

Title

The federal Corporate Transparency Act (CTA), whose constitutionality is currently being tested in the courts, creates another statutory exception to the trustee's duty of confidentiality

Text

The federal Corporate Transparency Act (CTA), effective January 1, 2024, whose constitutionality is currently being tested in the courts, follows in the footsteps of the IRC in that it creates a limited statutory exception to the beneficiary's right to have the affairs of the trust kept in confidence, a right that is an incident of the beneficiary's right to the trustee's undivided loyalty. As the CTA is no friend of the trust beneficiary, trustees need to be ever mindful of their fiduciary duties in matters pertaining to CTA compliance. Consider by analogy the trustee investor who refrains from lawfully exploiting on behalf of the trust public information that he has come upon privately. He is negligent if he is ignorant of the difference between material inside information and public information; he violates the duty of loyalty if he appreciates the difference but foregoes exploiting the investment opportunity out of unwarranted concern for his personal liability.

Turning now to some elements of the CTA that implicate the fiduciary principle in the trust context. While a "nonstatutory" trusteeship is generally not a Reporting Company, personal information regarding certain equitable interests incident to the trusteeship may need to be reported to the Financial Crimes Enforcement Network (FinCEN), such as that of the holder of a general inter vivos power of appointment or a non-holder who is the sole permissible recipient (?) of trust income and principal, provided the holder or non-holder constructively enjoys via the entrustment a 24% or more ownership interest in a Reporting Company. Each such owner of an equitable interest is hereinafter referred to as "the beneficiary." The Reporting Company may have to report to FinCEN the beneficiary's full legal name, date of birth, home address, and a unique identifying number from a valid identification document, such as a passport or driver's license, together with an image of the document. In most cases, the Reporting Company perforce will be relying on the trustee to disclose to it all this personal information. Consequently, the trustee well in advance owes the beneficiary a fiduciary duty to inform him and/or his counsel of all the personal information that the trustee intends to furnish the Reporting Company for CTA-compliance purposes; and if personal counsel is not involved, to see to it that the beneficiary, again, well in advance, has a full, subjective understanding of the facts and law that arguably support all this routine disclosure to the Treasury Department's criminal-enforcement bureau.

In *National Small Business United v. Yellen*, 2024 WL 899372 (March 1, 2024), the U.S. District Court, Alabama, N. D., held that the CTA is unconstitutional because it cannot be justified as an exercise of Congress' enumerated powers. The Department of the Treasury was enjoined from enforcing the CTA against the plaintiffs. On March 11, 2024, the government filed a notice of appeal. In the meantime, the government intends to continue enforcing generally the CTA's provisions, except against the plaintiffs, namely a one Isaac Winkles and namely the National Small Business Associations and its members as of March 1, 2024. Other constitutional challenges to the CTA in the works are: *Boyle v. Yellen et al*, Docket No. 2:24-cv-00081 (D. Me. Mar. 15, 2024) and *Small Business Association of Michigan et al v. Yellen et al*, Docket No. 1:24-cv-00314 (W.D. Mich. March 26, 2024). A trust beneficiary's right in equity to information and confidentiality is taken up generally in §5.4.1.1 of *Loring and Rounds: A Trustee's Handbook* (2024), which section is reproduced in the appendix immediately below.

Appendix

§5.4.1.1 [Beneficiary's] Right to Information and Confidentiality

[from *Loring and Rounds: A trustee's Handbook* (2024)].

Right to Information. *The trustee's duty to account to the beneficiary.* A trustee has a duty to account to the beneficiary.⁴ As a practical matter, this duty translates into a right in the beneficiary to all information needed to protect the beneficiary's equitable interest.⁵ Moreover, this right is not limited to “qualified” or “fairly representative” beneficiaries.⁶ The beneficiary has a right to full information about the concerns of the trust at all reasonable times⁷ and may examine the trust instrument,⁸ the trust property,⁹ accounts, vouchers,¹⁰ and usually the opinions of counsel consulted by the trustee in respect to trust affairs.¹¹ The Restatement (Third) of Trusts is generally in accord.¹² The trustee has a duty to furnish this information “with reasonable promptness” to the beneficiary and/or the beneficiary's accountant and attorney.¹³ “A beneficiary who shows that the trust fund is in danger can obtain, not only an interim injunction, but also an interim order directing a party to provide information about the location of trust property, or property

⁴See §6.1.5 of this handbook (trustee's duty to account to the beneficiaries).

