Act (“FOIA”) type access is particularly problematic at the state and territorial level where application and process are inconsistent.

Some argue that maintaining records of beneficial ownership information on a Federal or state level minimizes the risk that beneficial owners will be “tipped” when their information is produced by the responsible individual or records contact to law enforcement in response to a valid subpoena, summons or warrant. However, legislation or regulation could address that concern, including by providing civil or criminal penalties for such tipping.

**Principle 3: The Collection, Maintenance, and Verification of Applicable Responsible Individual, Beneficial Ownership, or Record Ownership Information Must Be an Obligation of the Entity**

The collection, maintenance and verification of information about responsible individuals and about beneficial or record ownership must be an entity obligation. Because the individuals who file formation documents to form entities often do not have ongoing access to information, they should not be relied upon or obligated to report beneficial ownership information.

Instead, the preferable approach is to require that each entity provide to a designated governmental authority or office (such as the secretary of state or similar governmental

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7 A report by the Treasury Inspector General for Tax Administration found that half of the IRS employees in a sample e-mailed personally identifiable information from tax returns in violation of IRS policy, including to external non-IRS e-mail accounts. In 2015, the IRS was reportedly subject to a cyber-attack in which hackers gained access to personal data from more than 700,000 taxpayer accounts. See also Massive IRS data breach much bigger than first thought, CBS, available at https://www.cbsnews.com/news/irs-identity-theft-online-hackers-social-security-number-get-transcript/.
authority that regulates entity formation) the name and address of a responsible individual or records contact in the United States, who should be designated as such at the time of entity formation. This records contact must be an individual U.S. citizen who has agreed to provide beneficial ownership information in response to an appropriate request from an authorized recipient.

The entity should have access to all information required to be obtained by the responsible individual or records contact. So long as “beneficial owner” is defined in a clear and reasonable manner, the entity should be able to identify its beneficial owners. If a beneficial ownership definition is overly expansive (such as including vague language about persons who have “a substantial interest in” or receive “substantial economic benefits from” the assets of the entity), it would include persons whose information would not necessarily be known or within the control of the entity, thereby making it impossible for the entity to comply with the disclosure requirements. Therefore, any such overly broad definition would work at counter purpose to Principle 4 below and should be opposed.

As described below under Principle 7, any penalties should be reasonable and commensurate with the nature of the offense to create a rational incentive for compliance. Penalties on beneficial owners, including, for example, equity owner disenfranchisement and/or restrictions on the exercise of rights, are unnecessary if the entity has access to all information it is required to maintain.

**Principle 4: Any Definition of and Reporting Threshold for Beneficial Ownership Must Be Clear, Reasonable, and Not Unduly Burdensome**

The definition of beneficial ownership used in reporting beneficial ownership information must be clear enough so that entities can determine what information to collect and maintain. Previous U.S. proposals have included a vague and broad definition of beneficial ownership (for example, the "TITLE Act" (S. 1454), the "Corporate Transparency Act" (S. 1717 and H.R. 3089), and the original draft version of the “Counter Terrorism and Illicit Finance Act” (H.R. 6068), all introduced in the 115th Congress) or deferred to U.S. Treasury rulemaking to define beneficial ownership. A vague or ambiguous definition will subject entities to undue delay and expense in determining how to comply properly with requirements that are difficult to interpret. Alternatively, entities, especially small businesses or unsophisticated entities, may be confused by unclear requirements and may not be able to comply. While large entities may have the ability to bear the costs of compliance, most U.S. entities are small businesses or single purpose entities where the costs of gathering and maintaining information would be burdensome.

The objective of beneficial ownership reporting should be to identify at least one natural

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8 Although Section 9 of the original draft version of the Counter Terrorism and Illicit Finance Act would have established beneficial ownership reporting requirements on certain businesses, that controversial section of the bill dealing with beneficial ownership was removed shortly before the legislation was formally introduced in the House on June 12, 2018 as H.R. 6068.
person that law enforcement can contact and communicate with during an investigation. The initial point of inquiry should be a direct equity ownership inquiry to the entity’s records contact. If the initial point of inquiry does not yield the identity of a natural person, a second point of inquiry could look to control and identify a natural person who exercises ultimate effective control over the entity, which could include a governing person of the entity. For example, it would meet the spirit of this Principle to define an “applicable beneficial owner” as (i) each person with ownership or voting power of 25% or more of the entity, and (ii) if no person has ownership or voting power of 25% or more of the entity, a natural person who exercises effective control over the entity, which would include any natural person who governs the entity.

Recent Federal regulations have sought to achieve this objective of identifying at least one natural person. The Geographic Targeting Order issued by the Financial Crimes Enforcement Network (“FinCEN”)⁹ has a specific definition of beneficial ownership (“each individual who, directly or indirectly, owns 25% or more of the equity interests of the Purchaser”) that is tied to equity ownership. That method is consistent with the definition of beneficial ownership used in the FinCEN Customer Due Diligence Requirements for Financial Institutions final rule (the “FinCEN CDD Rule”),¹⁰ which applies a two-prong test. The first prong, known as the “ownership prong,” includes each individual who directly or indirectly owns 25% or more of the equity interests of an entity. The second prong, referred to as the “control prong,” includes a single individual with significant responsibility to control, manage, or direct an entity. The definition of beneficial ownership in a reporting regime should be no more burdensome than existing law under these Federal regulations.

The beneficial ownership reporting regime should strike the appropriate balance between the benefits of law enforcement having ready access to beneficial ownership information and the burdens on governments in collecting that information and on business entities in complying with the reporting regime.

Fraud and corruption targeted by disclosure of beneficial ownership information is concentrated in closely-held entities, not entities that are owned by numerous stock or interest-holders. Individuals who have assets to shelter, income to hide from tax authorities or other improper motives do not band together to form broadly-held entities in which others invest. Rather, individuals and organizations engaged in fraud, corruption or illicit activity financing tend to form entities that they control through other entities or front-people they control. For that reason, the focus of any disclosure regime should be on the information of each applicable beneficial owner. Spending resources to collect information that has no rational connection to the source of the fraud, tax evasion, and other illegal conduct that is a legitimate concern of law enforcement risks wasting resources and detracting from economic growth, and engenders skepticism about whether government is regulating wisely in the public interest. If a strong disclosure regime is put in place that focuses on the closely-held entities that are the vehicles

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⁹ FinCEN is a bureau of the United States Department of the Treasury (the “U.S. Treasury”).

through which illegal conduct is conducted, law enforcement should benefit because
regulators charged with overseeing and enforcing that regime will be better positioned to
do it well.

