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Joining the Global Community in the Fight Against Financial Secrecy: Congress Enacts the Corporate Transparency Act to Mandate Beneficial Ownership Reporting in the United States

Glenn G. Fox, Raj A. Malviya,** Michael A. Breslow,*** and Kevin L. Shepherd*****

I. INTRODUCTION

Congress enacted the Corporate Transparency Act (“CTA”) at the beginning of 2021 as part of the National Defense Authorization Act for Fiscal Year 2021 (“NDAA”).¹ The CTA represents the most significant anti-money laundering (“AML”) legislation adopted in the United States since the revisions to the Bank Secrecy Act (“BSA”), implemented by the USA PATRIOT Act in 2001. The CTA adds a new section to the BSA entitled “Beneficial Ownership Information Reporting Requirements.”²

By enacting the CTA and the U.S. Treasury issuing implementing regulations, the United States now has a legal and regulatory framework to improve financial transparency and to combat the use of anonymous entities, such as corporations and limited liability companies (“LLCs”), for illicit purposes such as money laundering, tax evasion and the financing of terrorism. The CTA effectively creates a national beneficial ownership registry by requiring certain business entities to report their “beneficial owners” and “company applicants” to the U.S. Treasury’s Financial Crimes Enforcement Network (“FinCEN”).

On December 8, 2021, FinCEN issued a notice of proposed rulemaking (Docket Number 2021-26548 and RIN 1506-AB49, the “NPRM”) to promulgate proposed regulations that would implement

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¹ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, §§ 6401-03, 134 Stat. 4604, 4604-05.

² 31 U.S.C. § 5336.

the portion of the CTA dealing with the disclosure of beneficial ownership information (“Proposed Disclosure Regulations”).³ On September 29, 2022, FinCEN released final regulations (“Final Disclosure Regulations”).⁴ Importantly, FinCEN has yet to issue two other sets of regulations as part of the CTA roll out—the access and customer due diligence regulations.

Through the NPRM, FinCEN requested comments from the public on certain provisions in the Proposed Disclosure Regulations. The American College of Trusts and Estates Counsel (“ACTEC”) submitted comments to FinCEN on February 4, 2022.⁵ Some of these comments were reflected in beneficial changes in the Final Disclosure Regulations.⁶

Section II of this Article outlines the context of the global push towards financial transparency and the international and domestic pressures faced by the United States to take action on financial transparency. These efforts culminated in the adoption of certain regulatory measures in recent years, and ultimately the CTA at the beginning of 2021, and the Final Disclosure Regulations in September of 2022. Section III of this Article addresses key substantive provisions of the CTA and the Final Disclosure Regulations, including an outline of compliance requirements and explanations of important terms such as “beneficial owner,” “reporting company” and “company applicant.” Finally, Section IV of this Article addresses highlights from ACTEC’s comments to the Proposed Disclosure Regulations.

II. THE GLOBAL PUSH TOWARDS FINANCIAL TRANSPARENCY

A. International Efforts Relating to Beneficial Ownership and International Pressure on the United States

The 200 member nations⁷ of the Financial Action Task Force (“FATF”) have been in agreement that anonymously accessing the financial system through the use of entities is a significant vulnerability to

³ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69,920 (proposed Dec. 8, 2021) (to be codified at 31 C.F.R. pt. 1010).

⁴ See Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59,498 (Sept. 30, 2022) (to be codified at 31 C.F.R. pt. 1010).

⁵ AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL LETTER TO FINCEN REGARDING CORPORATE TRANSPARENCY ACT FINCEN NOTICE OF PROPOSED RULEMAKING OF REGULATIONS FOR BENEFICIAL OWNERSHIP INFORMATION REPORTING REQUIREMENTS ACTEC REPLIES TO QUESTIONS 15, 16, 17, 20 & 21 (Feb. 4, 2022) (available for download at <https://www.regulations.gov/comment/FINCEN-2021-0005-0323>) [hereinafter ACTEC Comments].

⁶ See *infra* Section IV.C.