⁵UTC §813(a) (Duty to Inform and Report). *See also* Rest. (Second) of Trusts §173 cmt. c (suggesting that “[a]lthough the terms of the trust may regulate the amount of information which the trustee must give and the frequency with which it must be given, the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust”); *Healy v. Axelrod Constr. Co. Pension Plan & Trust*, 787 F. Supp. 838, 844 (N.D. Ill. 1992) (holding that an ERISA fiduciary has a duty to disclose and inform a beneficiary of material facts which affect the interests of the beneficiary and of the fiduciary's knowledge of prejudicial acts by an employer such as failing to contribute to a pension fund); §6.1.5.1 of this handbook (the trustee's duty to provide necessary information to the beneficiaries). *See generally* Rust E. Reid, et al., *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 Real Prop. Prob. & Tr. J. 541 (1996).

⁶Rest. (Third) of Trusts §82 cmt. e.

⁷Rest. (Third) of Trusts §82 cmt. e; Bogert §§961, 861.

⁸Lewin ¶23-07 (England).

⁹Lewin ¶23-04 (England).

¹⁰Lewin ¶23-04 (England).

¹¹*See, e.g.*, *Fletcher v. Fletcher*, 253 Va. 30, 480 S.E.2d 488 (Va. 1997) (affording beneficiary access to copies of trust instrument and schedule of assets); *Taylor v. Nationsbank Corp.*, 481 S.E.2d 358 (N.C. App. 1997) (affording beneficiaries access to instruments of trusts that were currently operative but denying them access to documentation which pertained to trusts that the settlor had revoked before his death); *Gump v. Wells Fargo Bank, Nat'l Ass'n*, 237 Cal. Rptr. 311, 335 (1987) (concluding that when an attorney counsels a trustee to aid him in his duties as administrator of a trust, the trust beneficiaries are ordinarily to be treated as clients of the attorney and the “joint clients” exception to the attorney-client privilege established by Evidence Code §962 (California) applies). *See generally* 2A Scott on Trusts §173 n.5 and accompanying text; Lewin ¶23-08 (England); §8.8 of this handbook (whom does counsel represent?); Revised Reg. 9 (providing that a national bank administering a collective investment fund shall provide the fund's financial report to beneficiaries of participating trusts entitled to periodic accountings. 12 C.F.R. §9.18(b)(6)(iv) (1997)). Note, however, that the examination reports of bank examination agencies have a “qualified” privilege. *See, e.g.*, *Leslie Fay Cos., Inc. Sec. Litig.*, 152 F.R.D. 42, 44 (S.D.N.Y. 1993); *In re Subpoena Served upon Comptroller of Currency*, 967 F.2d 630, 633 (D.C. Cir. 1992); *First E. Corp. v. Mainwaring*, 21 F.3d 465 (D.C. Cir. 1994).

¹²Rest. (Third) of Trusts §82, cmt.

¹³Rest. (Third) of Trusts §82(2).

claimed to be trust property, or property into which trust property can be traced.”¹⁴

Right of assignees of equitable interests to information. The general right to information applies as well to an assignee of the beneficial interest.¹⁵ “On petition by the trustee or a beneficiary, however, a court may limit the frequency or extent of such inquiries by one or more of the beneficiaries, weighing the remoteness or substantiality of their interest in the trust against the burdens, intrusiveness, and privacy considerations that may be involved.”¹⁶

Information pertaining to the trustee’s interactions with regulators and counsel. That having been said, the beneficiary may not discover the work product of a bank examining agency, *e.g.*, the Comptroller of the Currency, unless the agency waives its bank examination privilege.¹⁷ Also, in England, it has been held that one’s right not to answer questions or give information that would incriminate oneself extends to trustees in civil accounting actions brought by beneficiaries.¹⁸ For a discussion of possible limitations on a beneficiary’s right to gain access to the trustee’s communications with trust counsel, the reader is referred to §8.8 of this handbook.

Rights of remaindermen to information. The most important thing that the trustee must keep in mind is that the income beneficiary does not possess this right to information alone: The remaindermen, including those with contingent interests,¹⁹ also share this right. Unless limited by the terms of the trust,²⁰ a trustee must not succumb to the pressure of a beneficiary to withhold information about the trust from other beneficiaries. This situation usually occurs when the current beneficiary is a member of a generation older than the remainder interests and does not want the existence of the trust disclosed. Typically, the current beneficiary is a parent of the beneficiaries who will take the remainder. To be sure, the settlor by express language may limit the rights of the remaindermen to information, but there is a limit to what a court will tolerate when it comes to limiting a beneficiary’s ability to protect the equitable interest.²¹ A trustee who may operate in secret is essentially unaccountable—a condition that is inimical to the concept of the trust.

