

By **Jocelyn M. Borowsky** & **Elizabeth King**

Corporate Transparency Act Just Got Real For Common Law Trusts

A review of the relevant aspects of the CTA's final rule

The federal government has developed yet another tool to help crack down on money laundering—this time by documenting who owns closely held companies. Private companies that are accustomed to the privacy that state law has afforded them will now have to provide key information to the federal government about who actually owns the companies, resulting in a first of its kind centralized repository in the United States for information about private entities. This new tool is the Corporate Transparency Act (CTA). The CTA seeks to prevent money laundering by forcing closely held companies to report information about the company itself and its controlling owners.¹ With the government's issuance of its "final rule" at the end of September, the countdown for filing the required report will commence on Jan. 1, 2024.

Common law trusts aren't directly subject to the CTA, but the CTA will impact trust administration if a trust holds an interest in an entity that's subject to the CTA. This potentially includes thousands of trusts that own interests in entities formed in the United States and foreign entities registered to do business in the United States, including closely held businesses, limited liability companies (LLCs) and partnerships.

To accomplish its objective, the CTA requires a "reporting company" to disclose certain information about each "beneficial owner" and the "company applicant" by e-filing a report with the Financial

Crimes Enforcement Network (FinCEN), and by keeping the report up to date. A broader review of the CTA final regulations was published in this journal in January.²

Let's review those parts of the final rule and preamble to the final rule that intersect with trusts and discuss how the CTA could impact various aspects of trust administration in ways that may not be expected.

Beneficial Owner

The main inquiry for trusts is whether the trustee or any other individual, including a grantor, beneficiary or named advisor, is a beneficial owner of the reporting company. The final rule defines a "beneficial owner" as an individual who either directly or indirectly: (1) owns or controls 25% or more of the ownership interest in the reporting company, or (2) exercises substantial control over the reporting company.³ The definition of "beneficial owner" was deliberately left open-ended to capture a broad variety of arrangements, including the many different trust structures used in modern trust planning.

With respect to a reporting company owned in whole or in part by a trust, many individuals who have a role or interest in the trust will be considered beneficial owners of the reporting company, including the named fiduciaries and certain grantors and beneficiaries. The named fiduciaries will include trustees, investment advisors, distribution advisors, protectors and other similar roles in the trust, regardless of whether the role is deemed "fiduciary" under applicable state law.

There are two aspects, or prongs, to the beneficial ownership definition. One tests an individual's ownership of, or control over, 25% or more of the ownership interests of the reporting company (the

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ownership test), and the other tests an individual's ability to substantially control the reporting company (the control test).

Under the ownership test, an individual is considered a beneficial owner if: (1) the individual owns⁴ at least 25%⁵ of the ownership interests⁶ in the reporting company; or (2) the individual controls at least 25% of the ownership interests of the reporting company. The final rule provides a descriptive list of individuals who would be considered the beneficial owner when a trust owns at least 25% of the ownership interests in a reporting company: (i) an individual trustee of the trust; (ii) an individual with authority to dispose of trust assets; (iii) a beneficiary who's the sole permissible recipient of income and principal from the trust; (iv) a beneficiary who has the right to demand a distribution of or withdraw substantially all of the assets in the trust; (v) a grantor of the trust who has the right to revoke the trust; and (vi) a grantor of the trust who has the right to withdraw the assets of the trust.⁷ The foregoing provisions aren't intended to be an exhaustive list of situations related to the ownership test with respect to a trust.⁸

The ownership test further contemplates that all of an individual's ownership interests in a reporting company are to be taken into account to determine if the individual meets the 25% threshold, including interests that the individual owns or controls directly or indirectly.⁹ This indicates that an individual's holdings will be aggregated, so that the foregoing rules may apply even if the trust holds less than a 25% ownership interest, when the individual owns or controls an ownership interest outside of the trust structure. The aggregation rule would require that all of a trustee's interests in the same reporting company be aggregated for purposes of identifying the beneficial owner.