In considering any beneficial ownership test, whether under the ownership or control
prong, an aggregation concept should be considered in appropriate circumstances, such
as where a person’s ownership has been allocated into portions that individually fall below
the threshold.

**Principle 5: Information Concerning an Entity’s Responsible Individual, Beneficial
Ownership, or Record Ownership, As Applicable, Should Only Be
Available to: (i) Law Enforcement Agencies Promptly, But Only in
Response to a Valid Subpoena, Summons, or Warrant; and (ii)
Financial Institutions, But Only with the Consent of the Entity and
Subject to Confidentiality Protections When Appropriate**

Law enforcement has a bona fide interest in being able to obtain beneficial ownership
information promptly. Access to beneficial ownership information is a valuable component
in pursuing persons engaged in money laundering, tax evasion, and terrorist financing. A
proper showing (i.e., a subpoena, summons or warrant issued in accordance with the
Fourth Amendment) validates the propriety of the law enforcement request for production
of beneficial ownership information.

Although the goal of beneficial ownership reporting legislation or regulation should be to
permit law enforcement to pursue those engaged in money laundering, tax evasion, and
terrorist financing, financial institutions are subject to due diligence requirements under
Federal, state, and territorial law that require them to collect the same (and in many cases
more) information. Federal legislation or regulation could permit the beneficial ownership
information to be made available to a financial institution upon a request made by a
financial institution, with customer consent, as part of the institution’s compliance with
applicable Federal, state, or territorial law. However, the information should only be
shared with the financial institution if after obtaining customer consent, (i) the financial
institution agrees to prevent the public disclosure of such beneficial ownership information
and that it will not use such beneficial ownership information for any other purpose and
(ii) such information is only made available to law enforcement upon the same proper
showing that would be required for law enforcement to obtain that information from the
records contact.

In assessing the costs and benefits of a regulatory system that balances legitimate
privacy concerns and bona fide law enforcement needs, it should be presumed that those
engaged in money laundering, tax evasion, and terrorist financing are unlikely to observe,
much less comply with, the regulatory system.

While law enforcement needs are compelling and financial institutions’ compliance
obligations are critical in supporting law enforcement, the public does not need to have
the same access to the same beneficial ownership information; many states and
teritories already provide for some level of specified information to be reported to state secretaries of state for certain entities (i.e., names and business addresses of directors and principal officers of corporations, managers of LLCs, and general partners of limited partnerships).

Reporting on governing persons should focus on identifying natural persons who have governing positions in an entity (including as controlling equity holders), giving law enforcement a human point of contact.

If, despite the points set forth above, persons other than law enforcement and financial institutions are able to obtain information on beneficial ownership, that ability should be subject to judicial oversight.

Principle 6: All Types of Business Entity Structures, Including Corporations and Limited Liability Companies, Should Generally be Subject to the Same Requirements, With Appropriate Exemptions or Variations to Recognize Differences in Entity Forms, Risk Levels, Existing Regulatory Obligations, or Other Factors

It is critical that the same general reporting standards be applicable to all types of business entity structures. In the United States, state and territorial law has traditionally governed entity formation and the internal affairs of legal entities. That should continue.

The basic elements of any new system of reporting beneficial ownership information will only be effective if those elements cover all forms of entities. Current reporting requirements and certain proposed new requirements, however, do not apply evenly to limited liability companies, limited partnerships, general partnerships, business trusts and other noncorporate alternative entities. As a result, for instance, reports by these entities to a secretary of state or other regulatory authorities do not necessarily identify a natural person having control. Limited liability companies may have no natural persons as members or managers, and only a minority of the states and territories require reporting of the members or managers. Limited partnerships may have no natural person general partners. General partnerships are not required to make any filings unless they elect to be limited liability partnerships or seek to file an assumed name.

The formation of alternative entities outpaces the formation of corporations by at least three to one. In Delaware, of 199,000 new business entities formed in 2017, 144,000 (72%) were LLCs, 42,000 (21%) were corporations, 12,000 (6%) were LPs/LLPs and 1,400 (less than 1%) were statutory trusts. In Pennsylvania and Maryland, the 2017 figures are even more skewed towards LLCs with 57,000 (Pennsylvania) and 46,000 (Maryland) LLCs formed and 7,000 (Pennsylvania) and 9,000 (Maryland) corporate charters filed. Kentucky and Nevada are similar with 24,000 (Kentucky) and 20,000 (Nevada) LLC formations in 2017 compared to 2,100 (Kentucky) and 4,400 (Nevada) corporate formations.

The misuses of any particular form of entity are not representative of the vast majority of
business entities. Legislation or regulation should not undermine or overburden legitimate businesses with aggregate costs that far outweigh the benefits of the legislative intent. Based on these realities, any new reporting regime should be applied to all types of business entity structures.\textsuperscript{11} Partnerships and business trusts (whether statutory or common law), which, as a practical matter, are alternative forms of business entities, should be treated similarly to all other business entities.\textsuperscript{12} However, consistent with the “risk-based approach,” legislation or regulations should provide appropriate exemptions or variations to recognize differences in entity forms, risk levels, existing regulatory obligations, or other relevant factors.

**Principle 7: Any Penalties for Noncompliance Must Be Calibrated to Reflect the Nature and Degree of the Noncompliance**

It is expected that legislation will include penalties for failure to comply with beneficial ownership information disclosure. Recent proposed Federal beneficial ownership disclosure legislation has included both civil and criminal penalties.

For example, the original version of the Counter Terrorism and Illicit Finance Act (H.R. 6068; 115\textsuperscript{th} Congress) would have imposed criminal penalties for both “knowing” and “willful” violations of its requirements:\textsuperscript{13}

- Knowledge generally relates to knowing the relevant facts, even if the actor was not aware that the action was illegal.
- Willful generally relates to the intent to do something that is illegal.

