

AMERICAN BAR ASSOCIATION

**ADOPTED BY THE HOUSE OF DELEGATES
FEBRUARY 6, 2023**

RESOLUTION

RESOLVED, That the American Bar Association supports reasonable efforts of the United States government to detect, deter, and combat money laundering, terrorist financing, corruption, kleptocracy, human rights violations, including human trafficking, forced labor, and modern slavery, and criminal conduct, for effective administration of U.S. foreign policy sanctions, export controls, and U.S. national security violations, including reasonable and appropriate legislation, regulations, and other governmental measures to ensure that adequate, accurate, and current entity beneficial ownership information can be obtained or accessed in a timely fashion by authorized government authorities and financial institutions;

FURTHER RESOLVED, That the American Bar Association supports reasonable and appropriate legislation, regulations, and other governmental measures that require business entities to disclose their beneficial ownership information to the federal government and authorize government authorities to access that information on an appropriately confidential basis to combat money laundering, terrorist financing, corruption, kleptocracy, human rights violations, including human trafficking, forced labor, and modern slavery, and criminal conduct, for effective administration of U.S. foreign policy sanctions and export controls, and U.S. national security violations;

FURTHER RESOLVED, That the American Bar Association urges that any such legislation, regulations, and other governmental measures referenced above , must be subject to and be consistent with the following fundamental principles:

- (1) Constitutional rights and confidentiality interests must be protected, including through strong technical and legal privacy measures and safeguards.
- (2) Any new beneficial ownership disclosure requirements must: (i) not conflict with the ethical duties, professional conduct requirements, and regulations imposed on the legal profession by a state's, territory's, or tribe's highest court, (ii) not undermine the applicable rules of professional conduct to which lawyers are subject, including without limitation the confidentiality of information relating to the lawyer's representation of a client, (iii) not undermine the attorney-client privilege, attorney work product doctrine, state based judicial regulation and oversight of the legal profession, and the

- confidential lawyer-client relationship, and (iv) support the critical and independent role of the legal profession in the administration of justice and the rule of law.
- (3) Reporting and verification of beneficial ownership information must be the obligation of the entity only, not the lawyers or law firms engaged by that entity.
 - (4) Any definition of and reporting threshold for beneficial ownership must be clear and reasonable.
 - (5) Information concerning the beneficial ownership of entities should be accessed from: (i) a confidential central registry maintained by an appropriate federal government agency, such as the Financial Crimes Enforcement Network (the “confidential registry approach”), (ii) the entity itself (the “company approach”), or (iii) some combination of the confidential registry approach and the company approach.
 - (6) Information concerning the beneficial ownership of entities maintained pursuant to a confidential registry created and maintained by the federal government or the company approach should only be accessed by:
 - a) State, territory, tribal, and local law enforcement agencies upon a proper showing that it is for an appropriate law enforcement purpose and is subject to judicial oversight and sanctions;
 - b) The federal government agencies with responsibility in the areas of law enforcement, money laundering, terrorist financing, corruption, human rights violations, or U.S. national security violations, subject to appropriate protocols for access;
 - c) Foreign law enforcement authorities, upon request by a U.S. federal agency, in compliance with disclosure and use limitations and upon a proper showing that it is for an appropriate law enforcement purpose and is subject to judicial oversight and sanctions; and
 - d) Financial institutions, with the consent of the entity and subject to confidentiality protections when appropriate, provided that an entity shall not be prohibited from providing access to beneficial ownership information voluntarily.
 - (7) All types of business entities generally should be subject to the same requirements, with appropriate: (i) exemptions or variations to recognize differences in entity forms, risk levels, or existing regulatory obligations and (ii) transitional provisions applicable to existing entities; and

- (8) Any new beneficial ownership disclosure requirements must be risk based, take into account the burdens they might impose on legitimate business activity, and impose no greater penalty than is commensurate with the nature and degree of noncompliance.

