COMMUNITY MATTERS

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We Have to Report What?!
Complying with the Corporate Transparency Act

by **Daniel E. Melchi, Esq.**

The Corporate Transparency Act (the "CTA") is a federal law passed into law in 2021 that, unless it is amended before December 31, 2024, will have a serious impact on community associations' reporting and compliance requirements before the end of next year. The CTA requires nearly all corporations, including community associations, to file reports with the Financial Crimes Enforcement Network ("FinCEN") (a division of the United States Treasury Department) which include certain specific information regarding the directors of the association. Failure to comply with the requirements of the CTA can result in heavy daily fines and/or imprisonment.

This article aims to inform boards and managers what to expect in the future, so that your community associations will be in compliance with this law.

The purpose of the CTA is to end the practice of "shell corporations" and to deter money laundering, terrorism financing, and tax evasion in the United States. In other words, all corporations in this country must now have a "face" and a responsible party to whom law enforcement can more easily turn should there be illegal activity discovered to be taking place.

To accomplish this, any non-exempt corporation in the United States is required to have its "beneficial owners" registered with FinCEN. A "beneficial owner" is defined as any individual who "exercises substantial control over the entity." That clearly includes any director on an association's board of directors. Exemptions are made for employees of other corporations who work for an association, so that would likely include an association's property manager. A non-director who has control over an association's bookkeeping or bank accounts might be considered a "beneficial owner" under this broad definition, however.

The CTA requires that such corporations file reports to FinCEN with the following information for each director or any non-exempt individual who exercises substantial control over the association:

(1) Full legal name,
(2) Date of birth,
(3) Residential or business address, and
(4) Unique identifying number from an acceptable form of identification such as a passport or government-issued identification card.

Because the stated goal of the CTA is to deter financial crimes, already heavily regulated industries such as banking, stock trading, and non-profit 501(c) corporations are exempt from the CTA reporting requirements. Those corporations are already subject to similar, if not more, stringent governmental and law enforcement oversight.

It is important to note that while many articles written about the CTA often state that "non-profit" corporations are exempt from the reporting requirements of the CTA, that oversimplified statement is misleading in the context of community associations. While it is true that community associations in Georgia are non-profit corporations, they are not considered "tax exempt 501(c)" corporations under specific IRS guidelines. Only tax exempt 501(c) corporations are specifically exempted from the reporting requirements by the CTA, and community associations do not qualify as 501(c) corporations.

The CTA imposes civil and criminal fines in the amount of up to $500.00 per day for failure of a corporation to comply with its registration requirements, and it also authorizes imprisonment for willful criminal violations, including providing false information. The CTA also states that all information provided to FinCEN is to remain confidential and sealed, and it is only to be released to law enforcement upon proper subpoena or warrant. There are criminal penalties in place for the unauthorized release of FinCEN data.

For community associations in existence on or before January 1, 2024 (in other words, all of them, as of the publication of this article in late 2023), such associations have until December 31, 2024 to comply with the reporting requirements of the CTA. Beginning in 2024, FinCEN will have forms available for associations to begin complying with the CTA's reporting requirements; however, as stated, there is still plenty of time as of now for associations to comply.

The Community Association Institute ("CAI") is actively reviewing the CTA and working with federal elected officials and regulators to try to have an exemption drafted and put into a bill that will, hopefully, become law before the end of 2024 in order to exempt community associations from the reporting requirements of the CTA. There are legitimate concerns that the reporting requirements of the CTA may deter homeowners from wanting to volunteer to be on boards of directors if they have to provide personal information such as dates of birth and photo identification to a government agency, even if the law requires such information to remain sealed. There is also the legitimate argument to be made that community associations have not historically been used for money laundering and terrorism, and that the requirement of reporting under the CTA is simply unwarranted for them.

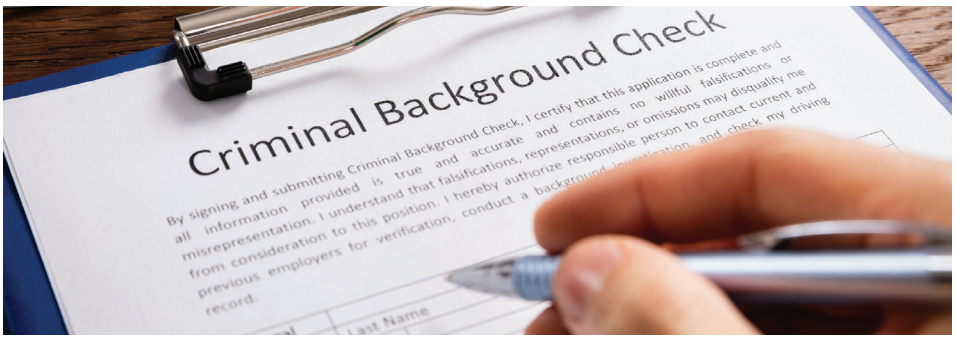
What is our recommendation?

While the CTA's reporting requirements are certainly something new and something to keep on the radar, our firm would generally suggest waiting until possibly September or October of 2024 before gathering the information and filling out the FinCEN reports and submit them. By that time, the submission website and forms should be more fully functional and ready, and it will still provide plenty of time to comply with the December 31, 2024 deadline. Additionally, and hopefully, an exemption may have been passed by that time that exempts community associations from the CTA's reporting requirements.