The Closing Loopholes Against Money-Laundering Practices (“CLAMP”) Act (S. 3268; 114\textsuperscript{th} Congress) would have imposed criminal penalties on anyone who “willfully” or “intentionally” attempts to evade its requirements:

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\textsuperscript{11} Donative trusts, which are traditional estate planning and property-owning vehicles, but are not generally regarded as business entities or required to register with any state or territory, also should be separately considered.

\textsuperscript{12} The scope of entities covered under beneficial ownership reporting legislation could be similar to the scope of entities that are “registered organizations” under the Uniform Commercial Code, where a registered organization means “an organization organized solely under the law of a single State or the United States by the filing of a public organic record with, the issuance of a public organic record by, or the enactment of legislation by the State or the United States.” Regardless of the scope of entities covered, the coverage of general partnerships may be problematic due to the informal nature of their formation.

\textsuperscript{13} Under the original version of the draft Counter Terrorism and Illicit Finance Act, Section 9 of the bill provided that it is unlawful for a person (including an applicant to form a corporation or limited liability company) to knowingly provide or attempt to provide false or fraudulent beneficial ownership information, or willfully fail to provide complete or updated beneficial ownership information to FinCEN. However, Section 9 of the draft bill was removed shortly before the legislation was formally introduced in the House on June 12, 2018 as H.R. 6068.

*(Note continued on following page.)*
“Intentional” conduct results in greater penalties; treats a pattern of failing to provide or update information as an intentional failure.

Criminal penalties include imprisonment for not more than three years.

The 2016 U.S. Treasury proposal discussed in Appendix II provided for civil penalties and no criminal penalties.

The FinCEN CDD Rule imposes criminal and civil penalties:

- Civil penalties are imposed for “willful” violations and may be imposed for “negligent” violations of its requirements.\(^\text{14}\)
- Criminal penalties are imposed for both "knowing" and “willful” violations of its requirements.\(^\text{15}\)
- Criminal penalties include imprisonment for not more than ten years.

Criminal penalties for “knowing” violations without knowledge that the action is illegal or that the information is false essentially criminalize failures of recordkeeping, particularly activities of closely-held entities conducting legitimate small business activities. Preventing this is a matter of economic justice and regulatory fairness. Failure to comply should only be a crime if there is “mens rea” – i.e., a willful attempt to evade the requirements or knowing provision of false information. Principles of due process may be violated if criminal penalties are imposed on the large numbers of unsophisticated small businesses that currently have difficulty understanding even basic record-keeping requirements, such as failing to file state annual reports. It is inappropriate to impose criminal liability for “knowing” violations where the rules are objectively vague or unclear.

Possible penalties for failure to collect, maintain and verify the information should be reasonable and commensurate with the nature of the offense, in order to create a rational incentive for compliance. Federal civil penalties would be applicable to any entity that, after appropriate due process, either fails to maintain records contact information or fails to provide the information that is required to be maintained. Administrative dissolution could also be imposed as a penalty. Federal criminal and/or civil penalties could be imposed for willful violations.

Penalties on beneficial owners, including, for example, equity owner disenfranchisement and/or restrictions on the exercise of rights, are not necessary if the entity has access to all information required to be maintained by the records contact. Placing obligations (and imposing the attendant penalties) on beneficial or record owners imposes costs on capital.

\(^{14}\) Under the FinCEN CDD Rule, it is unlawful for a person to willfully violate any reporting requirements. For any failure to file a report required under § 1010.340 or for filing such with any material omission or misstatement, the Treasury Secretary may assess a civil penalty. For negligent violation of any requirement, the Treasury Secretary may assess a civil penalty.

\(^{15}\) The FinCEN CDD Rule also makes it unlawful for a person to knowingly make a false, fictitious or fraudulent statement or representation, or willfully violate any requirement under the rule.
formation undertaken for legitimate purposes, including by creating significant compliance costs, and reduces the wealth creating potential of entities. Beneficial owners should only be subject to civil or criminal penalties for willful violations. Under the FinCEN CDD Rule, it is unlawful for a person to knowingly make false, fictitious or fraudulent statement or representation, or willfully violate any requirement under the rule.

**Principle 8: Any New Requirements Must Not Undermine the Attorney-Client Privilege, the Confidentiality of Lawyer-Client Communications, or the Confidential Lawyer-Client Relationship**

The fiduciary and confidential relationship between lawyers and their clients has long been appropriately subject to the regulatory authority of the states' highest courts of appellate jurisdiction.

Subjecting lawyers to Federal AML and suspicious activity reporting (“SAR”) requirements in connection with entity formation undermines the attorney-client privilege, the confidential client-lawyer relationship, and traditional state court regulation of lawyers. Certain proposed Federal legislation would subject many lawyers and law firms to the AML and SAR requirements of the Bank Secrecy Act. If lawyers and law firms that assist clients in forming business entities would be considered “formation agents” (and hence a new category of “financial institution” under the Bank Secrecy Act), the proposed Federal legislation would make them subject to the strict AML and SAR requirements under the Bank Secrecy Act. This would undermine the attorney-client privilege, the confidential lawyer-client relationship, and traditional state court regulation of the legal profession. These SAR requirements would compel lawyers to report certain privileged or confidential client information to government authorities.

Requiring lawyers to report confidential client information to the government—under penalty of civil and criminal sanctions—is inconsistent with their ethical duties and obligations established by the highest courts of states and territories that license, regulate, and discipline lawyers. Imposing SAR requirements on lawyers directly undermines ABA Model Rule of Professional Conduct 1.6 dealing with “Confidentiality of Information” and with the many binding state and territory rules of professional conduct that closely track the ABA Model Rule.16 One of the narrow exceptions is the “crime-fraud exception”, which permits the disclosure of criminal activity if the client was in the process of committing or intended to commit a crime and the client communicated with the lawyer with intent to further the crime or fraud, or to cover it up.17

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16 The ABA Model Rule states that “a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent...” or unless one or more of the narrow exceptions listed in the Rule is present.

