

March 2024

Community Associations and Corporate Newsletter

An Update on the Corporate Transparency Act

By: Todd A. Sinkins

In September 2023, we provided a newsletter describing the requirements of the Corporate Transparency Act (the “CTA”), which became effective January 1, 2024, and imposes on many small businesses, including community associations, an obligation for their “beneficial owners” to file a “beneficial ownership information” (“BOI”) report with FinCEN, the Financial Crimes Enforcement Network of the Department of the Treasury. Existing corporations and most community associations will need to have their beneficial owners file their BOI reports with FinCEN by December 31, 2024.

In recent weeks, new developments have put the long-term obligation to comply with the CTA in flux. In a decision dated March 1, 2024, a judge in the United States District Court for the Northern District of Alabama, in *National Small Business United, D/B/A The National Small Business Association, et al. v. Yellen*, ruled that the CTA is unconstitutional. However, while the judge issued an injunction prohibiting enforcement of the CTA, the court limited its ruling only to whether the CTA can be imposed on the plaintiffs and members of the plaintiffs in that particular case. Consequently, while the *National Small Business United* decision contains a substantive constitutional analysis as to why that judge believes the CTA to be unconstitutional, the CTA continues to apply to most of our community association clients, who are still obligated to file BOI reports by no later than December 31, 2024.

On another front, the House of Representatives passed legislation to delay the date for CTA compliance by a year – from December 31, 2024 until December 31, 2025. A companion bill was introduced in the Senate in January, which we understand from our firm’s legislative contacts currently does not have sufficient support to pass. We will keep you updated as this issue develops.

So, while there is movement on multiple fronts that may result in the elimination or delay in the need to comply with the CTA by submitting BOI to FinCEN, our clients that fall within the scope of the CTA still need to need to comply with the CTA by submitting their BOI to FinCEN by the current December 31, 2024 deadline. To assist our clients, Rees Broome has developed a program to assist our clients to comply with this BOI registration requirement.

For those corporate and community association clients that are required to have their beneficial owners file a BOI report with FinCEN pursuant to the CTA, our team can provide the information and links necessary to assist beneficial owners with submitting an initial BOI report to FinCEN, in a secured manner, including any required updates. We also work with our clients to monitor changes in the persons serving in beneficial ownership roles so that timely updates are filed with FinCEN. For services beginning in 2024, we will be charging an annual fee of \$350, plus \$50 for each update following the initial submissions. The filing requirements and determination of beneficial owners can be complex for some corporations and community associations. In those situations where a more detailed analysis is required, we will bill separately under our typical hourly rates.

However, for most of our clients, it is clear that incorporated community associations and all of our corporate and limited liability company clients are required to comply if they are not exempt. An entity is exempt if it can meet all of the following requirements 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 clients that cannot satisfy all three of these requirements, and who are not currently recognized as 501(c) tax exempt entities by IRS rules, are required to file a BOI with FinCEN. It is important to note that this filing requirement must be met each year after the initial filing deadline – currently December 31, 2024. An entity 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 receipts fall to \$5,000,000 or below.

As for community associations that are not incorporated, in Virginia and DC, residential condominiums are required to have their BOI filed for their beneficial owners due to the manner in which a residential condominium is registered and created. In Maryland, that analysis is less certain, although the conservative approach would be to submit BOI to FinCEN. We do not believe unincorporated commercial condominiums are required to submit BOI information.

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. The “exercises substantial control” standard is what most associations likely are going to be required to disclose. Substantial control includes any persons serving in the following roles:

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- 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 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, incurrence of any significant debt, or approval of the operating budget 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.

We are confident that members of boards of directors, officers of many of our community association and corporate entity clients, and owners of at least 25 percent of the ownership interests of such clients are required to submit their BOI to FinCEN. These individual “beneficial owners” will need to file a report with FinCEN disclosing the following information about themselves, 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 (which can be obtained from FinCEN and used for multiple filings if the beneficial owner is connected with multiple reporting entities).

As noted above, the CTA also creates an ongoing obligation to update this information. Therefore, community association and corporate clients that are not exempt will need to disclose any change in any of the information previously submitted (e.g., a change of address of a beneficial owner, changes in who is serving on a board of directors, etc.) within thirty (30) days of the change through an amendment to the initial annual filing. We will be asking our clients that utilize our FinCEN reporting service to provide us with such updated information on a timely basis and also keep us informed as to the date of any annual meeting at which directors are elected or the appointment of replacement officers or directors to allow us to push out the information necessary to assist our clients and their beneficial owners in complying with their BOI filing requirements.

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 and up to

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two years in jail. Therefore, it will be imperative that BOI filings be made in a timely manner, and that our clients have a means to track and report changes in information reported to FinCEN accurately, and to submit their subsequent annual reports in a timely manner.

The attorneys at Rees Broome are prepared to assist our clients in meeting their reporting obligations. We look forward to supporting you in meeting these reporting requirements and to keeping you abreast of any new and emerging issues impacting the CTA and its application and timing, either legislatively or via court decisions.

If you have questions about your role in complying with CTA, please contact your attorney at Rees Broome and we can connect you with our CTA compliance team to walk you through the requirements and assist in preparing the mandatory reports.

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