The control test doesn't require the individual to have an ownership interest in the reporting company. Instead, the final rule provides three general categories of individuals who have substantial control over a reporting company: (1) a senior officer at the reporting company; (2) an individual who has the ability to remove and appoint a senior officer or a majority of the board of directors; and (3) an individual who directs, determines or has substantial influence over important decisions

made by the reporting company.¹⁰ Some important decisions concerning the reporting company include those regarding its scope of business, sale of assets, merger or reorganization, incurrence of significant debt, compensation of senior officers, acceptance or termination of significant contracts and amendments to the operating agreement.¹¹

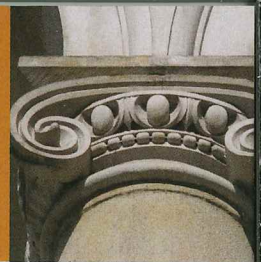
The final rule also has a catch-all provision designed to capture novel structures when the general indicators of substantial control aren't present but in fact there's an individual who has the ability to exercise substantial control over the reporting company.¹²

The rule expressly recognizes that an individual may exercise substantial control by acting as a trustee of a trust and, in such capacity, own or control a majority of the voting power or voting rights over a reporting company.

The rule expressly recognizes that an individual may exercise substantial control by acting as a trustee of a trust and, in such capacity, own or control a majority of the voting power or voting rights over a reporting company.¹³ An example given in the preamble is when the trustee can control the reporting company by exercising rights associated with shares held in trust.¹⁴ Any individual trustee, advisor, beneficiary, grantor or other individual fiduciary or non-fiduciary who has the power to remove and replace a senior officer of the reporting company or a majority of its directors also would be a beneficial owner.

Five Exceptions

There are five exceptions¹⁵ to the definition of "beneficial owner": (1) a minor, provided information about the minor's parent or legal guardian is reported;



(2) an individual acting as a nominee, intermediary, custodian or agent on behalf of another individual; (3) an employee of a reporting company (but not when the employee is also a senior officer); (4) an individual whose only interest in a reporting company is a “future interest through a right of inheritance”; and (5) a creditor of a reporting company.

The final rule makes clear that when a minor reaches the age of majority under the law governing the reporting company’s registration, the reporting company must file an updated report within 30 days.¹⁶

The final rule doesn’t expand on the exception for “future interest through a right of inheritance,” but the preamble elaborates that an individual who may in the future come to own ownership interests in an entity through a right of inheritance doesn’t have ownership interests until the inheritance occurs.¹⁷ The preamble further indicates that the term “inheritance” is used loosely to refer to a “variety of existing legal authorities, such as the terms of a will, the terms of a trust, applicable state laws and other valid instruments and rules.”¹⁸

The CTA will have a tremendous impact on the trust and estate industry from both a planning perspective and an ongoing administration perspective.

A special rule applies when a reporting company is owned by an entity that’s exempt from reporting under the CTA (an exempt entity). This could occur when a corporate trustee that’s an exempt entity serves as trustee of a trust that owns a reporting company. The exception provides in pertinent part:

If one or more exempt entities under paragraph (c)(2) of this section has or will have a direct or indirect ownership interest in a reporting company and an individual is a beneficial owner of the reporting company

exclusively by virtue of the individual’s ownership interest in such exempt entities, the report may include the names of the exempt entities in lieu of the information required under paragraph (b)(1) of this section with respect to such beneficial owner.¹⁹

Comments to this section clarify that this exception applies to those individuals who would be deemed beneficial owners of the exempt entity (for example, the corporate trustee) solely by virtue of their ownership interest in the corporate trustee. FinCEN considered and rejected expanding this exception to those individuals who exercise substantial control through an exempt entity (as opposed to merely having the requisite ownership interest).²⁰

Impact on Trust Administration

The CTA will have a tremendous impact on the trust and estate industry from both a planning perspective and an ongoing administration perspective. The biggest focus undoubtedly will be on ensuring the trustee’s own compliance with the CTA and the final rule, and this will entail the trustee bringing its existing book of trust accounts into compliance with the CTA and discussing the implication of the CTA during the trust planning process so that the parties are aware of CTA compliance before the structure is created.

Discerning trust beneficial owners generally. Thankfully, the final rule gives the trustee some bright-line rules that it can use to bring its existing trust structures into compliance. We know that for trusts that own an interest in a reporting company, the following individuals will be considered beneficial owners:

1. Any trustee, direction advisor, protector, designated representative or other individual acting on behalf of the trust (whether a fiduciary under state law or not) who has the power to dispose of trust assets when the trust(s) and such individual (collectively) holds at least a 25% ownership interest in the reporting company;²¹
2. Any trustee of a trust(s) that *owns* a majority of the voting power or voting rights in the reporting company;²²