17 ABA Model Rule of Professional Conduct 1.6 provides that “a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.”
As described above, it is expected that there will continue to be significant debate among many constituencies regarding proposals requiring the disclosure of beneficial ownership information for U.S. business entities, and the nature of any provisions ultimately considered cannot be accurately predicted at this time. Rather than attempting to address the provisions of particular proposals as they are introduced, this Resolution takes the approach of adopting a series of fundamental principles that any legislation or regulation must satisfy. This Resolution allows the ABA to respond as appropriate to future legislative and regulatory proposals and will enable the ABA to engage in constructive dialog around those proposals.

Respectfully submitted,

William H. Clark, Jr.
Chair, Task Force on Gatekeeper Regulation and the Profession

Vicki O. Tucker
Chair, Section of Business Law

David M. English
Chair, Section of Real Property, Trust & Estate Law

August 2019
CORE CONSIDERATIONS IN DEVELOPING LEGISLATION

The existing reporting framework in the United States supports the adoption of a Federal approach to disclosure of beneficial ownership information by all U.S. entities as the preferred approach to beneficial ownership reporting. This is the conclusion that the Financial Action Task Force (“FATF”) reached in its December 2016 Fourth Mutual Evaluation Report (the “FATF Report”) on anti-money laundering and counter-terrorist financing measures in the United States.

The FATF Report reviewed the framework for the formation of U.S. legal entities and the reporting of information by U.S. legal entities, noting that no adequate mechanisms are in place to ensure that identifying information of each “applicable beneficial owner” (as defined in accordance with the fundamental principles discussed in this Report) of each U.S. business entity (which we refer to herein as “beneficial ownership information”) is obtained and available at a specified location in the U.S. or can otherwise be determined in a timely manner by a competent authority. The FATF Report also reviewed the information collected by the IRS, including “responsible party” information, concluding that the definition of a responsible party is not consistent with the FATF definition of beneficial owner and that not all legal entities are required to obtain employer identification numbers (“EINs”).

In concluding that the United States was non-compliant in its transparency as to the beneficial ownership of legal persons, the FATF Report said that the major gap is “the generally unsatisfactory measures for ensuring that there is adequate, accurate and updated information on beneficial ownership information that can be obtained or accessed by competent authorities in a timely manner.” After analyzing the Federal and state reporting framework in the United States, the FATF Report concluded that steps should be taken to “ensure that adequate, accurate and current beneficial ownership information of U.S. legal persons is available to competent authorities in a timely manner, by requiring that such information is obtained at the Federal level.”

Federal legislation could be adopted to require that “adequate, accurate and current beneficial ownership information of U.S. legal persons is available to competent authorities in a timely manner” by mandating either a Federal system or a uniform state collection system (that could be appropriately augmented). Federal legislation has the advantage of establishing uniform requirements (similar to IRS reporting) and efficiency of enforcement by law enforcement authorities, but the availability of information may lag entity formation and access may be subject to political pressures. Although state level identification could impose reporting at the time of entity formation, many states lack the financial and personnel resources to enforce any reporting system. The use of state systems may also introduce incongruent variations in the
information reported and maintained. A Federal regime eliminates the potential hurdle and delay of conducting inquiries on a state-by-state basis. Without advocating for the adoption of a particular legislative or regulatory approach, either a Federal system or a state system adopted under uniform Federal legislation could provide that:

- Each entity must provide to a designated governmental authority or office (such as the secretary of state or similar governmental authority that regulates entity formation) the name and address of a records contact\(^{18}\) in the United States, who should be designated as such at the time of entity formation and who must be an individual U.S. citizen who has agreed to provide beneficial ownership information in response to an appropriate request from an authorized recipient.
  - Only the name and address of the records contact would be reported to the authorized recipient; no other personal identification would be required.
- The records contact would maintain the following information (which is referred to herein as “beneficial ownership information”).\(^{19}\)
  - The name and address of each “applicable beneficial owner” (as defined in accordance with the fundamental principles discussed in this Report).
  - For each applicable beneficial owner that is not a natural person, (i) the jurisdiction under which each such beneficial owner was formed, and (ii) the name and address of a natural person who has access to such beneficial owner’s records.
  - For each applicable beneficial owner that is not resident in the United States, the name and address of a natural person resident in the United States who has access to such beneficial owner’s records (including for each applicable non-U.S. beneficial owner that is not a natural person, the name of each record owner of such beneficial owner).
- The definition of applicable beneficial owner must be clear across all business forms so that entities can determine what information to collect and maintain.
- The information maintained by the records contact should be updated promptly (at least annually).
- The beneficial ownership information would be made available by the records contact only to specified recipients upon a proper showing.
- Federal civil penalties would be applicable to any entity that, after appropriate due process, fails either to maintain a records contact or to produce the information that the records contact is required to maintain.

\(^{18}\) Although the FATF Report concluded that the definition of “responsible party” in the IRS rules is not consistent with the FATF definition of “beneficial owner” and that not all legal entities are required to obtain an EIN, Federal legislation could amend the relevant IRS rules to implement the “records contact” framework and, as proposed in the CLAMP Act, require that every United States entity obtain and have an EIN.

\(^{19}\) The information maintained by the records contact would supplement any fiduciary information otherwise provided on an annual or other periodic basis to the appropriate state official.
Federal criminal and/or civil penalties could be imposed for willful violations.

Given the regulatory regime and transparency rules to which they are already subject, and for the reasons explained above, public entities (i.e., entities with common equity securities registered under the Securities Exchange Act of 1934 (the “Exchange Act”)) and their controlled affiliates should be exempt from beneficial ownership disclosure requirements.

Certain business entities engaging in active businesses at a physical location also should be exempt from beneficial ownership disclosure requirements. For example, proposed Federal legislation has included an exemption for any entity with 20 or more full-time employees, over $5 million in “gross receipts” or sales, and an operating presence at a physical office within the United States. Consideration should be given to expanding the exemption to entities that have business operations at a physical office in the United States without regard to a minimum revenue or number of employees component.