FURTHER RESOLVED, That the American Bar Association reaffirms the vital importance of lawyer-client confidentiality for the rule of law; recognizes that a client's confidence in lawyer-client confidentiality is essential in order for a lawyer to ensure effective assistance of counsel in criminal, civil, and administrative proceedings and be able to counsel a client against a course of action that could be illegal or improper; and thus urges that any beneficial ownership transparency system be designed and administered to best protect and preserve lawyer-client confidentiality and urges Congress to not enact legislation that regulates the legal profession;

FURTHER RESOLVED That the American Bar Association:

- (1) urges state, territory, tribal, local, and specialty bar associations and law schools to educate lawyers and law students about the scope of money laundering laws and the anti-money laundering requirements that apply to lawyers to prevent the profession from being used to facilitate money laundering, terrorist financing, corruption, kleptocracy, human rights violations, including human trafficking, forced labor, and modern slavery, criminal conduct, and U.S. national security violations; and
- (2) urges state, territory, tribal, local, and specialty bar associations, and other appropriate constituencies within the legal profession, with the assistance of the American Bar Association, to develop and keep current appropriate voluntary risk-based guidance for client due diligence that will assist lawyers in detecting and preventing money laundering, terrorist financing, corruption, kleptocracy, human rights violations, including human trafficking, forced labor, and modern slavery, criminal conduct, and U.S. national security violations, and assist lawyers in taking appropriate steps to comply with requirements to that end; and

FURTHER RESOLVED, That this Resolution rescinds Resolution 08A300.

REPORT

Introduction

This Resolution and Report was prepared by the Beneficial Ownership Working Group (“Working Group”).¹

The Working Group comprises representatives from various stakeholders, including the Business Law Section, the Criminal Justice Section, the Standing Committee on Professional Regulation, the International Law Section, the Real Property, Trust and Estate Law Section and the United Nations Representatives and Observers Standing Committee.

Prior to preparing this Resolution, the Working Group sent questionnaires on issues related to disclosure of beneficial ownership information to various interested entities.² The Working Group also conducted two public forums and invited representatives from the above-listed entities, as well as members of the Board of Governors and the House of Delegates to attend and provide input.

¹ Pursuant to the authority granted by the ABA Board of Governors, President Deborah Enix-Ross appointed the Working Group and charged the Working Group with developing a proposed resolution on disclosure of beneficial ownership information of corporations and other businesses for consideration at the 2023 House of Delegates Mid-Year Meeting.

² Antitrust Law Section
 Business Law Section
 Center for Human Rights
 Civil Rights and Social Justice Section
 Corporate Social Responsibility Law Committee, Business Law Section
 Criminal Justice Section
 Family Law Section
 International Law Section
 Lawyers Abroad Committee, International Law Section
 Litigation Section
 Real Property, Trust and Estate Law Section
 Rule of Law Initiative
 Senior Lawyers Division
 Solo, Small Firm, and General Practice Division
 Standing Committee on Ethics and Professional Responsibility
 Standing Committee on Law and National Security
 Standing Committee on Professional Regulation
 Taxation Section

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Drafts of this Resolution were circulated to the above-listed entities and to other individuals who expressed an interest or participated in the public forums. This Resolution reflects the work of the Working Group and the input received from various interested entities and persons. It balances important interests relating to the reporting of beneficial ownership information that will assist in: (1) detecting, deterring, and combating money laundering, terrorist financing, corruption, kleptocracy, human rights violations, including human trafficking, forced labor, and modern slavery, and criminal conduct, (2) supporting effective administration of U.S. foreign policy sanctions and export controls, and (3) preventing and remedying U.S. national security violations.

This Resolution constitutes just one piece of the ABA's longstanding and ongoing efforts to help detect, prevent, and deter unlawful activities described in this Report. In addition to this proposed policy relating to beneficial ownership information disclosure, there are complicated concomitant concerns relating to lawyers' ethical obligations to conduct client due diligence inquiries. Over the years, the ABA has adopted policy and issued ethics opinions relating to this subject. To continue the ABA's efforts to provide guidance and clarity to ABA members and the profession on this subject, the ABA Standing Committee on Ethics and Professional Responsibility and ABA Standing Committee on Professional Regulation are working to develop possible amendments to the comments and black letter Model Rules of Professional Conduct that would address a lawyer's obligation to conduct client due diligence. This complex undertaking has included the circulation of two discussion drafts for comment and multiple public roundtables.³ The Committees intend to file a Resolution on this subject with the House of Delegates for the 2023 Annual Meeting.

Background

At its Annual Meeting in 2008, the ABA adopted Resolution 08A300 in response to legislation that had been introduced in the U.S. 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.⁴ 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 defer to the states and refrain from enacting legislation that would regulate lawyers in the formation of such entities. Post adoption of Resolution 08A300, the ABA has opposed all federal legislation requiring the disclosure of beneficial ownership information for certain business entities.

This Resolution

³ See: https://www.americanbar.org/groups/professional_responsibility/discussion-draft-of-possible-amendments-to-model-rules-of-profes/

⁴ Resolution 08A300, known informally as Resolution 300 is available at https://www.americanbar.org/groups/criminal_justice/gatekeeper/.