3. A trustee, direction advisor, protector, designated representative or other individual acting on behalf of the trust (whether a fiduciary under state law or not) who *controls* a majority of the voting power or voting rights of the reporting company;²³
4. A trustee, direction advisor, protector, designated representative or other individual acting on behalf of the trust (whether a fiduciary under state law or not) who directs, determines or has substantial influence over important decisions made by the reporting company;²⁴
5. A trustee, direction advisor, protector, designated representative, grantor, beneficiary or other individual acting on behalf of the trust (whether a fiduciary under state law or not) with the right to remove and replace senior officers of the reporting company;²⁵
6. A trustee, direction advisor, protector, designated representative, grantor, beneficiary or other individual acting on behalf of the trust (whether a fiduciary under state law or not) with the right to remove and replace a majority of the board of directors of the reporting company;²⁶
7. A grantor with the right to revoke the trust when the trust and the grantor (collectively) own at least a 25% ownership interest in the reporting company;²⁷
8. A grantor with the right to withdraw the assets of the trust when the trust and the grantor (collectively) own at least a 25% ownership interest in the reporting company;²⁸
9. A beneficiary who's the sole permissible recipient of income and principal of the trust when the trust and beneficiary (collectively) own at least a 25% ownership interest in the reporting company;²⁹
10. A beneficiary who has the right to demand a distribution of, or withdrawal of substantially all of, the trust's assets when the trust and beneficiary (collectively) own at least a 25% ownership interest in the reporting company.³⁰ This would include any beneficiaries who have a present power of appointment (POA).

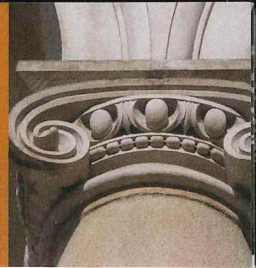
We surmise that remainder beneficiaries and permissible appointees of a POA likely aren't considered beneficial owners because of the inheritance exception.

What's not addressed. The above bright-line list doesn't address the following matters:

1. The final rule states that an individual who's the sole current permissible beneficiary of a trust is a beneficial owner (if the 25% ownership threshold is met) but doesn't clarify whether names of beneficiaries must be reported when there are multiple current permissible beneficiaries. When there are multiple current permissible beneficiaries, their interests may be considered a "mere expectancy" under state law,³¹ and therefore, could fall into the inheritance exception.

The rule may be drawing a bright line by deeming any trustee holding legal title to the reporting company to be a beneficial owner, regardless of the fact that the trustee is only an administrative trustee and can't influence, control or otherwise manage trust assets.

2. The final rule states that any individual with authority to dispose of trust assets is a beneficial owner (if the 25% ownership threshold is met), but the regulation is phrased in such a way as to imply that if the individual is a trustee, then the individual trustee is a beneficial owner regardless of whether that trustee has authority to dispose of trust assets. This fails to account for directed trusts. Further, the authority to "dispose" of trust assets could encompass both distributions and investments of trust property. The rule may be drawing a bright line by deeming any trustee holding legal title to the reporting company to be a beneficial owner, regardless of the fact that the trustee is only an administrative trustee and



can't influence, control or otherwise manage trust assets.

3. The final rule states that a beneficiary who has a substantial withdrawal power is a beneficial owner (if the 25% ownership threshold is met), but it's unclear whether an individual holding this power who isn't a beneficiary, per se, is included in this POA definition. Similarly, the final rule doesn't address whether an individual holding a POA exercisable only on death is a beneficial owner.

Some trusts permit the grantor to make the removal and appointment decision, while others permit a beneficiary or a class of beneficiaries to make the decision, and as a result, those grantors and beneficiaries would be considered beneficial owners for purposes of the CTA.

4. The final rule states that a grantor of the trust who has the right to withdraw the assets of the trust is a beneficial owner (if the 25% ownership threshold is met), but it's unclear if this extends to a swap power.
5. The final rule states that the individual who has a power to remove and replace a senior officer of a reporting company is a beneficial owner but doesn't address the situation in which an individual has a power to fill a vacancy but doesn't have authority to remove a senior officer.
6. The final rule states that an individual who directs, determines or has substantial influence over important decisions is a beneficial owner but doesn't address the situation in which

important decisions are to be made by multiple individuals jointly. Presumably, all of them would be considered beneficial owners.

Impact on Trust Structures

Tiered trust structure. A common trust structuring technique is to create an LLC to hold assets (such as real estate, marketable securities) with a single manager and then create a trust to own the LLC as the sole owner. This common structure results in the possibility of substantial control being exercised directly at the reporting entity level (the LLC) and indirectly at the trust level. Each element of the control test and of the ownership test should be applied at both the LLC level and at the trust level.