Judicial proceedings and the remainderman’s right to notice. A contingent equitable remainder-in-corpore incident to a trust relationship, even one that is subject to the nonexercise of a power of appointment, is a property interest. By virtue of the Due Process Clause of the Fourteenth Amendment, one who possesses such an interest is entitled to advance notice and an opportunity to be heard in a judicial proceeding that

¹⁴Lewin ¶38-09. *See generally* §7.2.3.1.5 of this handbook (the preliminary or temporary injunction to preserve trust property) and §7.2.3.1.3 of this handbook (tracing (following property into its product)).

¹⁵Lewin ¶23-11A (England).

¹⁶Rest. (Third) of Trusts §82 cmt. e.

¹⁷Frankford Tr. Co. v. Advest, Inc., No. 93-329, 1995 WL 491300, at *2 (E.D. Pa. Aug. 18, 1995).

¹⁸Lewin ¶23-14 (England).

¹⁹UTC §813(a) (providing that unless reasonable under the circumstances, a trustee shall promptly respond to a beneficiary’s request for information related to the administration of the trust). *See* 2A Scott on Trusts §§172, 173.

²⁰*See* Rest. (Second) of Trusts §173 (providing that beneficiaries may examine trust instrument unless its terms provide otherwise). *See, e.g.*, Taylor v. Nationsbank, 481 S.E.2d 358 (N.C. Ct. App. 1997), *review granted, then withdrawn*, 493 S.E.2d 57 (N.C. 1997); Fletcher v. Fletcher, 480 S.E.2d 488 (Va. 1997) (both affording beneficiaries full access to trust instruments).

²¹*See, e.g.*, *In re Short Revocable Living Tr.*, 465 P.3d 903 (Haw. 2020). *Cf.* UTC §105(b)(9) (providing that the settlor may not waive the trustee’s duty to respond to the request of a beneficiary of an irrevocable trust for trustee’s accountings and “reports” and other information reasonably related to the administration of the trust). *Cf. also* UTC §105(b)(8) (providing that the settlor may not waive the trustee’s duty to notify the current beneficiaries and the presumptive remaindermen of an irrevocable trust who are 25 years of age or older of the existence of the trust and of their right to request trustee’s accountings and “reports” and other information reasonably related to the administration of the trust).

could adversely affect that interest.²² The U.S. Constitution pre-empts state law to the contrary.²³

The qualified beneficiary concept. Under the UTC, any person who has a present or future interest in an irrevocable trust, whether vested or contingent, and any holder of a power of appointment over the trust property is entitled upon request to the trustee's accountings or "reports," as well as any other information reasonably related to the trust's administration.²⁴ This right may not be waived by the settlor.²⁵ The UTC further provides that the trustee has an affirmative duty to notify the "qualified beneficiaries" of an irrevocable trust who are 25 years of age or older of the existence of the trust and of their right to request accountings or "reports" and other information related to the administration of the trust.²⁶ The trustee may not be relieved of this duty by express language in the governing instrument.²⁷ A "qualified beneficiary" is either a current beneficiary or a presumptive remainderman.²⁸

Under the UTC, in a critical matter such as when equitable property rights, whether vested or contingent, are at stake, notice to the qualified beneficiaries would *not* relieve the trustee of the duty to give adequate notice *to the nonqualified beneficiaries*, either by giving actual notice to them or by giving notice to a duly appointed guardian ad litem charged with representing their interests. The virtual representation exception to the rule applies only if there is no conflict of interest between the qualified and nonqualified beneficiaries. In most cases, however, there will be such a conflict. Here is the UTC's commentary on the limitations of the qualified beneficiary concept: "Due to the difficulty of identifying beneficiaries whose interests are remote and contingent, and because such beneficiaries are not likely to have much interest in the *day-to-day affairs of the trust*, the UTC uses the concept of "qualified beneficiary" ... to limit the class of beneficiaries to whom certain notices must be given or consents received."²⁹

Examples given are trustee resignations, successor trustee appointments, combining trusts, and the like. In other words, notice to the qualified beneficiaries is sufficient only in quasi-ministerial undertakings that generally do not affect one way or another equitable property rights, absent special facts. A trustee who fails to parse the due process limitations of the qualified beneficiary concept does so at his peril. In the words of Justice J.D. Heydon of the High Court of Australia, "the silent waters of equity run deep—often too deep for legislation to obstruct."³⁰

Waiver by the settlor via the trust terms of the trustee's duty to keep the beneficiaries informed. Section 105 of the UTC imposes some mandatory duties on the trustee. Two of them "have been extremely controversial and have failed to gain traction in UTC-adopting jurisdictions." Here are the two §105 mandatory duties:

- [8] the duty under §813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports.
- [9] the duty under §813(a) to respond to the request of a [qualified] beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the

²²See *Roth v. Jelley*, 45 Cal. App. 5th 655, 259 Cal. Rptr. 3d 9 (2020).

