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Community Associations Newsletter

The New Corporate Transparency Act What Boards and Managers Need to Know

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In 2021, Congress enacted the Corporate Transparency Act (the “CTA”) as an amendment to the Bank Secrecy Act. The purpose of this law is to make it more difficult for smaller business entities to engage in money laundering by requiring these entities to provide information about the natural persons who directly or indirectly own or operate the entity. The CTA required the United States Department of Treasury’s Financial Crimes Enforcement Network (“FinCEN”) to adopt regulations to implement the provisions of the CTA, to create the forms required to be filed, and the procedures for filing them. Those regulations have now been adopted and are effective.

The regulations require many types of legal entities to file a “beneficial ownership information” (“BOI”) report to FinCEN. Specifically, any entity that is a corporation, a limited liability company (“LLC”), or any entity created through a filing with a Secretary of State or any similar office under the law of any State or Indian tribe is required to submit a BOI. As a result, the rule requires the following types of entities to file reports, unless they fall within an exemption:

- U.S. corporations
- U.S. LLCs
- Other similar U.S. entities such as limited partnerships and business trusts/statutory trusts
- Non-U.S. corporations, LLCs and other similar entities that are registered to do business in the United States

Given that community associations are created through a filing with the State Corporation Commission, Common Interest Community Board, or other similar state agencies, it is our opinion that our community association clients are required to comply with the reporting requirements of the CTA, including the filing

of a BOI. However, certain very large community associations may be exempt from compliance. An entity is exempt if they comply with the following three criteria for the prior tax year:

- More than twenty (20) full-time employees.
- Gross receipts in excess of \$5,000,000.
- Physical office in the United States.

Our community association clients that cannot satisfy all three of these requirements are required to file a BOI with FinCEN. It is important to note that this requirement must be met each year. An association can be exempt one year but not exempt the next if the number of their full-time employees falls to twenty (20) or below or their gross receipt falls to \$5,000,000 or below.

Community associations that are required to file reports must disclose certain information about what the CTA refers to as the “beneficial owners.” A beneficial owner is:

- [A]n 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 entity.

The 25% ownership criterion is fairly straightforward. In practice, for a community association, this test likely will be triggered for communities under development by a declarant, for commercial condominiums or for smaller associations.

However, the “exercises substantial control” standard is what most associations likely are going to be required to disclose. Substantial control includes the following:

- serving as a senior officer of the company;
- having authority over the appointment or removal of any senior officer or a majority or dominant minority of the directors or manager(s) of the company;
- having any direction, determination, or decision power over, or substantial influence over, important matters affecting the company, including but not limited to:
 - the nature, scope, and attributes of the business of the company, including the sale, lease, mortgage, or other transfer of any principal assets of the company;
 - the reorganization, dissolution, or merger of the company;
 - major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the company;

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- the selection or termination of business lines or ventures, or geographic focus, of the company;
- compensation schemes and incentive programs for senior company officers;
- the entry into or termination, or the fulfillment or non-fulfillment, of significant contracts of the company; or
- amendments of any substantial governance documents of the Company, including the Articles or similar formation documents, bylaws, and significant policies or procedures of the Company; and,
- any other form of substantial control over the Company.

Under this standard, an association will have to disclose information relating to the members of their Board of Directors. Under the CTA, a non-exempt community association will need to file a report with FinCEN disclosing the following information about each “beneficial owner”, including each member of the Board of Directors: (i) full legal name; (ii) date of birth; (iii) current address [business or residential]; and (iv) either a unique identifying number from an acceptable form of identification (e.g., unexpired passport, driver’s license) or a FinCEN identifier number.

The CTA also creates an ongoing obligation to update this information. Specifically, a non-exempt community association will need to disclose any change in any of the information previously submitted (e.g., a change of address of a beneficial owner) within thirty days of the change through an amendment to the initial annual filing. Also, if a community association becomes aware that any information included on a report filed with FinCen is inaccurate, it will have 30 days from the date the community association became aware of the inaccuracy to file a report correcting the inaccuracy.

The obligation to timely update the information included in a report will be particularly challenging for community associations given the frequency of turnover of members of the Board of Directors. As a result, it will be imperative for our clients to keep accurate and up to date records, and to communicate with their attorney to ensure that reports are filed in a timely manner to avoid the risk of penalties being imposed upon the association.

Community associations (and any other non-exempt entities) have some time to comply. The Reporting Rule goes into effect on January 1, 2024, and all non-exempt entities will have one year (until January 1, 2025) to file their initial report with FinCEN.

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Any non-exempt entities, including community associations, created on or after January 1, 2024 will be required to file their report with FinCEN within 30 days after the effective date of their creation, which for our community association clients will be the date of recordation of the condominium instruments or date of filing of the Articles of Incorporation. Companies formed or registered after the effective date of the Reporting Rule are required to include information on both Company Applicants and beneficial owners. The Company Applicant is the person responsible for the filing of the documents creating the entity, which in many cases will be the lawyer who prepared and filed the Articles of Incorporation or condominium instruments, as applicable. Unlike the beneficial owner report, there is no obligation to submit a report updating information on the Company Applicant after the initial submission.

The penalties for non-compliance are substantial. Reporting violations, subject to limited safe harbors, will be fined \$500 per day, and willful violations are a felony subject to a fine of up to \$250,000. Therefore, it will be imperative for community associations and their management companies to file their initial reports in a timely manner, to accurately track and report changes in information reported to FinCEN, and to submit their subsequent annual reports in a timely manner.

While this memorandum focuses on our community association clients, many of the corporate clients of our firm will face these same reporting obligations. The attorneys at Rees Broome are prepared to assist our clients in meeting their reporting obligations. We look forward to assisting you in meeting these reporting requirements. If you would like our assistance, please contact your attorney at Rees Broome and we can walk you through the requirements and assist in the preparing the reports.

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