Consider the foregoing common trust structure, and further assume that the trust has one individual trustee; the individual trustee isn't the same individual as the LLC manager; the LLC manager controls the day-to-day operations of the LLC; and the trustee holds certain other powers over the LLC on behalf of the trust, as the LLC's sole member, such as the power to amend the LLC operating agreement and the power to remove and replace the manager. Applying the above list of 10 indicators of beneficial ownership, the manager would be a beneficial owner as a senior officer.³² The trustee would be a beneficial owner under several different indicators, both under the control test and under the ownership test. The trustee has a power to remove and replace the manager and the power to make at least one important decision for the LLC.³³ Under the control test, the trustee is a beneficial owner. The trustee is an individual who owns at least a 25% ownership interest in the reporting company and has authority to dispose of trust property.³⁴ The trustee is a beneficial owner under the ownership test also. Both the manager and the trustee must be reported as beneficial owners.

Often, the individual responsible for appointing and removing the LLC manager is different from the LLC manager and the trustee. Some trusts permit the grantor to make the removal and appointment decision, while others permit a beneficiary or a class of beneficiaries to make the decision, and as a result, those grantors and beneficiaries would be considered beneficial owners for purposes of the CTA.

Shifting to a different fact pattern, when a trust is fully managed by a large corporate trustee, and the trust holds a 100% interest in a reporting company, the special rule in CFR Section 1010.380(b)(2)(i) would apply to those individuals who would be considered beneficial owners of the reporting company exclusively by virtue of their ownership interest in the corporate trustee. To illustrate, suppose XYZ Trust Company is a privately owned trust company that's exempt from reporting under the CTA and that's owned by individual shareholders A, B, C and D, and XYZ Trust Company is the trustee of a trust that owns 100% of Rep Co LLC, a reporting company. Rep Co LLC (the reporting company) needn't report A, B, C and D as its beneficial owners and instead will need to provide FinCEN with the name of XYZ Trust Company.

Trust agreements and LLC operating agreements should designate who has the responsibility for reporting such changes to the reporting company.

This special rule doesn't extend to the status of those senior officers of XYZ Trust Company who make discretionary decisions on behalf of the trust that affect the reporting company. If Jack and Ellen are the senior vice presidents of XYZ Trust Company who make discretionary decisions on behalf of the trust with respect to the management or disposition of Rep Co LLC, they would be considered beneficial owners of Rep Co LLC because of their authority to exercise substantial control over Rep Co LLC.³⁵ If Tiffany is the trust officer for the trust account but doesn't make the ultimate decisions with respect to the management or disposition of Rep Co LLC on behalf of the trust, presumably she wouldn't be considered to be a beneficial owner by virtue of the employee exception.³⁶ Jack and Ellen will most likely prefer to obtain a FinCEN identifier, discussed below, rather than report their personal information to Rep Co LLC.

Directed trusts. The popularity of directed trust structures has skyrocketed over the last several years. Often, a directed trust structure consists of one or more trustees, an investment direction advisor, a distribution direction advisor and a trust protector. Consider the following hypothetical situation: A trust owns a single member LLC. The LLC has one individual manager. The trust has one individual trustee who's the bare legal title holder on behalf of the trust of the wholly owned LLC. The individual trustee isn't the same individual as the LLC manager. The LLC manager controls the day-to-day operations of the LLC. The trustee is directed by an individual investment direction advisor with respect to investment decisions for the trust, including decisions concerning the LLC. In that capacity, the investment direction advisor is authorized to direct the trustee to amend the LLC operating agreement and to remove and replace the manager. The trustee is directed by an individual distribution direction advisor as to discretionary distributions of trust property.

Under the foregoing fact pattern, the following individuals are (or most likely are) beneficial owners:

- The manager of the LLC, as a senior officer;³⁷
- The trustee as the bare legal title holder of 100% of the ownership interests in the LLC even though the trustee has no authority over the disposition of trust assets;³⁸
- The distribution direction advisor as the individual who has control over the discretionary distribution of trust assets;³⁹
- The investment direction advisor as the individual who has control over certain important LLC decisions (the power to amend the operating agreement) and who can remove and replace the LLC manager.⁴⁰

If any of the direction advisor roles were set up as a committee structure, such as a distribution committee that makes discretionary distribution decisions by majority vote, it's likely that every individual who serves on the committee will be deemed a beneficial owner and will be required to provide the necessary information to the reporting company. Moreover, whenever there's a change in the composition of the committee or an individual serving in a role is



removed or replaced, updated information must be provided to the reporting company so a timely update may be filed. Trust agreements and LLC operating agreements should designate who has the responsibility for reporting such changes to the reporting company.