⁷ *Who We Are*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/about/whoweare/> [<https://perma.cc/GE7S-V2BU>].

money laundering and terrorist financing. The United States is a founding member of the FATF and has agreed to implement its so-called Forty Recommendations which are measures to combat money laundering and terrorist financing.⁸ The FATF specifically targets the use of anonymous entities in Recommendation 24.

Recommendation 24 provides, in pertinent part, as follows:

Countries should assess the risks of misuse of legal persons for money laundering or terrorist financing Countries should ensure that there is adequate, accurate and up-to-date information on the beneficial ownership and control of legal persons that can be obtained or accessed rapidly and efficiently by competent authorities⁹

Until the adoption of the CTA, Europe was ahead of the United States in implementing the beneficial ownership and national registry mandates of Recommendation 24.¹⁰ Many countries had already adopted laws requiring the gathering of beneficial ownership information; however, in the eyes of the international community, the United States has failed to satisfy its commitment to implement Recommendation 24.¹¹

The FATF “mutual evaluation process” is a large-scale peer review method by which the FATF evaluates and publicizes member countries’ degrees of compliance with the Recommendations.¹² In 2016, FATF issued the United States a “Non-Compliant” rating for Recommendation

⁸ See FIN. ACTION TASK FORCE, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION: THE FATF RECOMMENDATIONS 7 (Mar. 2022) [hereinafter Recommendations], <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>; see also *United States*, FIN. ACTION TASK FORCE, <https://www.fatf-gafi.org/countries/#United%20States> [<https://perma.cc/UFP8-NEJA>].

⁹ See Recommendations, *supra* note 8, at 22.

¹⁰ Compare William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, §§ 6401-03, 134 Stat. 4604, 4604-05, with Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, Amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and Repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, 2015 O.J. (L 141) 73, 75.

¹¹ See generally Council Directive 2015/849, 2015 O.J. (L 141) 75; see also William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, §§ 6401-03, 134 Stat. 4604, 4604-05, (demonstrating the significant time difference between the European Union’s Council Directive and the United States enacting the CTA).

¹² See Laurel S. Terry & José Carlos Llerena Robles, *The Relevance of FATF’s Recommendations and Fourth Round of Mutual Evaluations to the Legal Profession*, 42 FORDHAM INT’L L.J. 627, 627, 649-50, 718 (2018).

24 because the United States had “generally unsatisfactory measures for ensuring that there is adequate, accurate and updated information on [beneficial ownership] which can be obtained or accessed by competent authorities in a timely manner.”¹³ In its March 2020 update, FATF did not note any meaningful progress to the United States’ compliance with Recommendation 24.¹⁴

The mutual evaluation process appears to have had its intended effect in the case of the United States with the adoption of the CTA.

B. Domestic Policy – Public, Regulatory and Legislative Pressures

1. *Public and Media Pressure*

In addition to the international community, and U.S. and international media, many in Congress and law enforcement have decried that the United States is a place in which the corrupt and criminal continue to freely take advantage of the corporate anonymity offered by the corporation and LLC statutes of nearly every state. The leaks of the Panama Papers, the Paradise Papers, the Pandora Papers, and the FinCEN Files¹⁵ highlighted the unfortunate fact that anonymous entities are routinely abused by the corrupt for tax evasion, money laundering and the financing of terrorism. Further, a CBS News 60 Minutes report from January 31, 2016, entitled “Anonymous, Inc.” highlighted that U.S. lawyers seem enthusiastic to facilitate the movement and concealment of illicit funds into the American financial system through the use of opaque limited liability entities.¹⁶ The New York Times’ Towers of Se-

¹³ FIN. ACTION TASK FORCE, ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING MEASURES – UNITED STATES, FOURTH ROUND EVALUATION REPORT 226 (Dec. 2016), <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>.

¹⁴ See FIN. ACTION TASK FORCE, ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING MEASURES – UNITED STATES, 3RD ENHANCED FOLLOW-UP REPORT & TECHNICAL COMPLIANCE RE-RATING 8 (Mar. 2020), <https://www.fatf-gafi.org/media/fatf/documents/reports/fur/Follow-Up-Report-United-States-March-2020.pdf>.