This Resolution rescinds Resolution 08A300.

The Corporate Transparency Act (“CTA”), which is part of the Anti-Money Laundering Act of 2020, which itself is part of the National Defense Authorization Act for Fiscal Year 2021, became law effective on January 1, 2021.⁵ The CTA requires certain business entities to file, in the absence of an exemption, information on their beneficial owners with the Financial Crimes Enforcement Network (“FinCEN”) of the U.S. Department of Treasury. The CTA represents the culmination of more than a decade of congressional efforts to implement beneficial ownership information reporting for business entities. When fully implemented, it will create a database of beneficial ownership information within FinCEN.

On September 29, 2022, FinCEN released the first set of final regulations for reporting beneficial ownership information under the CTA. The remaining two sets of regulations under the CTA, not yet released, are expected to address the framework for access to this beneficial ownership information and to update the customer due diligence rules surrounding the opening of new accounts by financial institutions.

This Resolution reflects these recent legislative and regulatory developments, including the disclosure systems currently being considered in Congress and the Administration. This Resolution restates the 2008 principle that disclosure requirements should be risk-based and take into account the burdens they impose. This Resolution also restates provision from the 2008 Resolution urging state and local bar associations to develop voluntary risk-based approaches to the risks of money laundering, among other things to reflect the ABA's adoption in 2010 of its Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing.

Continued significant debate is expected among many constituencies regarding proposals requiring the disclosure of beneficial ownership information for certain business entities. These proposals will include the yet to be released regulations under the CTA. To ensure the ABA has current policy to address the provisions of particular proposals as they are introduced, this Resolution adopts 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.

Support of Disclosure of Beneficial Ownership Information

This Resolution provides that the ABA supports reasonable efforts of the U.S. government to detect, deter, and combat money laundering, terrorist financing,

⁵ The full name of the NDAA is the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 (H.R. 6395), 134 Stat. 338, 116th Cong. 2d Sess. Congress’ override of the President’s veto was taken in Record Vote No. 292 (Jan. 1, 2021). The anti-money laundering provisions are found in §§ 6001-6511 of the NDAA. The CTA consists of §§ 6401-6403 of the NDAA. Section 6402 of the NDAA sets forth Congress’ findings and objectives in passing the CTA, and § 6403 contains its substantive provisions, primarily adding § 5336 to Title 31 of the United States Code.

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corruption, kleptocracy, human rights violations, including human trafficking, forced labor, and modern slavery, and criminal conduct, for effective administration of U.S. foreign policy sanctions and export controls, and U.S. national security violations. This includes reasonable and appropriate legislation, regulations, and other governmental measures to ensure that adequate, accurate, and up-to-date entity beneficial ownership information can be obtained or accessed rapidly and efficiently by authorized government authorities and financial institutions.

This Resolution further provides that the ABA supports reasonable and appropriate legislation, regulations, and other governmental measures that require business entities to disclose their beneficial ownership information to the federal government and authorizes government authorities to access that information on an appropriately confidential basis to combat money laundering, terrorist financing, corruption, kleptocracy, human rights violations, including human trafficking, forced labor, and modern slavery, and criminal conduct, for effective administration of U.S. foreign policy sanctions and export controls, and U.S. national security violations.

This Resolution provides that any such legislation, regulations, and other governmental measures referenced above must be subject to and be consistent with the fundamental principles discussed below.

Principle 1: Constitutional rights and confidentiality interests must be protected, including through strong technical and legal privacy measures and safeguards.

Legislation contemplating a central database containing personal information runs the risk of violating constitutional rights and/or confidentiality interests, 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.
- Due process rights should be provided to maintain the confidentiality of information and ensure it is used for a proper purpose.
- Public disclosure creates an increased risk of identity theft or fraud.
- Legitimate commercial business interests, such as property acquisition, are also valid interests to protect from public disclosure.

While law enforcement and other valid governmental needs are compelling to combat money laundering and the other misdeeds described above, 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.

Principle 2: Any new beneficial ownership disclosure requirements must: (i) not conflict with the ethical duties, professional conduct requirements, and regulations imposed on the legal profession by a state's,

territory's, or tribe's highest court, (ii) not undermine the applicable rules of professional conduct to which lawyers are subject, including without limitation the confidentiality of information relating to the lawyer's representation of a client, (iii) not undermine the attorney-client privilege, attorney work product, judicial regulation and oversight of the legal profession, and the confidential lawyer-client relationship, and (iv) support the critical and independent role of the legal profession in the administration of justice and the rule of law.