Consider a slight change to the foregoing fact pattern. Suppose the trust is divided or severed into multiple different trusts, with each trust owning 10% of the LLC. The trustee and LLC manager in the above example would continue to be beneficial owners after the division of the trust because of the aggregation rule. The direction advisors also would continue to be beneficial owners after the division of the trust if they continue to serve as direction advisor for each separate trust.

The fact that a beneficiary may be deemed a beneficial owner creates unique considerations for “silent trusts.”

Another interesting twist found in directed trust structures arises when there’s an entity that’s formed to serve in the role of investment direction advisor. This strategy is used for certain planning goals, and in this case, there are two reporting entities: (1) the entity owned by the trust; and (2) the entity serving as the investment direction advisor. There’s no question that the investment advisor entity has the power to control or dispose of trust assets, but an entity itself isn’t a beneficial owner. There’s a look-through to see who controls the trust-owned entity through the investment advisor entity.⁴¹ Whichever individuals control the investment advisor entity would be deemed to control the trust-owned reporting company. Such individuals will have to provide the required individual information to the trust-owned reporting entity. The investment advisor entity is itself a reporting entity and will need to provide the name of its beneficial owners. This rule may extend to an individual who’s given the power to remove

and replace the manager of the investment advisor entity. For example, if a beneficiary or a grantor has the power to remove and replace the investment advisor entity (or manager of the investment advisor entity), whether in the terms of the trust itself or in the terms of the entity operating agreement, then that beneficiary or grantor, as the case may be, will be the beneficial owner of the investment advisor entity, regardless of any power they have directly over the trust owned reporting entity.

Silent trusts. The fact that a beneficiary may be deemed a beneficial owner creates unique considerations for “silent trusts.” Generally speaking, a beneficiary of a silent trust isn’t entitled to information about the trust until a certain point in time, for example, reaching a certain age. Even though the beneficiary isn’t aware of the trust’s existence, the terms of the trust nevertheless still confer certain rights and powers on the beneficiary. For example, the beneficiary might be the sole permissible recipient of income and principal of the trust; the beneficiary might have certain powers after a period of time to remove and replace trustees, investment advisors, protectors, etc.; and the beneficiary might have a present POA. In these cases, an individual is often named to represent the beneficiary during the period in which the beneficiary isn’t aware of the existence of the trust or their rights under the trust, and this individual may exercise the rights of the beneficiary or otherwise represent the beneficiary in matters concerning the trust.⁴² Regardless of any silent trust provisions, no exceptions under the CTA exist for silent trusts. This will put the reporting company in the awkward position of asking the beneficiary for information (and a driver’s license) without disclosing the reason behind the request. An argument could be made that the individual named to represent the beneficiary (the designated representative) should be considered the beneficial owner during the time they represent the beneficiary, but it’s questionable whether providing the designated representative’s information would satisfy the reporting requirements. In fact, a designated representative may be excluded as a beneficial owner under the “nominee” exception for an individual “acting as a nominee, intermediary, custodian, or agent on behalf of another individual.”⁴³ To the extent that the beneficiary is a beneficial owner by virtue of holding certain trust powers, such as a

POA, or a power to remove and replace the manager of a wholly owned LLC, a designated representative who holds such powers on behalf of the beneficiary during the silent period might be considered the beneficial owner in lieu of the beneficiary. Once the silent period ends and the designated representative no longer holds the power on behalf of the beneficiary, the beneficiary would be considered the beneficial owner, and updated information would need to be filed.

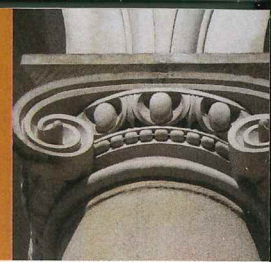
On the other hand, when the beneficiary holds no trust powers but is the sole permissible beneficiary, providing the information of the designated representative may not be sufficient. A choice might need to be made as to which goal is more important—creating a silent trust to delay notification of the trust's existence to the beneficiary or giving the beneficiary the rights and powers desired, thus triggering disclosure of beneficiary information. A possible solution to avoid having to make this choice would be to create a silent trust for a certain period of time (for example, until the beneficiary reaches a certain age) and then ensure that the rights and powers that would trigger compliance are only given on the termination of the silent period. The analysis is very case specific, and careful planning and dialogue about the attributes of the structure and the impact on reporting obligations is required.