The goal of the framework described above is “smart” enforcement where the compelling interests of law enforcement in having prompt access to a natural person who controls an entity are balanced against valid confidentiality interests and the burdens of compliance with reporting requirements, especially if the requirements are unreasonable or are not clear. The identification of a records contact (who is resident in the United States with access to the required beneficial ownership information) by all entities strikes this balance.

Broader measures, such as public registries, could infringe on valid confidentiality interests and may subject entities and individuals to penalties for not taking actions that would not be relevant to law enforcement. As a matter of enforcement, expanding the focus and increasing the amount of information actually benefits those who commit the illegal acts by diverting enforcement resources to the pursuit of record-keeping violations and validation of voluminous amounts of reported information. In addition, broader measures impose costs on capital formation, including by creating significant compliance costs, and reduce the wealth-creation potential of legitimate entities.
SUMMARY OF PREVIOUS U.S. PROPOSALS AND EXISTING INTERNATIONAL REQUIREMENTS

As a preliminary matter, previous legislative proposals considered in the United States and existing international requirements for reporting beneficial ownership information provide important context to the fundamental principles highlighted above and discussed below. Many of those legislative proposals and existing international requirements are summarized here.

**Uniform Law Enforcement Access to Entity Information Act (2009)**

- The Uniform Law Enforcement Access to Entity Information Act (the “ULEAEIA”) was drafted in 2009 by the Uniform Law Commission at the request of the National Association of Secretaries of State.
- The ULEAEIA provides a single statute that can be enacted by states to address the issues regarding availability of beneficial ownership information raised by the FATF in its recommendations, which include a recommendation that countries “ensure that there is adequate, accurate and timely information on beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities.”
- The Committees were represented on the drafting committee of the ULEAEIA and reviewed the ULEAEIA, and under the Uniform Laws Commission process, the views of the American Bar Association were formally solicited, and the House of Delegates of the American Bar Association approved a resolution supporting the ULEAEIA.
- The ULEAEIA has not been adopted by any state.
- The ULEAEIA requires each entity organized under the laws of a state to provide an entity information statement to the secretary of state of that state.
  - Entities subject to the ULEAEIA would include corporations, limited liability companies, limited partnerships, cooperative associations, statutory trusts and any other entities authorized by the laws of the state.
  - The entity information statement would include the name and address of a records contact of the entity.
- The duties of the records contact would include requesting from the entity its “beneficial ownership and control information” for each interest holder upon an appropriate request from a competent authority.
  - “Beneficial ownership” information would have included holders of record and not the beneficial owners of the holders of record of the entity.
  - An entity does not have a duty under the ULEAEIA to inquire as to who are the beneficial owners of the interests in the entity held by its interest holders of record.
- If an entity failed to materially comply with the ULEAEIA, the attorney general of the state could commence a proceeding to dissolve the entity.
The ULEAEIA stated that the records contact would not be liable for providing information or for an inaccuracy in or omission from the information provided, except for liability for recklessness, intentional misconduct or criminal conduct.

United Kingdom’s PSC Regulations Adopted in Response to the European Union’s (“EU’s”) Anti-Money Laundering Directive (2016)

In response to the EU’s Anti-Money Laundering Directive, the United Kingdom has adopted a national legislative framework for reporting beneficial ownership of companies and similar entities. All companies and similar entities, other than publicly traded entities, are required to maintain a registry of persons identified as controlling persons and provide the information on the registry to Companies House. Anyone may have access to the full registry, or obtain a copy of it upon payment of a nominal fee, by making written request stating their name, address and purpose for seeking the information. Under the UK regime, special rules apply to the disclosure and publication of residential addresses and dates of birth, and the public information that is extracted from the registry and disclosed on the Companies House website is a subset of the information maintained on the company’s registry. Failure to comply with the requirements of the UK PSC regime is a criminal offense and the entity and its directors may face fines, imprisonment or both.

- Recognizing that entities may not always have the information required to comply with the PSC regime, the UK regulations require that notice be provided on anyone believed to have information that will help identify the PSCs.
- Failure to respond to this notice is also a criminal offense.
- Moreover, an individual or legal entity’s failure to respond to a company’s enquiries about registering gives the company the ability (without a court order) to impose restrictions on any shares held by them.


- Amends the Bank Secrecy Act to provide that the “Secretary may require any United States entity to maintain records and file reports on the beneficial owners of such entity.”
- A “United States entity” includes any entity that uses “any facility in interstate or foreign commerce . . . in its business activity.”
- Beneficial ownership is to be defined by the U.S. Treasury.

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20 Under the UK PSC regime, a company may note on its PSC registry that a restriction has been issued on the shares. While that restriction is in place, neither the shares nor any interest in the shares can be transferred or sold and no payments can be received in respect of the shares. A company may also apply to a court to sell or transfer the restricted shares.
• Does not include provisions relating to the confidentiality of information that is reported.
• Contemplates civil penalties only (no criminal penalties).

Closing Loopholes Against Money-Laundering Practices ("CLAMP") Act (114th Congress; 2016)

• Introduced in the U.S. Senate in July 2016 as S. 3268 by Sen. Thomas Carper (D-DE) and referred to the Senate Finance Committee. Comparable legislation was not re-introduced in the 115th Congress.
• Amends the Internal Revenue Code to require that every “United States entity” obtain and have an employer identification number, or EIN, and to submit IRS Form SS-4, which includes the name of a “responsible party” within the business, i.e., an individual who is able to “control, manage, or direct the entity and the disposition of its funds and assets.”.
• A United States entity is “any business entity created or organized in the United States or under the law of the United States or a State, possession, or territory of the United States” other than exempt organizations under Section 501(a) of the Internal Revenue Code.
• Provides that certain taxpayer identification information including the name of the entity’s responsible party may be disclosed to Federal law enforcement agencies for use in anti-money laundering and counterterrorism prosecutions and investigations.
• In addition to civil penalties, includes criminal penalties for “willful” violations.