²³See *Roth v. Jelley*, 45 Cal. App. 5th 655, 259 Cal. Rptr. 3d 9 (2020).

²⁴UTC §105(b)(9).

²⁵UTC §105(b)(9).

²⁶UTC §105(b)(8).

²⁷UTC §105(b)(8).

²⁸UTC §103(12).

²⁹UTC §103, cmt.

³⁰The Hon. Justice J.D. Heydon, A.C., *Does statutory reform stultify trust law analysis?*, 6 Tr. Q. Rev., Issue 3, at 28 (2008) [a STEP publication].

administration of the trust.

As of 2013, only Nebraska, New Mexico, and Florida “have actually and substantially adopted the duty to notify found in §105(b) (8).”³¹ There is less to this mini-revolt, however, than meets the eye. “Waiver by a settlor of the trustee’s duty to keep the beneficiaries informed of the trust’s administration does not otherwise affect the trustee’s duties. The trustee remains accountable to the beneficiaries for the trustee’s actions.”³² All beneficiaries are owed this general duty, not just the qualified beneficiaries. True, the UTC imposes on the trustee a duty to involve the qualified beneficiaries in the “day-to-day affairs of the trust” to a limited degree, such as by keeping them informed of trustee resignations and the like. This is an additional burden imposed on the trustee by the UTC. In no way does this imposition, however, derogate from, or otherwise erode, the trustee’s critical general duty—a duty that trustees have had since time immemorial—to account to all the beneficiaries, qualified and nonqualified alike, for his or her actions. It remains the case that the beneficiary is entitled to whatever information the beneficiary must have in order to effectively defend and protect his or her equitable property rights, whether those rights be vested or contingent, except, perhaps, (1) while the trust is revocable or (2) if the five-year period of the UTC’s §1005(c) statute of ultimate repose has run.

Whether the trustee may disclose to the beneficiary only selected excerpts from the trust instrument. The practice of furnishing certain classes of beneficiaries with excerpts only of a governing instrument is a questionable one,³³ even in the face of express, unambiguous authority to do so in the governing instrument.³⁴ This Restatement (Third) of Trusts is generally in accord:

Because one’s enforcement of his or her rights as a trust beneficiary normally requires an awareness of the terms of the trust, a beneficiary is ordinarily entitled to obtain a copy of the trust. Sometimes, a request for the needed terms of the trust can be satisfied by copies of relevant provisions or a suitably redacted copy of the trust instrument. In situations involving or likely to involve litigation, however, selected or edited terms of the trust will be unsatisfactory. Accordingly, the easiest and most helpful response to a beneficiary’s request (and ordinarily *required* if demanded) is for the trustee simply to send a copy of the instrument when the request is made.³⁵

At least one court recognizes a particular exception to the general principle that a trust beneficiary is entitled to a complete, un-redacted copy of the trust instrument upon request, namely, when the beneficiary is immediately entitled under the terms of the trust only to a fixed-sum pecuniary/cash distribution and the trustee is ready, willing, and able to make the distribution.³⁶ Presumably, if a “specific distributee” has

³¹John Spencer Treu, *The Mandatory Disclosure Provisions of the Uniform Trust Code: Still Boldly Going Where No Jurisdiction Will Follow*, 82 Miss. L.J. 597, 611 (2013).

³²UTC §105, cmt.

³³*See, e.g.*, UTC §813(b)(1) (providing that upon request of a beneficiary, the trustee shall promptly provide the beneficiary with a copy of the trust instrument); *Taylor v. Nationsbank Corp.*, 125 N.C. App. 515, 520; 481 S.E.2d 358, 362 (1997) (holding that beneficiaries are entitled to review the entire trust instrument, not just the clauses that grant them their equitable interests).

³⁴“Even limitations of these types, however, cannot properly prevent beneficiaries, even underage beneficiaries (or their duly appointed representatives), from requesting and receiving information currently necessary for the protection of their interests” Rest. (Third) of Trusts §82 cmt. e.

³⁵Rest. (Third) of Trusts §82 cmt. e.