The fiduciary and confidential relationship between lawyers and their clients has long been appropriately subject to the regulatory authority of the highest courts of appellate jurisdiction of states, tribes, and territories, and ABA policy has long supported and continues to support the regulatory authority of those courts⁶

Under state, tribe, and territory court-based enforceable rules of professional conduct, lawyers have an ethical obligation to keep confidential all information relating to the representation of their clients. Lawyers are also prohibited from knowingly counseling or assisting a client in committing a crime or fraud. By acting consistently with these duties, a lawyer has the ability to help a client understand and follow the law. These duties therefore make lawyers a critical, effective, and indispensable first line of defense against money laundering and other illicit activities. The principle of client confidentiality promotes trust in the lawyer-client relationship and encourages clients to seek legal assistance and candidly discuss sensitive matters with their lawyers.

Subjecting lawyers to federal anti-money laundering ("AML") and suspicious activity reporting ("SAR") requirements in connection with forming entities on clients' behalf and other entity formation activities undermines the attorney-client privilege, the confidential client-lawyer relationship, and traditional state, tribe, and territory court regulation of lawyers. Federal legislation and regulations are proposed or under discussion that would subject many lawyers and law firms to the AML and SAR requirements of the Bank Secrecy Act.⁷ For example, the SAR requirements would undermine the attorney-client privilege, the confidential lawyer-client relationship, and traditional state, tribe, and territory court regulation of the legal profession.

Imposing SAR requirements on lawyers undermines ABA Model Rule of Professional Conduct 1.6 requiring lawyers to keep confidential all information relating to the representation of clients and with the binding state, tribe, and territory rules of

⁶ For purposes of this Principle, the term "requirements" is used in the context of future statutes or implementing regulations that are consistent with current or new statutes.

⁷ See, e.g., Establishing New Authorities for Business Laundering and Enabling Risks to Security Act of 2022 or the ENABLERS Act of 2022, which was discussed as an Amendment to the FY 2023 National Defense Authorization Act (H.R. 7900/S. 4543).

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professional conduct that closely track the ABA Model Rule.⁸ Requiring lawyers to report confidential client information to the government—under penalty of civil and criminal sanctions—raises the risk of conflicting with their ethical duties and obligations established by the highest courts of states, tribes, and territories that license, regulate, and discipline lawyers.

There are permissive exceptions to the Rule 1.6 requirement that lawyers must keep confidential all information relating to the representation of clients, e.g., the “crime-fraud exception,” to prevent, mitigate, or rectify substantial injury to the financial interests or property of another and disclosure to the extent the lawyer reasonably believes is necessary, in order to comply with other law or court order.”⁹

When disclosure of information relating to the representation appears to be required by other law or court order, the lawyer must discuss the matter with the client to the extent required by Rule 1.4.¹⁰ If a lawyer is required by law to disclose confidential client information, “absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all non-frivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4.”¹¹

The discussion above concerning Rules 1.4 and 1.6 is not intended to cover all aspects relating to lawyer confidentiality. Lawyers confronted with the issues addressed herein should analyze the Rules applicable in their jurisdiction based on the facts of the matter at hand.

Principle 3: Reporting and verification of beneficial ownership information must be the obligation of the entity only, not the lawyers or law firms engaged by that entity.

⁸ ABA Model Rule of Professional Conduct 1.6 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 exceptions listed in the Rule is present.

⁹ The permissive exception found in ABA Model Rule of Professional Conduct 1.6(b)(3) 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.” ABA Model Rule of Professional Conduct 1.6(b)(6). See also Comment [17] providing “Paragraph (b) permits but does not require the disclosure of information relating to a client’s representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6).”

¹⁰ ABA Model Rule of Professional Conduct 1.6, Cmt. [12].

¹¹ ABA Model Rule of Professional Conduct 1.6, Cmt. [15].

The collection, maintenance, and verification of beneficial ownership information 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. This includes in-house counsel of the entities reporting the information and the law firms engaged by the entities.

So long as “beneficial owner” is defined in a clear and reasonable manner, the entity should be able to identify its beneficial owners. As described below under Principle 8, any penalties should be reasonable and commensurate with the nature of the offense to create a rational incentive for compliance.

Principle 4: Any definition of and reporting threshold for beneficial ownership must be clear and reasonable.

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. 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 readily comply.