FinCEN Customer Due Diligence Requirements for Financial Institutions (the “FinCEN CDD Rule”) (2016)

• Issued in May 2016 with compliance required by May 2018.
• Intended to clarify and strengthen customer due diligence requirements under the Bank Secrecy Act.
• Covered financial institutions are banks, brokers or dealers in securities, mutual funds, and futures commission merchants and introducing brokers in commodities.
• Requires identification and verification of the identity of beneficial owners of legal entity customers when a new account is opened.
• In addition, requires maintenance of records of the beneficial ownership information obtained.
• Amends the Anti-Money-Laundering Program to “explicitly include risk-based procedures for conducting ongoing customer due diligence, to include understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile.”
  o Requires risk-based maintenance and update of customer information that is event-driven from normal monitoring procedures (change in beneficial ownership information requires updating).
• “Beneficial owner” is broadly defined by two prongs:
Each individual, if any, who directly or indirectly owns 25 percent of the equity interests of a legal entity customer (“ownership prong”); and

- “a single individual with significant responsibility to control, manage, or direct a legal entity customer, including an executive officer or senior manager or any other individual who regularly performs similar functions.” (“control prong”).

- Under the rule, at least one individual must be identified under the control prong while zero to four individuals can be identified under the ownership prong.

- Covered financial institutions may be liable for civil or criminal penalties for violating the rule.

**FinCEN Geographic Targeting Order (2016)**

- Issued in July 2016 and extended numerous times, most recently in November 2018 through May 2019.
- Intended to carry out the purposes of the Bank Secrecy Act.
- Requires title insurance companies to collect and report beneficial ownership information of entities purchasing residential real property in identified markets (i.e., New York City, Southern Florida, California, Honolulu, Las Vegas, Seattle, Boston, Chicago, Dallas and San Antonio) if the purchase is made without a bank loan or other similar form of external financing.
  - The entity must report information about the identity of each beneficial owner of the entity and must collect information (driver’s license, passport or similar identifying information) about each beneficial owner.
  - The title insurance company also must collect information (driver’s license, passport or similar identifying information) about the individual “primarily responsible for representing” the purchaser.
- “Beneficial owner” is narrowly defined to mean “each individual who, directly or indirectly, owns 25% or more of the equity interests” of the Purchaser.
- The title insurance company may be liable for civil or criminal penalties for violating the order.

**Counter Terrorism and Illicit Finance Act (115th Congress; 2017)**

- Section 9 of the original unnumbered draft bill would require small corporations and limited liability companies (LLCs) and many of their lawyers to submit extensive information about the companies’ beneficial owners to the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) and would require FinCEN to disclose the information to many other federal and foreign governmental agencies and financial institutions upon request.
- The definition of beneficial ownership in Section 9 of the draft bill is broad and vague:
  - As defined, beneficial owner includes any natural person who directly or indirectly (a) “exercises substantial control over”, (b) owns 25% or more of the equity interests of” or (c) “receives substantial economic benefits
from the assets” of a corporation or limited liability company.

- Minor children, creditors, and persons acting solely as employees are excluded from the definition of beneficial owner.

- Section 9 of the draft bill would impose the initial obligation to provide beneficial ownership information on “each applicant to form a corporation or limited liability company” and penalizes applicants for “knowingly” providing false or fraudulent beneficial ownership information or “willingly” failing to provide complete beneficial ownership information.

- Also requires that the corporation or limited liability company update the beneficial ownership information within 60 days after any change in the information provided and otherwise annually.

- Various corporations and limited liability companies are excluded from the reporting requirements, including most significantly:
  - An issuer of a class of securities registered under the Exchange Act or an entity that is required to file reports under the Exchange Act;
  - Regulated entities, including banks, bank holding companies, broker-dealers, insurance companies and public utilities;
  - An entity with (i) 20 or more full-time employees, (ii) over $5 million in “gross receipts” or sales and (iii) “an operating presence at a physical office within the United States”; and
  - A corporation or limited liability company that is “formed and owned by an entity” that is not required to be subject to the reporting requirements.

- Section 9 of the draft bill would require beneficial ownership information is to be provided in response to:
  - a criminal subpoena from a Federal agency;
  - a request made by a Federal agency on behalf of a law enforcement agency of another country (provided that such other country agrees to prevent the public disclosure of such beneficial ownership information or use it for another purpose); or
  - a request made by a financial institution, with customer consent, as part of the institution’s compliance with due diligence requirements under the Bank Secrecy Act, the PATRIOT Act or other applicable Federal or state law.

- Penalties under Section 9 include civil fines and criminal fines and imprisonment for not more than three years.

- On November 29, 2017, a joint hearing to discuss the draft bill was held by the House Financial Services Subcommittees on Financial Institutions & Consumer Credit and Terrorism & Illicit Finance.

- On June 12, 2018, Reps. Steve Pearce (R-NM) and Blaine Luetkemeyer (R-MO) introduced a revised version of the bill as H.R. 6068 that did not include Section 9 of the original draft bill dealing with beneficial ownership reporting. H.R. 6068 was referred to the House Financial Services Committee, but there was no further action on the bill during the 115th Congress.

**TITLE Act (115th Congress; 2017)**
• Introduced in the Senate by Sen. Sheldon Whitehouse (D-RI) as S. 1454.
• Would require states, small businesses, and those businesses’ lawyers to gather and maintain extensive beneficial ownership information on the new corporations and limited liability companies they help create and make the information available to Federal law enforcement authorities.
• Also contains provisions that would regulate many lawyers and law firms as “formation agents” (and hence “financial institutions”) under the Bank Secrecy Act and subject them to the Act’s AML and SAR requirements when they help clients establish new companies.
• The definition of “beneficial owner” is vague, overly broad, and unworkable. It includes every natural person who directly or indirectly exercises “substantial control” over the company or who has a “substantial interest” in or receives “substantial economic benefits” from the assets of the company, subject to several exceptions.
• Because the beneficial ownership definition is so expansive and unclear and would cover many individuals whose personal information is not even within the knowledge or control of the businesses or their lawyers, it would be almost impossible for many of them to comply with the bill’s disclosure requirements.
• The bill would impose a civil penalty and authorized criminal penalties—including fines, prison terms up to three years, or both—for providing false or fraudulent beneficial ownership information or for willfully failing to provide complete or updated beneficial ownership information.
• S. 1454 was referred to the Senate Judiciary Committee, but there was no further action on the bill during the 115th Congress.