Many trustees will be wondering whether the trustee has a duty to ensure that a reporting company that it owns, whether partially or fully, complies with the CTA.

Foreign trusts. Another area that will be impacted is foreign trust planning. A lot of foreign trusts are structured as grantor trusts, and the appeal of establishing these trusts in the United States has been, at least partially, a result of the privacy afforded in the United States. Going forward, the foreign grantor who's the sole current permissible beneficiary

or who retains the right to revoke the trust will have a responsibility to provide their personal information to the reporting entity, which in turn will be provided to FinCEN. If the trust is a foreign grantor trust with no underlying entity, the grantor's information wouldn't be required to be reported. However, foreign trusts almost always have underlying entities to serve as blockers for estate or income tax purposes, so it's more likely than not that the foreign grantor will need to provide their personal information.

One further scenario to be aware of is when a U.S. trust owns a foreign entity, like a Canadian partnership or Bahamian private investment company, which in turn owns underlying assets like real estate and liquid assets. The final rule states generally that all domestic entities are reporting companies and are therefore subject to the reporting requirements of the CTA. Entities formed outside of the United States that are registered to do business in the United States are also subject to the reporting requirement.⁴⁴ Consider this fact pattern: A foreign grantor establishes a revocable U.S. trust, which owns a Canadian limited partnership, which in turn owns financial assets. The general partner (GP) of the Canadian Partnership is a Delaware LLC, which is wholly owned by the trust. The trust itself serves as the limited partner of the Canadian partnership. The Canadian partnership itself isn't a reporting entity because it's a foreign entity and isn't registered to do business in the United States. Further, we know that the trust itself isn't a reporting entity, even if it's acting as the limited partner of the Canadian LP. However, the Delaware LLC, the GP of the Canadian LP, is a reporting entity, so it will have to disclose the names of the individuals who own or control 25% or more of the Delaware LLC and the names of the individuals who exert substantial control over the Delaware LLC. Because the grantor can revoke the trust and ultimately control the disposition of the Delaware LLC, the Delaware LLC will also need to provide the foreign grantor's information. Assume that instead of creating a Delaware LLC to serve as the GP of the Canadian LP, the foreign grantor creates a second trust for the purpose of serving as the GP. This purpose trust isn't considered a reporting entity, and under this fact pattern, it would appear that the grantor wouldn't be deemed to be a beneficial owner because there's no reporting entity in the structure that must comply with the CTA's requirements.



Communicating Changes

The reporting entity must certify that the information in the beneficial ownership information report is true, accurate and complete.⁴⁵ Although in most cases, the reporting entity will be supplying information about other individuals, using information supplied by those individuals, FinCEN made a deliberate decision to place the responsibility for the certification on the reporting entity, under the theory that the reporting entity should know who its beneficial owners and applicants are, thus rejecting commentators' requests to eliminate or modify the certification. FinCEN expects that reporting companies will "take care to verify the information they receive from their beneficial owners and applicants" before submitting the information.⁴⁶ An individual submitting the report on behalf of the reporting entity as the reporting entity's agent isn't responsible for the information provided; the reporting entity is ultimately responsible.⁴⁷ Even though the reporting company is responsible for filing the initial report and updating it as information changes, the beneficial owner has a responsibility to provide accurate information to the reporting entity. It's unlawful for an individual to provide false or fraudulent beneficial ownership information or to willfully fail to report complete or updated beneficial ownership information.⁴⁸

When a reporting company is held in trust, the following events may trigger a reporting requirement on the reporting company: (1) a change of situs as that may result in a change of address for the trustee; (2) the resignation, removal or appointment of a trustee, advisor or protector; (3) a minor beneficiary reaching an age at which such beneficiary holds the power to control or dispose of trust assets; (4) death of a beneficiary or grantor who was a beneficial owner; and (5) any other event that would trigger a change in the reporting information, including the change of address for a beneficiary, advisor or grantor who's a beneficial owner.

Many trustees will be wondering whether the trustee has a duty to ensure that a reporting company that it owns, whether partially or fully, complies with the CTA. A trustee will also wonder whether it has a duty to ensure that the beneficial owners—whether the grantor, one or more beneficiaries, one or more

advisors or the parents of any minor beneficiary—provide their information to the reporting entity. The responsibility for compliance technically rests with the reporting company under the CTA, but because the trustee would be responsible as an owner of the reporting entity, it may have a common law duty to assist the reporting company.