The reporting regime for beneficial ownership information should be reasonable, which means striking the appropriate balance between the benefits of authorized government and law enforcement having ready access to beneficial ownership information, given the serious issues that gathering such information is intended to address, and the burdens on business entities in complying with the reporting regime.

Principle 5: Information concerning the beneficial ownership of entities should be accessed from: (i) a confidential central registry maintained by an appropriate federal government agency, such as the Financial Crimes Enforcement Network (the “confidential registry approach”), (ii) the entity itself (the “company approach”), or (iii) some combination of the confidential registry approach and the company approach.

The CTA provides that beneficial ownership information be submitted to FinCEN and maintained on a confidential basis. The CTA includes significant penalties for the unauthorized disclosure or use of beneficial ownership information reported to FinCEN.

Alternatively, legislation could require entities to obtain and hold adequate, accurate, and up-to-date information on their own beneficial ownership and make such information rapidly and efficiently available to competent authorities. The Financial Action Task Force (“FATF”), the global money laundering and terrorist financing watchdog, explicitly requires through Recommendation 24 a multi-pronged approach, i.e., the use of a combination of different mechanisms for collection of beneficial ownership information to ensure it is rapidly and efficiently available to competent

authorities. Principle 5 is consistent with FATF's requirement.

Principle 6: Information concerning the beneficial ownership of entities maintained pursuant to a confidential registry created and maintained by the federal government or the company approach should only be accessed by:

- a) State, territory, tribal, and local law enforcement agencies upon a proper showing that it is for an appropriate law enforcement purpose and is subject to judicial oversight and sanctions;
- b) The U.S. government agencies with responsibility in the areas of law enforcement, money laundering, terrorist financing, corruption, human rights violations, or U.S. national security violations, subject to appropriate protocols for access;
- c) Foreign law enforcement authorities, upon request by a U.S. agency, in compliance with disclosure and use limitations and that it is for an appropriate law enforcement purpose and is subject to judicial oversight and sanctions; and
- d) Financial institutions, with the consent of the entity and subject to confidentiality protections when appropriate, provided that an entity shall not be prohibited from providing access to beneficial ownership information voluntarily.

Law enforcement may have a bona fide interest in being able to obtain beneficial ownership information promptly. Access to beneficial ownership information can be a valuable component in pursuing persons engaged in money laundering, terrorist financing, corruption, kleptocracy, human rights violations, and criminal conduct. A proper showing or other appropriate protocols validate the propriety of the request for production of beneficial ownership information.

Financial institutions are subject to customer due diligence requirements under federal, state, and territorial law that require them to collect the same (and in many cases more) information about their customers. 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 beneficial ownership 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 entity itself.

While authorized government and law enforcement needs for beneficial ownership information can be 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 territories

already provide for some level of specified information to be reported to state and territory secretaries of state for certain entities (i.e., names and business addresses of directors and principal officers of corporations, managers of limited liability companies, and general partners of limited partnerships).

Principle 7: All types of business entities generally should be subject to the same requirements, with appropriate: (i) exemptions or variations to recognize differences in entity forms, risk levels, or existing regulatory obligations, and (ii) transitional provisions applicable to existing entities.

It is critical that the same general reporting standards be applicable to all types of business entity structures. In the U.S., state, tribal, 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, 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, tribes, and territories require reporting of the members or managers. Limited partnerships may have no natural person general partners.

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.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, and other relevant factors.

Principle 8: Any new beneficial ownership disclosure requirements must be risk based, take into account the burdens they might impose on legitimate business activity, and impose no greater penalty than is commensurate with the nature and degree of noncompliance.

Any new beneficial ownership disclosure requirements should strike a balance between the benefits of authorized government and law enforcement having access to beneficial

¹² 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.

ownership information, given the serious issues that gathering such information is intended to address, and the burdens on business entities in complying with the reporting regime. It is also recognized that disclosure of beneficial ownership information is increasingly required for a variety of purposes, including opening bank accounts, government contracting, and responding to due diligence requests from potential contracting parties or service providers (including, potentially, responding to know-your-client requests from law firms). There may be benefits of collecting the beneficial ownership information, including for the business itself in readily having beneficial ownership information at hand for use in such other contexts.

It is expected that legislation will include penalties for failure to comply with beneficial ownership information disclosure. Recent proposed federal beneficial ownership information disclosure legislation has included both civil and criminal penalties. 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 annual reports with state, tribal, or territory authorities. 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 beneficial ownership information should be reasonable and commensurate with the nature of the offense, in order to create a rational incentive for compliance. At the same time, where there is *mens rea* and willful violation, penalties must be strong enough to be meaningfully dissuasive. Federal criminal or civil penalties would be applicable to any entity that, after appropriate due process, either fails to maintain the applicable beneficial ownership 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.