³⁶*Schrage v. Seberger Living Tr.*, 52 N.E.3d 45 (Ind. Ct. App. 2016) (“In examining the policy considerations involved, we are persuaded by the Trustee’s suggestion that the right of a remainder beneficiary to obtain a complete copy is based upon such beneficiary’s interest in the administration of the trust for the preservation of assets, in which the remainder beneficiary is typically entitled to a share of the trust principal. Specific distributees such as Schrage, by contrast, are entitled to a specific sum of

reasonable grounds for doubting the trustee's assurances that a specific sum (or unique item) is the beneficiary's only economic interest under the trust, then the beneficiary would be entitled to peruse the entire instrument, not just those portions that pertain to the cash distribution.

The trust term that purports to partially negate the trustee's duty to inform. Under the UTC, the settlor may negate the trustee's duty to provide a beneficiary upon request with a copy of the trust instrument and the requirement that the trustee provide annual reports to the "qualified beneficiaries."³⁷ On the other hand, "[t]he furnishing of a copy of the entire trust instrument and preparation of annual reports may be required in a particular case ... if such information is requested by a beneficiary and is reasonably related to the trust's administration."³⁸

Upon death of settlor of revocable trust. Upon the death of the settlor of a revocable trust, the trustee upon request may be obliged to furnish those succeeding to the equitable interests with a copy of the instrument.³⁹ In one jurisdiction, by statute, this obligation extends upon request to the "heirs" of the deceased settlor.⁴⁰

The right to confidentiality. On the other hand, the beneficiary's right to information under certain circumstances may conflict with another beneficiary's right to confidentiality, the latter right being an incident of the trustee's duty of loyalty.⁴¹ The conflict arises not in the context of the trustee's duty to refrain from making unnecessary disclosures of the affairs of the trust to third parties, which is virtually absolute; it arises in the context of balancing the interests of multiple classes of beneficiaries. Is someone with a remote contingent remainder interest, for example, entitled to all the information that the trustee was privy to when a discretionary distribution to a permissible life beneficiary was made? That information might include medical information or intimate details of the beneficiary's marital situation. The answer is "of course not." On the other hand, an abuse of the trustee's discretion could improperly eliminate the remainderman's property interest altogether.⁴²

There are no easy answers. The trustee must exercise good judgment in distinguishing the fishing expedition from legitimate efforts to protect one's property. "Appropriate disclosure can usually be provided in general terms that allow reasonable protection for confidential, private, or sensitive information."⁴³ While the contingent remaindermen ought not to be furnished with all the details of the discretionary distribution, they at least are entitled to know that discretion has been exercised; they certainly are entitled to a copy of the governing instrument. When the trustee is unable to reconcile a beneficiary's "need to know" with the

money or other unique property whereby the management of trust assets would not affect the amount of the distribution.").

³⁷UTC §105 cmt.

³⁸UTC §105 cmt.

³⁹*Cf.* UTC §813(b)(3) (requiring the trustee of a revocable trust within sixty days after acquiring knowledge of the settlor's death to notify the qualified beneficiaries, usually the current beneficiaries and the presumptive remaindermen, of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report).

⁴⁰Cal. Prob. Code §16061.5 (1999).

⁴¹*See* §6.2.3 of this handbook (duty of confidentiality); Rest. (Third) of Trusts §78 cmt. i. Rust E. Reid, et al., *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 Real Prop. Prob. & Tr. J. 541, 590 (1996) ("Like an umpire who must call a runner either safe or out, the trustee must make decisions that almost always could be considered adverse to some beneficiary's interest."). For a case illustrating the tension between the trustee's duty to disclose and the beneficiary's right to confidentiality, *see* Fletcher v. Fletcher, 480 S.E.2d 488 (Va. 1997) (the fact that plaintiff was beneficiary of one of three trust shares not grounds for denying him access to entire trust document and its schedule of assets).

⁴²*See* 2A Scott on Trusts §173 n.3 and accompanying text.

⁴³Rest. (Third) of Trusts §50 cmt. e(1).

“privacy concerns” of the cobeneficiary, then the trustee may have to give some thought to asking the court to fashion some response to the beneficiary's information request that balances the competing considerations of interest protection and confidentiality.⁴⁴ Involving the courts, however, should not be undertaken lightly. Besides the attendant time and expense, the very purpose of the endeavor could be compromised by the resultant publicity.

Cross-reference. The disclosure requirements of the Corporate Transparency Act take precedence over a trust beneficiary's equitable right to confidentiality. See generally §7.3.4.2(d) of this handbook.

⁴⁴Rest. (Third) of Trusts §82, cmt. f. *See generally* §8.42 of this handbook (the difference between a complaint (petition) for instructions and a complaint (petition) for declaratory judgment).