Corporate Transparency Act (115th Congress; 2017)

• Introduced in the Senate by Sen. Ron Wyden (D-OR) as S. 1717 and in the House by Rep. Carolyn Maloney (D-NY) as H.R. 3089.
• Would require small businesses and those businesses' lawyers to gather and maintain extensive beneficial ownership information on the new corporations and limited liability companies they help create and make the information available to Federal law enforcement authorities.
• Also contains provisions that would regulate many lawyers and law firms as “formation agents” (and hence “financial institutions”) under the Bank Secrecy Act and subject them to the Act’s AML and SAR requirements when they help clients establish new companies.
• The definition of “beneficial owner” is vague, overly broad, and unworkable. It includes every natural person who directly or indirectly exercises “substantial control” over the company or who has a “substantial interest” in or receives “substantial economic benefits” from the assets of the company, subject to several exceptions.
• Because the beneficial ownership definition is so expansive and unclear and would cover many individuals whose personal information is not even within the knowledge or control of the businesses or their lawyers, it would be almost impossible for many of them to comply with the bill’s disclosure requirements.
• The bill would impose a civil penalty and authorized criminal penalties—including fines, prison terms up to three years, or both—for providing false or fraudulent beneficial ownership information or for willfully failing to provide complete or updated beneficial ownership information.

• S. 1717 was referred to the Senate Banking, Housing, and Urban Affairs Committee and H.R. 3089 was referred to the House Financial Services Committee, but there was no further action on either bill during the 115th Congress.


• EU Member States are required to maintain a central register of beneficial ownership information for corporate and other legal entities.

• EU Member States should ensure that registers of ultimate beneficial owners of companies and other legal entities become accessible to the general public (but not the register of ultimate beneficial owners of trusts, which will still require demonstration of a legitimate interest).

• Under the EU’s Fifth Anti-Money Laundering Directive, EU Member States may, in exceptional cases, deny access to the central register where such access would expose beneficial owners to disproportionate risks, to risks regarding fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or if the beneficial owner is a minor or otherwise legally incapable.
1. Summary of Resolution.

This Resolution provides that the American Bar Association supports reasonable and necessary measures to detect and combat money laundering and terrorist financing. This Resolution also supports legislation and related regulations that would require every domestic business entity to designate either (i) a responsible individual who significantly participates in the control or management of the entity or (ii) a records contact individual with responsibility for obtaining, maintaining, and taking reasonable measures to verify applicable beneficial or record ownership information for the entity, or both, and then provide law enforcement agencies with timely access to information regarding the entity’s responsible individual, beneficial ownership, and/or record ownership in response to a valid subpoena, summons, or warrant. Further, this Resolution provides that any legislation and related regulations to detect and combat money laundering and terrorist financing must be consistent with the eight fundamental principles outlined in this Resolution.

2. Approval by Submitting Entity.

This Resolution was approved by (i) the Task Force on Gatekeeper Regulation and the Profession on April 10, 2019, (ii) the Business Law Section on March 30, 2019, and (iii) the Section of Real Property, Trust & Estate Law on April 10, 2019.

3. Has this or a similar Resolution been submitted to the House or Board previously?

This Resolution is to update and supplement Resolutions 03M104 and 08A300. Resolution 03M104 was adopted by the ABA House of Delegates at its Midyear Meeting in 2003, and Resolution 08A300 was adopted by the ABA at its Annual Meeting in 2008. Neither this Resolution nor a similar resolution has been submitted previously to the House of Delegates or the Board of Governors since the adoption of Resolution 08A300.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?
At its Midyear Meeting in 2003, the ABA adopted Resolution 03M104 in response to efforts by the FATF to develop and promote anti-money laundering policies at the national and international levels, including potential new lawyer obligations that could undermine the confidential lawyer-client relationship. Subsequently, at its Annual Meeting in 2008, the ABA adopted Resolution 08A300. Resolution 08A300 was adopted in response to legislation that had been introduced in Congress that would have required those who form business entities to document, verify, and make available to law enforcement authorities the record and beneficial ownership of those business entities. Resolution 08A300 also urged that the regulation of those involved in the formation of business entities should remain a matter of state and territorial law and urged Congress to refrain from enacting legislation that would regulate lawyers in the formation of business entities and to defer to the states and territories.

That proposed 2008 legislation was not enacted, but since 2008 there have been a variety of proposals requiring the disclosure of certain identifying information for certain owners of U.S. business entities. As a result of Resolutions 03M104 and 08A300, the ABA has opposed all Federal legislation requiring the disclosure of beneficial ownership information for U.S. business entities.

This Resolution is to update and supplement Resolutions 03M104 and 08A300, and other existing ABA policies. It is expected that there will continue to be significant debate among many constituencies regarding proposals requiring the disclosure of ownership information for certain owners of U.S. business entities (which ownership information is hereinafter referred to as “beneficial ownership information” and which owners are hereinafter referred to as “applicable beneficial owners”), and the nature of any provisions ultimately considered cannot be accurately predicted at this time. Rather than attempting to address the provisions of particular proposals as they are introduced, this Resolution takes the approach of adopting a series of fundamental principles that any legislation or regulation must satisfy while preserving a degree of flexibility in the application of those principles to particular proposals. Those fundamental principles are described in this Report. This Resolution allows the ABA to respond as appropriate to future legislative and regulatory proposals and will enable the ABA to engage in constructive dialog around those proposals.

5. If this is a late Report, what urgency exists which requires action at this meeting of the House?

N/A


The 115th Congress considered but declined to enact several AML bills, including the "TITLE Act" (S. 1454, sponsored by Sen. Sheldon Whitehouse, (D-RI)); the "Corporate Transparency Act" (S. 1717, sponsored by Sen. Ron Wyden, (D-OR), and H.R. 3089, sponsored by Rep. Carolyn Maloney, (D-NY)); and the original version of the "Counter Terrorism and Illicit Finance Act" (H.R. 6068, sponsored by Reps. Steve Pearce (R-NM)
and Blaine Luetkemeyer (R-MO)). Each of these measures would have required small businesses, those businesses' lawyers, and states (TITLE Act only) to gather and maintain extensive beneficial ownership information on the new corporations and limited liability companies they help create and make the information available to various types of government agencies and to financial institutions. The TITLE Act and the Corporate Transparency Act also contained provisions that would have regulated many lawyers and law firms as “formation agents” (and hence, “financial institutions”) under the Bank Secrecy Act and subjected them to the Act’s AML and SAR requirements when they help clients establish new companies.