¹⁵ See generally *Center Unit, the ICIJ, Releases Panama Papers*, CTR. FOR PUB. INTEGRITY (Apr. 3, 2016), <https://www.icij.org/investigations/fincen-files/fincen-files-investigation-named-pulitzer-prize-finalist/> [<https://perma.cc/P5BB-YPPG>]; see also Rocco Fazzari, *Offshore Trove Exposes Trump-Russia Links and Piggy Banks of the Wealthiest 1 Percent*, ICIJ (Nov. 5, 2017), <https://www.icij.org/investigations/paradise-papers/paradise-papers-exposes-donald-trump-russia-links-and-piggy-banks-of-the-wealthiest-1-percent/> [<https://perma.cc/MH37-TM8S>]; see also Michael Hudson, *FinCEN Files Investigation Named Pulitzer Prize Finalist*, ICIJ (June 11, 2021), <https://www.icij.org/investigations/fincen-files/fincen-files-investigation-named-pulitzer-prize-finalist/> [<https://perma.cc/69M9-RU8L>].

¹⁶ See Steve Kroft, *Anonymous, Inc.*, CBS News (Jan. 31, 2016), <http://www.cbsnews.com/news/anonymous-inc-60-minutes-steve-kroft-investigation/> [<https://perma.cc/5Z6U-ZEY6>].

crecy series highlighted the frequency with which luxury real estate is purchased with foreign wealth through anonymous entities.¹⁷ The United States continues to be viewed as a jurisdiction permissive to financial secrecy.¹⁸

2. *United States Regulatory Efforts*

Despite this negative reputation, the United States has made important efforts in recent years to satisfy Recommendation 24 and to limit the abuse of corporate anonymity. First, in 2016, FinCEN issued regulations (“CDD Regulations”) requiring a financial institution when opening a bank account to gather identifying information on the individuals who own a 25% or greater equity interest in a “legal entity customer” and on a single individual who has “significant responsibility to control, manage, or direct a legal entity customer,” such as a director or officer of a corporation or a manager of an LLC.¹⁹

In 2016, FinCEN began issuing geographic targeting orders (“GTOs”), which require title insurance companies to provide beneficial ownership information for legal entities used to make high-end cash and wire purchases of residential real estate in several U.S. metropolitan areas.²⁰ The data gathered as a result of the GTOs have been useful to FinCEN in its efforts to track the illicit flow of funds into the residential real estate market.

III. THE CTA AND FINCEN FINAL DISCLOSURE REGULATIONS

Congress enacted the CTA to require corporations, LLCs, certain partnerships, and indirectly trusts, to disclose information on their beneficial owners and to help to bring the U.S. into compliance with Recommendation 24. The disclosure requirements of the CTA cast a broad net, can be onerous, and are riddled with exceptions. The CTA affects all practitioners who advise on and carry out entity formation, governance, planning and tax compliance (e.g., lawyers, accountants, financial advisors, business consultants, and more).

¹⁷ See *Towers of Secrecy: Piercing the Shell Companies*, N.Y. TIMES, <https://www.nytimes.com/news-event/shell-company-towers-of-secrecy-real-estate> [<https://perma.cc/P5TM-JYR9>].

¹⁸ See Mark Bou Mansour, *US Tops Financial Secrecy Ranking as G7 Countries Upend Global Progress on Transparency*, TAX JUST. NETWORK (May 17, 2022), <https://taxjustice.net/press/us-tops-financial-secrecy-ranking-as-g7-countries-upend-global-progress-on-transparency/> [<https://perma.cc/6FK2-3J6N>].

¹⁹ 31 C.F.R. § 1010.230(d)(1)-(2) (2020).

²⁰ See *FinCEN Takes Aim at Real Estate Secrecy in Manhattan and Miami*, FINCEN (Feb. 16, 2016), https://www.fincen.gov/sites/default/files/news_release/20160113.pdf.