The analysis becomes less clear when the trustee's duties are bifurcated among co-trustees or direction advisors. In these situations, under state law or under the terms of the trust instrument, each fiduciary may not be liable for the acts or omissions of the other and may have no duty to monitor the other or give advice to the other.⁴⁹ On the other hand, in these bifurcated structures, each fiduciary is responsible for giving the other fiduciary the information needed to perform the assigned responsibilities under the terms of the trust. If all parties are determined to be beneficial owners under the CTA, a trustee in this situation will have to decide whether to proactively take responsibility for assisting the reporting company or take a more passive approach on the theory that it may be best not to take responsibility that they actually don't have under the terms of the trust or under the CTA.

As a practical matter, corporate trustees with internal compliance and legal departments will be best equipped to analyze the beneficial ownership rules to determine which individuals involved in the trust are deemed to be beneficial owners. It will be important for trust companies to have talking points to facilitate the many conversations that will need to take place during the collection of the information.

If the trustee determines that it will facilitate the collection and submission of personal information to the reporting company, it will need to have a robust process for identifying and tracking the various individuals who have rights or powers in the trusts that give rise to beneficial ownership and a system for tracking any changes that would require an updated report. Also at the planning stage, the trustee may consider adding a provision in the trust agreement identifying whose responsibility it is to provide beneficial ownership information to the reporting company when the trust is structured as a directed trust, so everyone understands their responsibilities at the outset. The trust could include an indemnity clause to protect the trustee if an individual

responsible for providing information or reporting a change of information fails to do so within the 30-day filing period. A difficult area to control or track will be changes in address for beneficiaries. A lot of beneficiaries receive statements electronically or use a post office box address for statement delivery. Beneficiaries who are deemed to be beneficial owners must provide a residential street address to the reporting company; a post office box won't suffice. The trustee must find a way to encourage beneficiaries to update their residential addresses with the trust's records, whether by placing a banner

or announcement on the monthly statements or using other tools to detect a change of address (for example, returned mail).

If a family office is in the picture, it can play a helpful role in apprising the reporting company of any changes that must be reported to FinCEN.

Ultimately, the reporting company and trustee will likely conclude that the best way to avoid reporting mistakes is to shift the responsibility to the beneficial owners by requiring them to obtain a FinCEN identifier, discussed in the next section.

Privacy Concerns

The privacy and security of personal information is fragile and challenging to maintain in today's digital way of life. Understandably, individuals will be hesitant to provide their personal information to reporting companies, especially when there's a tenuous or indirect relationship between the beneficial owners and the reporting company. The rules address this concern by permitting an individual to apply directly to FinCEN for a unique FinCEN number (a FinCEN identifier) by providing the same information that the individual would otherwise be required to provide in connection with the beneficial ownership reporting. Once an individual obtains a FinCEN identifier, such individual can provide this number to the reporting entity instead of providing their own personal information.⁵⁰ A beneficial owner who obtains a FinCEN identifier has the obligation to report any changes within 30 days and to correct any inaccuracies in the information, rather than the reporting company.⁵¹

Reporting Complexities

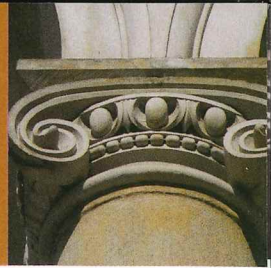
The CTA will undoubtedly have an impact on trusts, especially in states where many trusts are structured to own closely held companies or disregarded companies. FinCEN recognizes that there are many complex trust structures used for tax and wealth planning and that determining the beneficial owners in these complex structures might be challenging. However, FinCEN also believes that individuals setting up these complex structures are surrounded by advisors who will inform their clients about the reporting complexities involved in the structuring so that they may assess whether the benefits of the




SPOT LIGHT

I See Monsters

Gaudí XVII by Joan Miró sold for £34,020 at Phillips Evening & Day Editions Auction on Jan. 18-19, 2023 in London. Miró was introduced to art at a young age by his watchmaker father. Much of Miró's work was influenced by the scenic seaside town where he grew up in Barcelona and the distinct style that he found in the area.



structuring outweigh the complexities.⁵² On a going forward basis, individuals who are surrounded by advisors that are familiar with the beneficial ownership obligations for trust-owned reporting companies will be able to weigh the complexities of the structure against the benefits of the structure they're planning and make changes to their plans before implementing them. The same may not be true of existing irrevocable trust structures. It will be important for all trust parties to understand the reporting obligations under the CTA as well as the role each individual plays in compliance. Corporate trustees will have a heavy lift in evaluating the existing structures they administer to determine beneficial ownership, collecting information from their clients (and potential non-clients) and monitoring structures for a change of beneficial ownership. 