This Resolution further provides that the ABA:

- reaffirms the vital importance of lawyer-client confidentiality for the rule of law;
- recognizes that a client’s confidence in lawyer-client confidentiality is essential in order for a lawyer to ensure effective assistance of counsel in criminal, civil and administrative proceedings and be able to counsel a client against a course of action that could be illegal or improper; and
- thus urges that any beneficial ownership transparency system be designed and administered to best protect and preserve lawyer-client confidentiality and urges Congress to refrain from enacting legislation that would regulate the legal profession.

Finally, this Resolution provides that the ABA:

- urges state, territory, tribal, local, and specialty bar associations and law schools to educate lawyers and law students about the scope of money laundering laws and the AML requirements that apply to lawyers to prevent the profession from being used to facilitate money laundering, terrorist financing, corruption, kleptocracy, human rights violations, including human trafficking, forced labor, and modern slavery, criminal conduct, and U.S. national security violations; and
- urges state, territory, tribal, local, and specialty bar associations, and other appropriate constituencies within the legal profession, with the assistance of the ABA, to develop and keep current appropriate voluntary risk-based guidance for client due diligence that will assist lawyers in combatting, detecting, and preventing money laundering, terrorist financing, corruption, kleptocracy, human rights violations, including human trafficking, forced labor, and modern slavery, criminal conduct, and U.S. national security violations, and assist lawyers in taking appropriate steps to comply with requirements to that end.

The reference to law schools and law students is not intended to lead to additional accreditation standards, but instead to provide that the ABA include law schools and law students in its overall efforts to educate lawyers and law students about the scope of money laundering laws and AML requirements that apply to lawyers.

As described above, continued significant debate is expected among many constituencies regarding proposals requiring the disclosure of beneficial ownership information for certain business entities. These proposals will include the yet to be released regulations under the CTA. Rather than attempting to address the provisions of particular proposals as they are introduced, this Resolution adopts 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. This Resolution allows the ABA to respond as appropriate to future legislative and regulatory proposals and will enable the ABA to engage in constructive dialogue around those proposals. It also underscores the ABA's support for reasonable efforts of the U.S. government to detect, deter, and combat money laundering, terrorist financing, corruption, kleptocracy, human rights violations, including human trafficking, forced labor, and modern slavery, and criminal conduct, for effective administration of U.S. foreign policy sanctions and export controls, and U.S. national security violations, including reasonable and appropriate legislation, regulations, and other governmental measures to ensure that adequate, accurate, and up-to-date entity beneficial ownership information can be obtained or accessed rapidly and efficiently by authorized government authorities and financial institutions.

Respectfully submitted,

Bob Carlson, Chair
Beneficial Ownership Working Group

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February 2023

GENERAL INFORMATION FORM

Submitting Entity: Beneficial Ownership Working Group

Submitted By: Bob Carlson, Chair

1. Summary of the Resolution(s).

This Resolution supports reasonable and appropriate legislation and related regulations to ensure that adequate, accurate, and timely entity beneficial ownership information can be obtained or accessed in a timely fashion by authorized government authorities and financial institutions for detecting, deterring, and combating money laundering, terrorist financing, corruption, kleptocracy, human rights violations, including human trafficking, forced labor and modern slavery, and U.S. national security violations.

This Resolution also supports legislation, regulations, and other governmental measures that require disclosure by business entities of beneficial ownership information to the federal government and authorizes government authorities to access that information on an appropriately confidential basis to combat money laundering, terrorist financing, corruption, kleptocracy, human rights violations, including human trafficking, forced labor, and modern slavery, and criminal conduct, for effective administration of U.S. foreign policy sanctions and export controls, and enforcement of U.S. national security laws.

This Resolution also urges that any disclosure requirements must protect constitutional rights and confidentiality interests, not conflict with the ethical duties, professional conduct requirements, and regulations imposed on the legal profession by a state, territory or tribe's highest court, and not undermine the applicable rules of professional conduct to which lawyers are subject.

This Resolution also reaffirms the vital importance of lawyer-client confidentiality for the rule of law; recognizes that a client's confidence in lawyer-client confidentiality is essential to ensure effective assistance of counsel in criminal, civil, and administrative proceedings and be able to advise a client against a course of action that could be illegal or improper; and thus urges that any beneficial ownership transparency system be designed and administered to best protect and preserve lawyer-client confidentiality while urging Congress to not enact legislation that would regulate the legal profession.