Under the Final Disclosure Regulations, the CTA has an effective date of January 1, 2024.²¹ Reporting companies in existence prior to January 1, 2024 must file their initial reports under the CTA by January 1, 2025.²² Reporting Companies formed (for domestic entities) or registered (for foreign entities) on or after January 1, 2024 must file their initial reports within 30 days after formation or registration.²³

This Section outlines the substantive legislative provisions of the CTA, as amplified by the Final Disclosure Regulations.

A. Key Definitions of the CTA

The CTA requires “reporting companies” to disclose specific information regarding their “beneficial owners” and “company applicants” to FinCEN.²⁴ In addition, the Final Disclosure Regulations require specific information on the reporting company itself to be disclosed to FinCEN.²⁵ The CTA creates two types of reporting companies: the “domestic reporting company” and the “foreign reporting company.”²⁶

1. “Reporting Company”

The CTA defines a reporting company as follows:

(11) Reporting company—The term “reporting company”—

(A) means a corporation, limited liability company, or other similar entity that is—

- (i) created *by the filing of a document with a secretary of state or a similar office* under the law of a State or Indian Tribe; or
- (ii) formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe²⁷

The CTA does not define “other similar entity,” but the Final Disclosure Regulations emphasize that “other similar entity” is defined to mean any other entity that is created by the filing of a document with the state Secretary of State or formed under the law of a foreign country and registered to do business in the U.S. by the filing of a document with the state Secretary of State.²⁸ This definition is intended to apply to

²¹ See Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59,498, 59,498 (Sept. 30, 2022) (to be codified at 31 C.F.R. pt. 1010.380).

²² See *id.* at 59,592 (to be codified at 31 C.F.R. pt. 1010.380(a)(1)(iii)).

²³ See *id.* at 59,591-92 (to be codified at 31 C.F.R. pt. 1010.380(a)(1)(i)-(ii)).

²⁴ 31 U.S.C. § 5336(b)(1)-(2).

²⁵ See 87 Fed. Reg. at 59,592 (to be codified at 31 C.F.R. pt. 1010.380(b)(1)(i)).

²⁶ See *id.* at 59,508.

²⁷ 31 U.S.C. § 5336(a)(11)(A) (emphasis added).

²⁸ See 87 Fed. Reg. at 59,593 (to be codified at 31 C.F.R. pt. 1010.380(c)(1)(i)).

limited partnership (LPs), limited liability partnerships (LLPs), limited liability limited partnerships (LLLPs) and business statutory trusts.

Twenty-three types of entities are specifically excluded from the definition of reporting company, such as, for example, entities with a physical presence in the United States with over twenty full-time employees and which file federal tax returns reporting more than \$5 million in gross receipts or sales, tax-exempt organizations, and other entities that do not pose significant risks of transparency-related concerns, such as publicly traded companies, bank and bank-type entities, credit unions, insurance companies, certain public accounting firms and other regulated businesses.²⁹

Private trusts *are not* specifically included in the definition of reporting company (because a private trust is not formed through filing a document with a state or Indian Tribe). In its comments to the Proposed Disclosure Regulations, ACTEC asked FinCEN to confirm that a private trust is not a reporting company.³⁰ The Final Disclosure Regulations do not do so, however; private trusts that own interests in reporting companies are captured under the definition of “beneficial owner” in the Final Disclosure Regulations, discussed next.

2. “Beneficial Owners”

The CTA defines a “beneficial owner” as follows:

- (3) Beneficial owner.—The term “beneficial owner”—
- (A) means, with respect to an entity, an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—
 - (i) exercises substantial control over the entity; or
 - (ii) owns or controls not less than 25 percent of the ownership interests of the entity³¹

Accordingly, there is a control test and an ownership test for a reporting company to identify its beneficial owners. The Final Disclosure Regulations provide three indicia for substantial control. First, service as a senior officer of a reporting company indicates that an individual has substantial control.³² Second, an individual with authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body) of a reporting company will be considered to

²⁹ See *id.* (to be codified at 31 C.F.R. pt. 1010.380(c)(2)); see also 31 U.S.C. § 5336(a)(11)(B).

³⁰ See ACTEC Comments, *supra* note 5, cmt. IV(A).

³¹ 31 U.S.C. § 5336(a)(3)(A).