S. 1454 was referred to the Senate Judiciary Committee, S. 1717 was referred to the Senate Banking, Housing, and Urban Affairs Committee, and H.R. 3089 and H.R. 6068 were referred to the House Financial Services Committee. Although the House Financial Services Committee held a hearing on the Counter Terrorism and Illicit Finance Act in November 2017 and the Senate Judiciary Committee held a similar hearing on beneficial ownership legislation in general, there was no further action on any of these four bills during the 115th Congress.

On March 13, 2019, the House Financial Services Subcommittee on National Security, International Development and Monetary Policy held a hearing titled "Promoting Corporate Transparency: Examining Legislative Proposals to Detect and Deter Financial Crime." At that hearing, Rep. Carolyn Maloney (D-NY) discussed the latest draft of the "Corporate Transparency Act," which she said she planned to introduce during the 116th Congress. On May 3, 2019, Rep. Maloney formally introduced the Corporate Transparency Act as H.R. 2513. The House Financial Services Committee began to mark up a substitute version of the bill on May 8, 2019 but the markup was postponed until the Committee’s next scheduled markup in June 2019. Prior to the May 8 markup, the ABA sent a new letter21 to the Committee expressing concerns over the legislation and urging all Members of the Committee to oppose it. It is also expected that legislation similar to the other bills described above will be re-introduced in the 116th Congress.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

If the proposed Resolution is adopted by the House of Delegates, the ABA will engage in constructive dialogue with the sponsors of the leading beneficial ownership reporting bills and will likely submit new letters or testimony to Congress in an effort to implement the principles outlined in the Resolution.

8. Cost to the Association (both indirect and direct costs).

21 The ABA’s letter to the House Financial Services Committee expressing concerns over H.R. 2513 is available at https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2019may6-lettertohfscopposinghr2513substitutebill.pdf.
This Resolution does not commit the ABA to incur any direct or indirect costs. The proposed implementation will allow the ABA to respond as appropriate to future legislative and regulatory proposals and will enable the ABA to engage in constructive dialog around those proposals. The direct or indirect costs of being involved in that dialogue are in the discretion of the ABA and are not currently estimable.


None.

10. Referrals.

In addition to the ABA entities referenced in item 2, the Resolution has been referred to the Criminal Justice Section (which subsequently agreed to become a co-sponsor) and the Standing Committee on Ethics and Professional Responsibility.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address and telephone number and e-mail address.)

William H. Clark, Jr.
Drinker Biddle & Reath LLP
One Logan Square, Ste. 2000
Philadelphia, PA 19103-6996
T: 215.988.2804
E: William.Clark@dbr.com

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Kevin L. Shepherd
Venable LLP
750 E. Pratt Street, Suite 900
Baltimore, MD 21202
T: 410.244.7772
M: 443.889.7712
E: KLShepherd@Venable.com
EXECUTIVE SUMMARY

1. Summary of Resolution.

This Resolution provides that the American Bar Association supports reasonable and necessary measures to detect and combat money laundering and terrorist financing. This Resolution also supports legislation and related regulations that would require every domestic business entity to designate either (i) a responsible individual who significantly participates in the control or management of the entity or (ii) a records contact individual with responsibility for obtaining, maintaining, and taking reasonable measures to verify applicable beneficial or record ownership information for the entity, or both, and then provide law enforcement agencies with timely access to information regarding the entity’s responsible individual, beneficial ownership, and/or record ownership in response to a valid subpoena, summons, or warrant. Further, this Resolution provides that any legislation and related regulations to detect and combat money laundering and terrorist financing must be consistent with the eight fundamental principles outlined in this Resolution.

2. Summary of the issue which the Resolution addresses.

At its 2003 Midyear Meeting and 2008 Annual Meeting, the ABA adopted Resolutions 03M104 and 08A300, respectively. Resolution 03M104 was adopted in response to efforts by the FATF to develop and promote AML policies at the national and international levels, including potential new lawyer obligations that could undermine the confidential lawyer-client relationship. Resolution 08A300 was adopted in response to legislation that had been introduced in the United States Congress that would have required those who form business entities to document, verify, and make available to law enforcement authorities the record and beneficial ownership of those business entities. Resolution 08A300 also urged that the regulation of those involved in the formation of business entities should remain a matter of state and territorial law and urged Congress to refrain from enacting legislation that would regulate lawyers in the formation of business entities and to defer to the states and territories.

That proposed 2008 legislation was not enacted, but since 2008 there have been a variety of proposals requiring the disclosure of certain identifying information for certain owners of U.S. business entities. As a result of Resolutions 03M104 and 08A300, the ABA has opposed all Federal legislation requiring the disclosure of beneficial ownership information for U.S. business entities.

3. An explanation of how the proposed policy position will address the issue.

This Resolution is to update and supplement Resolutions 03M104 and 08A300, and other existing ABA policies. It is expected that there will continue to be significant debate among many constituencies regarding proposals requiring the disclosure of information concerning the beneficial owners of U.S. business entities, and the nature of the provisions ultimately adopted (if any) cannot be accurately predicted at this time. Rather
than attempting to address the provisions of particular proposals as they are introduced, this Resolution takes the approach of adopting a series of fundamental principles that any legislation or regulation must satisfy while preserving a degree of flexibility in the application of those principles to particular proposals. Those fundamental principles are described in this Report. This Resolution allows the ABA to respond as appropriate to future legislative and regulatory proposals and will enable the ABA to engage in constructive dialog around those proposals.

4. A summary of any minority views or opposition internal and/or external to the ABA which have been identified.

Although the proponents of this Resolution are not aware of formal opposition to the Resolution, the National District Attorneys Association has expressed concerns regarding the subpoena, summons, or warrant requirements contained in the Resolution.