



State & Local Tax Advisory ■

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Amendment to NYS Tax Law Affects Recording of Deeds for LLCs

New York State just made it more difficult for LLCs to transfer or receive real property. On September 13, 2019, New York Governor Andrew Cuomo signed into law an amendment to New York Tax Law Section 1409(a) that requires all LLCs that are either grantors or grantees in a deed transfer of real property to disclose *all* their members before the real estate may be transferred. Some may say this disclosure requirement is an invasion of privacy, but New York does not see it the same way. The law's amendment specifically includes a provision to the contrary, explicitly stating that "[t]he identification of such names and addresses shall not be deemed an unwarranted invasion of personal privacy..." under New York law.

The new law, which became effective upon the governor's signature, requires LLCs to disclose both the names and business addresses of each of its members, managers, and other authorized persons. For purposes of 1409(a)'s amendment, members are defined as "a person designated by the members to manage the limited liability company as provided in the operating agreement." The New York Department of Taxation and Finance (DTF), the entity enforcing 1409(a)'s amendment, defines authorized persons as a "person, whether or not a member, who is authorized by the operating agreement, or otherwise, to act on behalf of an LLC or foreign LLC." The DTF recently issued a technical memorandum, TSB-M-19(2)R, on November 4, 2019, that provides its view on the new filing requirements and an example of their application.

The most significant compliance burden of 1409(a)'s amendment is the disclosure requirement of an LLC's members until ultimate ownership by a "natural person" is determined. DTF defines a natural person as a "human being, as opposed to an artificial person, who is the beneficial owner of the real property. A natural person does not include: a corporation or partnership, natural person(s) operating a business under a d/b/a (doing business as), an estate (such as the estate of a bankrupt or deceased person), or a trust." Such a requirement creates a compliance nightmare because members of LLCs are often comprised of partnerships, corporations, trusts, and other LLCs. Under the law's amendment, the disclosure process must continue through all of the entity members until the natural persons are disclosed.

The following example crystallizes the complexity of 1409(a)'s amendment. XYZ LLC is a single-member LLC and the grantor in a deed transfer of a single-family house to an individual. In addition to its managers and authorized persons (who must be disclosed), XYZ has four members: XYZ Partnership, XYZ 2 LLC, XYZ Trust, and XYZ Corporation. Under 1409(a)'s amendment, before the deed transfer is effective, XYZ LLC must disclose: (1) all of XYZ Partnership's partners; (2) all managers, authorized persons, and members of XYZ 2 LLC; (3) all beneficiaries of the XYZ Trust; and (4) all shareholders of XYZ Corporation.

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Further, if each partner, member, beneficiary, or shareholder of the members of XYZ LLC are not natural persons, the disclosure requirement is not satisfied until all natural persons have been identified. Thus, if any shareholders of XYZ Corporation are mutual funds, the natural persons who own the funds must be disclosed, and if any of the beneficiaries of the XYZ Trust are charities, the officers, directors, and managers of the charities must also be disclosed.

Finally, an already complicated compliance issue ramps up if both grantor and grantee are LLCs. Continuing with the example, had XYZ LLC entered into a deed transfer with ABC LLC, a single-member LLC, both XYZ LLC and ABC LLC as grantor and grantee would have to disclose all their members down to the natural person.

As the example illustrates, disclosing all members of an LLC through to the natural persons is likely an impossible task. For the moment, however, this is DTF's official position. We will continue to monitor how DTF enforces the amendment and whether it can even police noncompliance.

Section 1409(a)'s amendment also leaves LLCs with additional questions, including: What are "one- to four-family dwelling units?" And must LLCs disclose the taxpayer identification numbers of its members, managers, or other authorized persons? As currently written, the amendment does not elaborate on what constitutes one- to four-family dwelling units.

Certain localities and titling companies have seized on this ambiguity and are enforcing the disclosure requirement when an LLC is involved in a deed transfer of a condominium or a cooperative. Arguably, unless the condominiums or cooperatives have one to four units, such a transfer of property does not apply to 1409(a)'s amendment, but without clarification from DTF or the state, localities may choose not to accept a deed transfer on condominiums or cooperatives unless natural persons are disclosed.

Localities and titling companies also appear to be adding an additional disclosure requirement that the Social Security number or other tax identification numbers of LLC members, managers, and other authorized persons be disclosed before accepting a deed transfer. While the amendment does not require such disclosure, it does not explicitly forbid it, and until further explanations are issued by DTF or the state, this requirement continues to be enforced by localities and titling companies.

As currently drafted, compliance with 1409(a)'s amendment is extremely challenging, if not impossible. Our State and Local Tax Group continues to closely monitor the change in law and will provide an update when additional interpretations are available.

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