³² 87 Fed. Reg. at 59,594 (to be codified at 31 C.F.R. pt. 1010.380(d)(1)(A)).

have substantial control.³³ Third, an individual with authority for direction, determination, or substantial influence over, important decisions of a reporting company will be deemed to have substantial control over the reporting company.³⁴

The Final Disclosure Regulations identify ownership and control factors as pertaining to matters relating to estate planning and trusts. The Final Disclosure Regulations provide that an individual may directly or indirectly own or control an ownership interest in a reporting company by virtue of “joint ownership with one or more other persons of an undivided interest in such ownership interest[,]” or “through another individual acting as a nominee, intermediary, custodian, or agent on behalf of such individual.”³⁵ As such, a person acting as an attorney in fact on behalf of another who has a 25% ownership interest in a reporting company is a beneficial owner who must be reported by the reporting company.

With respect to trusts or “similar arrangements” (perhaps, for example, a civil law *stiftung* under non-US law or a non-charitable foundation under Wyoming law) that hold an ownership interest in a reporting company, the following individuals are considered beneficial owners: (1) “a trustee of the trust or other individual (if any) with the authority to dispose of trust assets;” (2) “a beneficiary who: (i) is the sole permissible recipient of income and principal from the trust; or (ii) has the right to demand a distribution of or withdraw substantially all of the assets from the trust;” or (3) “a grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust.”³⁶ Presumably these are the only types of trustees, beneficiaries, and grantors who are reportable as beneficial owners under the CTA and Final Disclosure Regulations, but it is noteworthy that the language of the Final Disclosure Regulations that precedes the above provisions states as follows: “[a]n individual may directly or indirectly own or control an ownership interest of a reporting company through any contract, arrangement, understanding, relationship, or otherwise, *including*”³⁷ The word “including” implies that other types of trustees, beneficiaries, and grantors may be captured by the Final Disclosure Regulations. With that said, it could also be assumed that if the Final Disclosure Regulations intended to include other trustees, beneficiaries, and grantors they would have done so. Needless to say, the ambiguity of the word “including” will lead some more conservative reporting companies to over-report

³³ *Id.* (to be codified at 31 C.F.R. pt. 1010.380(d)(1)(B)).

³⁴ *Id.* at 59,594-95 (to be codified at 31 C.F.R. pt. 1010.380(d)(1)(C)).

³⁵ *Id.* at 59,595 (to be codified at 31 C.F.R. pt. 1010.380(d)(2)(ii)(A), (B)).

³⁶ *Id.* (to be codified at 31 C.F.R. pt. 1010.380(d)(2)(ii)(C)).

³⁷ *Id.* (to be codified at 31 C.F.R. pt. 1010.380(d)(2)(ii)).

their beneficial owners when a trust owns an interest in the reporting company by including discretionary beneficiaries of the trust as beneficial owners.

3. “Company Applicant”

The CTA defines a “company applicant” for purposes of the reporting requirements as an individual who directly files a document to create (with respect to a domestic reporting company) or first register (with respect to a foreign reporting company) a reporting company with a Secretary of State or similar office of a state,³⁸ and also includes the individual who is primarily responsible for directing or controlling the individual to file the document. The Final Disclosure Regulations thus envision that a reporting company will have no more than two company applicants. One can easily envision lawyers and their staff (e.g., associate, paralegal, legal assistant), who regularly assist clients with the formation of entities, falling within the definition of “company applicant.” Unlike for a reporting company or its beneficial owners, a company applicant’s information is not required to be updated.³⁹ In addition a reporting company in existence prior to January 1, 2024, the effective date of the CTA, need not report the company applicant’s information.⁴⁰

B. Information to be Disclosed

The CTA and the Final Disclosure Regulations require that the reporting company disclose specific information about itself, its beneficial owners and its company applicant.⁴¹ For each reporting company, the reporting company must report the following:

- Name (including d/b/a)
- Business Address
- Jurisdiction of formation
- Unique identification number⁴²

³⁸ See 31 U.S.C. § 5336(a)(2); see also Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59,498, 59,596 (Sept. 30, 2022) (to be codified at 31 C.F.R. pt. 1010.380(e)).