This Resolution urges state, territory, tribal, local, and specialty bar associations and law schools to educate lawyers and law students about the scope of money laundering laws and the anti-money laundering requirements that apply to lawyers to prevent the profession from being used to facilitate money laundering, terrorist financing, corruption, human rights violations, including human trafficking, forced labor, and modern slavery, criminal conduct, and U.S. national security violations.

This Resolution also urges state, territory, tribal, local, and specialty bar associations, and other appropriate constituencies within the legal profession, with the assistance of the American Bar Association, to develop and keep current appropriate voluntary risk-based guidance for client due diligence that will assist lawyers in detecting and preventing money laundering, terrorist financing, corruption, human rights violations, and U.S. national security violations, and assist lawyers in taking appropriate steps to comply with requirements to that end.

Finally, the Resolution rescinds Resolution 08A300.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This Resolution seeks to advance Goals 1, 2, and 4.

This Resolution supports Goals 1 and 2 by continuing to protect the attorney – client privilege and client confidences while supporting education of lawyers to assist in combating money laundering, terrorist financing, corruption, human rights violations, and national security violations.

This Resolution supports Goal 4 by advancing the rule of law to assist in preventing money laundering, terrorist financing, corruption, human rights violations, including human trafficking, forced labor, and modern slavery, and criminal conduct, and U.S. national security violations by supporting disclosure requirements concerning beneficial ownership of entities.

3. Approval by Submitting Entity.

On November 15, 2022, the Beneficial Ownership Working Group approved the Resolution.

4. Has this or a similar resolution been submitted to the House or Board previously?

No. A proposed Resolution 119 on beneficial ownership disclosure was withdrawn from the 2019 Annual Meeting. This Resolution is similar to resolution 119 in that it supports reasonable efforts to detect and combat money laundering and terrorist financing but also recognizes additional reasons for beneficial ownership disclosure. This Resolution, like the 2019 Resolution, supports timely access to beneficial ownership information by government authorities but adds broader access by government agencies. Both Resolutions make it clear that any reporting of beneficial ownership information is the obligation of the entity only.

This Resolution also reflects developments such as adoption of the Corporate Transparency Act in January 2021. This Resolution, like the 2019 Resolution, urges

that legislation and related regulations to detect and combat money laundering and terrorist financing must be subject to and consistent with certain fundamental principles. Elements of this Resolution that were not included in the 2019 Resolution include re-affirming the importance of attorney-client privilege and lawyer-client confidentiality, urging bar associations and law schools to educate lawyers on money laundering and other risks, and urging bar associations to develop and keep current guidance to assist lawyers in detecting and preventing money laundering and other risks.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

08A300 would be rescinded by this Resolution.

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

Not applicable.

7. Status of Legislation. (If applicable)

The Corporate Transparency Act (“CTA”), which is part of the Anti-Money Laundering Act of 2020, which itself is part of the National Defense Authorization Act for Fiscal Year 2021, became law effective on January 1, 2021. The full name of the NDAA is the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 (H.R. 6395), 134 Stat. 338, 116th Cong. 2d Sess. Congress’ override of the President’s veto was taken in Record Vote No. 292 (Jan. 1, 2021). The anti-money laundering provisions are found in §§ 6001-6511 of the NDAA. The CTA consists of §§ 6401-6403 of the NDAA. Section 6402 of the NDAA sets forth Congress’ findings and objectives in passing the CTA, and § 6403 contains its substantive provisions, primarily adding § 5336 to Title 31 of the United States Code.

On September 29, 2022, FinCEN released the first set of final regulations for reporting beneficial ownership information under the CTA. The remaining two sets of regulations under the CTA, not yet released, are expected to address the framework for access to this beneficial owner information and to update the customer due diligence rules surrounding the opening of new accounts by financial institutions.

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

Adoption of this Resolution will allow the ABA to respond constructively to future legislative and regulatory proposals and will enable the ABA to engage in constructive dialogue around them.

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9. Cost to the Association. (Both direct and indirect costs)

None.

10. Disclosure of Interest. (If applicable)

Not applicable.