Endnotes

1. Federal Register, Vol. 87, No. 189 (Sept. 30, 2022) (FR), at p. 59515.
2. Stephen Liss, "The Corporate Transparency Act: Our New Normal," *Trusts & Estates* (January 2023).
3. 31 CFR Section 1010.380(d); FR, at pp. 59525-59530 (substantial control); FR, at pp. 59530-59530 (ownership interest).
4. 31 CFR Section 1010.380(d)(2)(ii) (ownership encompasses a variety of forms, including direct, indirect, joint, through intermediaries, in trust, etc.).
5. Calculation of the threshold percentage is described in 31 CFR Section 1010.380(d)(2)(iii).
6. An ownership interest includes equity, stock, capital or profits interest, as well as more complex forms of ownership. 31 CFR Section 1010.380(d)(2)(i).
7. 31 CFR Section 1010.380(d)(2)(ii)(C)(2).
8. FR, at p. 59532.
9. 31 CFR Section 1010.380(d)(2)(ii), (iii).
10. 31 CFR Section 1010.380(d)(1)(i); FR, at pp. 59523, 59526-59527.
11. 31 CFR Section 1010.380(d)(1)(i)(C).
12. See FR, at pp. 59527-59528 (noting that a bad actor may use an advisor to set up a reporting company, and the advisor might be officially named as the individual responsible for making all decisions with respect to the entity, but in actuality, the bad actor controls the decisions of the advisor).
13. 31 CFR Section 1010.380(d)(1)(ii)(B).
14. FR, at p. 59529.
15. 31 CFR Section 1010.380(d)(3); FR, at p. 59533.
16. 31 CFR Section 1010.380(a)(2)(iv); FR, at p. 59533.

17. FR, at p. 59535.
18. *Ibid.*
19. 31 CFR Section 1010.380(b)(2)(i).
20. FR, at pp. 59521-595522 ("FinCEN believes that it would limit the usefulness of the database and create opportunities for evasion if beneficial owners who have substantial control over reporting companies through exempt entities do not need to be reported.")
21. 31 CFR Section 1010.380(d)(2)(ii)(C)(2).
22. 31 CFR Section 1010.380(d)(1)(ii)(B).
23. *Ibid.*
24. 31 CFR Section 1010.380(d)(1)(i)(C).
25. 31 CFR Section 1010.380(d)(1)(i)(B).
26. *Ibid.*
27. 31 CFR Section 1010.380(d)(2)(ii)(C)(3).
28. *Ibid.*
29. 31 CFR Section 1010.380(d)(2)(ii)(C)(2)(i).
30. 31 CFR Section 1010.380(d)(2)(ii)(C)(2)(ii).
31. 12 Del. C. Section 3315(b) refers to a discretionary trust interest as a "mere expectancy" and not a property right.
32. A "senior officer" is defined as "any individual holding the position or exercising the authority of a president, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of official title, who performs a similar function." 31 CFR Section 1010.380(f)(8); 31 CFR Section 1010.380(d)(1)(i)(A).
33. 31 CFR Section 1010.380(d)(1)(i)(B), (C).
34. 31 CFR Section 1010.380(d)(2)(ii)(C)(1).
35. FR, at pp. 595521-595522.
36. 31 CFR Section 1010.380(d)(3)(iii).
37. 31 CFR Section 1010.380(d)(1)(i)(A).
38. 31 CFR Section 1010.380(d)(2)(ii)(C)(1).
39. *Ibid.*
40. 31 CFR Section 1010.380(d)(1)(i)(C).
41. 31 CFR Section 1010.380(d)(1)(ii)(D); 31 CFR Section 1010.380(d)(2)(ii)(D).
42. See, e.g., 12 Del. C. Section 3339 ("Designated Representatives for Trusts").
43. 31 CFR Section 1010.380(d)(3)(ii).
44. See FR, at p. 59523.
45. 31 CFR Section 1010.380(b); FR, at p. 59514.
46. FR, at p. 59514.
47. *Ibid.*
48. 31 CFR Section 1010.380(g).
49. See, e.g., 12 Del. C. 3313.
50. 31 CFR Section 1010.380(b)(4); See FR, at p. 59525.
51. 31 CFR Section 1010.380(b)(4)(C)(iii).
52. FR, at pp. 59529-59530.