³⁹ See 87 Fed. Reg. at 59,592 (to be codified at 31 C.F.R. pt. 1010.380(a)(2)(i)) (noting that changes concerning a *reporting company* or *its beneficial owners* must be reported to FinCEN in an update within 30 calendar days); see also 87 Fed. Reg. at 59,593 (to be codified at 31 C.F.R. pt. 1010.380(b)(3)(i)) (updates filed pursuant to subpart (a)(2) “shall reflect any change . . . concerning a *reporting company* or *its beneficial owners*.” (emphasis added)).

⁴⁰ See *id.* at 59,593 (to be codified at 31 C.F.R. pt. 1010.380(b)(2)(iv)).

⁴¹ See 31 U.S.C. § 5336(b)(2) (discussing reporting requirements); see also 87 Fed. Reg. at 59,592 (to be codified at 31 C.F.R. pt. 1010.380(b)).

⁴² 87 Fed. Reg. at 59,592 (to be codified at 31 C.F.R. pt. 1010.380(b)(1)(i)(A)-(F)).

For each beneficial owner and company applicant, the following information is required to be submitted to FinCEN:

- Legal name
- Date of birth
- Residential address for beneficial owners
- Business address for professional company applicants, and residential address for other company applicants
- Unique identifying number from an acceptable identification document or FinCEN identifier
- An image of the document from which the unique identifying number was obtained⁴³

C. Due Dates for Reports

As noted above, the CTA imposes a series of deadlines for submitting reports to FinCEN. Reporting companies in existence prior to January 1, 2024 must file their initial reports under the CTA by January 1, 2025.⁴⁴ Reporting companies formed (for domestic) or registered (for foreign) on or after January 1, 2024, must file their initial reports within 30 days after formation or registration.⁴⁵ If there is a change in beneficial ownership information, the entity will have to file an updated report within 30 days of the change.⁴⁶

D. Penalties

The CTA imposes criminal and civil penalties for willfully providing false or fraudulent beneficial ownership information, or for willfully failing to report complete or updated beneficial ownership information.⁴⁷ A violation may result in a civil penalty of \$500 per day for each day that the violation continues or is not remedied, or a criminal fine of not more than \$10,000, imprisonment for not more than two years, or both.⁴⁸

IV. ACTEC'S COMMENTS TO PROPOSED DISCLOSURE REGULATIONS

On February 4, 2022, ACTEC submitted comments ("ACTEC Comments") to the Proposed Disclosure Regulations prepared by a subcommittee of the FATF Task Force.⁴⁹ The ACTEC Comments raised

⁴³ 87 Fed. Reg. at 59,592 (to be codified at 31 C.F.R. pt. 1010.380(b)(1)(ii)(A)-(E)).

⁴⁴ *See id.* (to be codified at 31 C.F.R. pt. 1010.380(a)(1)(iii)).

⁴⁵ *See id.* at 59,591 (to be codified at 31 C.F.R. pt. 1010.380(a)(1)(i) and (ii)).

⁴⁶ *See id.* at 59,592 (to be codified at 31 C.F.R. pt. 1010.380(a)(2)).

⁴⁷ *See* 31 U.S.C. § 5336(h)(1) (addressing penalties).

⁴⁸ *See id.* § 5336(h)(3).

⁴⁹ *See* ACTEC Comments, *supra* note 5.

several concerns about the Proposed Disclosure Regulations in an effort to seek clarity; however, FinCEN largely declined to adopt the suggestions in the ACTEC Comments.