11. Referrals.

Antitrust Law Section
Business Law Section
Center for Human Rights
Civil Rights and Social Justice Section
Corporate Social Responsibility Law Committee, Business Law Section
Criminal Justice Section
Family Law Section
International Law Section
Lawyers Abroad Committee, International Law Section
Litigation Section
Real Property, Trust & Estate Law Section
Rule of Law Initiative
Senior Lawyers Division
Solo, Small Firm, and General Practice Division
Standing Committee on Ethics and Professional Responsibility
Standing Committee on Law and National Security
Standing Committee on Professional Regulation
Taxation Section

12. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.)*

Bob Carlson, (406) 490-1054, bcarlson@cpklawmt.com

13. Name and Contact 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.*

Bob Carlson, (406) 490-1054, bcarlson@cpklawmt.com

EXECUTIVE SUMMARY

1. Summary of the Resolution.

This Resolution supports reasonable and appropriate legislation and related regulations to ensure that adequate, accurate, and timely entity beneficial ownership information can be obtained or accessed in a timely fashion by authorized government authorities and financial institutions for detecting, deterring, and combating money laundering, terrorist financing, corruption, kleptocracy, human rights violations, including human trafficking, forced labor and modern slavery, and U.S. national security violations.

This Resolution also supports legislation, regulations, and other governmental measures that require disclosure by business entities of beneficial ownership information to the federal government and authorizes government authorities to access that information on an appropriately confidential basis to combat money laundering, terrorist financing, corruption, kleptocracy, human rights violations, including human trafficking, forced labor, and modern slavery, and criminal conduct, for effective administration of U.S. foreign policy sanctions and export controls, and enforcement of U.S. national security laws.

This Resolution also urges that any disclosure requirements must protect constitutional rights and confidentiality interests, not conflict with the ethical duties, professional conduct requirements, and regulations imposed on the legal profession by a state, territory or tribe's highest court, and not undermine the applicable rules of professional conduct to which lawyers are subject.

This Resolution also reaffirms the vital importance of lawyer-client confidentiality for the rule of law; recognizes that a client's confidence in lawyer-client confidentiality is essential to ensure effective assistance of counsel in criminal, civil, and administrative proceedings and be able to advise a client against a course of action that could be illegal or improper; and thus urges that any beneficial ownership transparency system be designed and administered to best protect and preserve lawyer-client confidentiality while urging Congress to not enact legislation that would regulate the legal profession.

This Resolution urges state, territory, tribal, local, and specialty bar associations and law schools to educate lawyers and law students about the scope of money laundering laws and the anti-money laundering requirements that apply to lawyers to prevent the profession from being used to facilitate money laundering, terrorist financing, corruption, human rights violations, including human trafficking, forced labor, and modern slavery, criminal conduct, and U.S. national security violations.

This Resolution also urges state, territory, tribal, local, and specialty bar associations, and other appropriate constituencies within the legal profession, with the assistance of the American Bar Association, to develop and keep current appropriate voluntary risk-based guidance for client due diligence that will assist lawyers in detecting and preventing money laundering, terrorist financing, corruption, human rights violations, and U.S. national security violations, and assist lawyers in taking appropriate steps to comply with requirements to that end.

Finally, the Resolution rescinds Resolution 08A300.

2. Summary of the issue that the resolution addresses.

The Corporate Transparency Act (“CTA”), which is part of the Anti-Money Laundering Act of 2020, which itself is part of the National Defense Authorization Act for Fiscal Year 2021, became law effective on January 1, 2021. The full name of the NDAA is the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 (H.R. 6395), 134 Stat. 338, 116th Cong. 2d Sess. Congress’ override of the President’s veto was taken in Record Vote No. 292 (Jan. 1, 2021). The anti-money laundering provisions are found in §§ 6001-6511 of the NDAA. The CTA consists of §§ 6401-6403 of the NDAA. Section 6402 of the NDAA sets forth Congress’ findings and objectives in passing the CTA, and § 6403 contains its substantive provisions, primarily adding § 5336 to Title 31 of the United States Code.

On September 29, 2022, FinCEN released the first set of final regulations for reporting beneficial ownership information under the CTA. The remaining two sets of regulations under the CTA, not yet released, are expected to address the framework for access to this beneficial owner information and to update the customer due diligence rules surrounding the opening of new accounts by financial institutions.

3. Please explain how the proposed policy position will address the issue.

Adoption of this Resolution will allow the ABA to respond as appropriate to future legislative and regulatory proposals and will enable the ABA to engage in constructive dialogue around them.

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

No known opposition.

The Criminal Justice Section Council originally voted to oppose the resolution. The Section decided to withdraw its opposition and instead to consider offering an amendment to add language to the resolution.