A. Trusts as Beneficial Owners

As to situations in which a trust holds an ownership interest in a reporting company, the ACTEC Comments pointed out that the Proposed Disclosure Regulations do not adequately address all situations in which an individual has a direct ownership or control interest, such as (a) fully discretionary trusts with multiple beneficiaries; (b) contingent beneficiaries; (c) bifurcated or unmeasurable interests; (d) a beneficiary, trustee, or third party who holds a power of appointment; (e) certain third parties or fiduciaries given power to remove trustees, amend, decant, appoint trust assets (e.g., Trust Protectors, Trust Directors, and non-adverse parties); and (f) certain advisors appointed separate from trustees (e.g., investment advisor or special securities committee).⁵⁰

Identifying the trustee of the trust is a relatively straightforward proposition in many cases; however, questions arise when an entity is serving as trustee. The ACTEC Comments noted that it is not clear whether the reporting company is required to determine which individuals (such as employees) within that entity might fit within the provision. It was also noted that it is not clear how the provision is to be applied in a situation in which the ordinary roles of a trustee are divided among multiple parties.⁵¹

The types of trusts that are covered by the Final Disclosure Regulations – namely, trusts with one income beneficiary who may withdraw the principal – are fairly uncommon, and many trusts have multiple beneficiaries and are discretionary. One concern was that the Proposed Disclosure Regulations are silent as to other types of trusts and that the types of trusts that were addressed appear to be only illustrative.⁵² The ACTEC Comments were concerned that the likely effect will be that a reporting company will be conservative and may “over-comply” with the Proposed Disclosure Regulations in this context;⁵³ however, no

⁵⁰ *Id.* cmt. II.

⁵¹ *Id.*

⁵² See 87 Fed. Reg. at 59,594 (to be codified at 31 C.F.R. pt. 1010.380(d)(3)(ii)).

⁵³ See ACTEC Comments, *supra* note 5, cmt. II. The ACTEC Comments suggested four proposed modifications to the Proposed Disclosure Regulations relating to trusts, which were not adopted in the Final Disclosure Regulations. Specifically, (1) If a trust owns an ownership interest in a reporting company, the reporting company should be required to identify only (a) the trustee, (b) a beneficiary who is the sole permissible recipient of income and principal from the trust; or has the right to demand a distribution of or withdraw substantially all of the assets from the trust, and (c) the grantor. (2) A reporting company that reasonably relies on information provided by a trustee as to

changes to the Proposed Disclosure Regulations were adopted in the Final Disclosure Regulations addressing these concerns.

B. Definitions of Reporting Companies and Exceptions

Among other observations unrelated to trusts, ACTEC offered discrete comments on the definitions of domestic reporting company and foreign reporting company, emphasizing that FinCEN should confirm that “other entity” will not be expanded to include entities that do not require filing with the state, such as private trusts.⁵⁴ FinCEN did not adopt that suggestion in the Final Disclosure Regulations.

C. Definition of “Company Applicant”

ACTEC also opined that the Proposed Disclosure Regulations contained an overly broad definition of “company applicant,” because the definition applies not only to those who file the formation document, but also those who “direct or control” the filing of such document by another person.⁵⁵ This could be several individuals in the chain of command of a client’s directive to form the entity. It would be quite difficult for reporting companies to know and gather the identifying information on the company applicant or the person who directed the filing of the formation documents. Based on comments FinCEN received, it revised the definition of company applicant to only one or two individuals. The Final Disclosure Regulations do not require information that is reported for a company applicant to be updated if that information changes in the future.⁵⁶

V. CONCLUSION

The CTA represents a significant step forward for the United States for increasing transparency and reducing the risk that anonymous entities may be used for money laundering, tax evasion or the financing of terrorism. The United States, although belatedly, has joined the international community in creating a legal and regulatory framework for identifying the individuals behind a broad class of legal entities. The world

whether any beneficiary or other individual should be included in a report shall not be subject to penalties if that information is later determined to be inaccurate. (3) To extend the timeframe for a reporting company to report on beneficial ownership changes with respect to beneficiaries of trusts from thirty days to one year for changes other than a change to the trustee. (4) If a trust company is serving as trustee and has authority to dispose of trust assets, the trustee itself and not any of its employees should be reported. *Id.*

⁵⁴ See *id.* cmt. IV(A).

⁵⁵ See *id.* cmt. III.

⁵⁶ See 87 Fed. Reg. at 59,592 (to be codified at 31 C.F.R. pt. 1010.380(a)(2)(i)).

community will be watching to see whether, and how well, the CTA achieves the policy goal of making money laundering and terrorist financing more difficult in the United States' financial system.