Why Your Association Should Avoid Direct Involvement with the Tenant Approval Process

by | **Cynthia C. Hodge, Esq.**

Several times per year, directors and officers will ask us: Should my Condo (or HOA) review background checks for renters as grounds for approving or disapproving a lease?



The answer: No, it should not. Let me explain why.

To begin, it is very natural for community developments, such as condominiums or common law homeowner associations, to consider background checks. With the continual rise in entity ownership and ownership for investment purposes over the last decade, the topic of leasing and leasing administration is prevalent. When you serve on the board of directors, you aim to be problem-solvers and achieve solutions that best serve the entire community. However, establishing rules and regulations where the association is responsible for controlling the renter approval process goes against federal and state law and must be avoided.

More specifically, the Federal Fair Housing Act and the Georgia Fair Housing Act (or "Acts") prohibit discrimination on the basis of race, color, religion, sex, national origin, familial status, and disability (or handicap). Community associations (condominiums, HOAs, POAs, etc.) fall within the definition of "housing provider" under the Acts, and, as such, associations are prohibited from creating or enforcing rules that discriminate against people based on any of these categories.

Additionally, courts have held that even rules that appear neutral could violate the Acts if they adversely affect a protected class of people. This is called "disparate impact." If a rule, regulation, or law, while appearing nondiscriminatory on its face actually has negative effects on a protected class of persons, then courts will examine the "actual intent" of the parties who made the rule, regulation, or law. That is where Boards can get into trouble if a judge determines that the "actual intent" of the rule, regulation, or law, while appearing to be neutral on its face, was really a cloaked attempt to unlawfully discriminate against a protected class under the guise of a neutral activity.

For example, suppose a condominium board of directors wants to establish rules associated with the tenant approval process. The board wants to require owners to produce copies of criminal background checks of the tenant(s) with the lease form for the board to review. The board believes that this right falls within their governing documents since it says that the board shall "approve or disapprove the form of said lease." The board's reasoning may be to protect all association members and provide an additional measure of security or safety from possibly dangerous residents (renters).

Here, the rule itself appears to be quite neutral. However, as counsel, we would advise that this rule will likely have a disparate impact on a protected class or classes of people, and such rule should not be adopted or enforced. For starters, associations are not in the habit of requiring criminal background checks of owners who become members of the Association; so, why target renters? Moreover, here in the United States, many minorities (including African Americans and Hispanic people) are arrested, convicted, and incarcerated at greater rates than other races in the general population. As such, a rule that would prohibit tenants from occupying a Unit or Lot based on their criminal record might disproportionately affect certain minorities. Because it will likely have a disparate impact on a protected class or classes of people, there is a very high likelihood that a court is going to delve into the motives behind the enactment of this rule along with each and every person who campaigned for it, including private communications and personal matters to ensure that it was enacted for an actually unlawful intent.

Importantly, boards should examine their leasing provisions for language that reads as follows: "Nothing herein shall be construed as giving the Association the right to approve or disapprove a proposed lessee; the Board's approval or disapproval shall be limited to the form of the proposed lease." The term "lessee" is used interchangeably with tenant or renter. This language appears in many governing documents, usually under the subtitle of "Leasing Provisions." This reiterates that the Association should not have any authority on saying yes or no to the proposed renter.

To that end, boards may ask: What can we do? Often, boards have rulemaking authority to establish policies for the type of lease form that owners should use. Within that form can be an addendum, or checklist, that requires owners to perform criminal background checks and credit reports of potential renters. While the actual reports are not produced to the Association, it can ensure that owners are performing their due diligence in evaluating potential renters.

If your community association is interested in proposing rules and lease forms to address this issue, consult with your association's counsel regarding the best procedure for doing so.

INTERPLEADER:
I JUST GOT SUED AND I LIKE IT

by | **Stephen A. Finamore, Esq.**

Being served with a summons and a lawsuit can be an unsettling event. A uniformed, and usually armed, deputy or marshal appears unannounced, asks for the person in charge, and hands over a stack of legal papers while stating that the association "has been served." Anxiety and concern is quickly washed away by outrage. This lawsuit titled "Petition for Interpleader" surely involves some alleged frivolous or baseless claim against the association for breach of duty, misappropriation, or negligence resulting in damages. Regardless of the merit of this "interpleader" thing, the association is most certainly in for a fight. It must be bad news then, right? Fortunately, this is not a "bad news" situation. We can stop pacing and relax a bit. Maybe drink a cold glass of water.

A petition for interpleader is not a claim for relief against the association. In fact, getting served with a petition for interpleader is most often good news for the association. An interpleader petition (an "Interpleader") is filed when a party is holding funds that do not belong to them. The party holding the funds (the "Petitioner"), files the Interpleader because one or more other parties may have a claim to the funds. Since the Petitioner does not know who should receive the funds, and since the Petitioner does not want to get sued for giving the funds to the wrong party, it names all the parties in the Interpleader who may have a claim to the funds. Once served with the Interpleader, the parties who may have a claim to the funds (the "Respondents"), may then file answers to the Interpleader explaining why they are entitled to the funds ahead of the other Respondents.

The funds which are the subject of the Interpleader cases involving community associations are usually generated by the sale of real property, either by the county for unpaid taxes or by a foreclosing security deed holder of a loan against the property. In either circumstance, the sale generated more money than what was owed, leaving extra money (the "Excess Funds") that can be given out to other parties with claims against the property at the time of the sale. The Interpleader names the association because there may have been assessments owed by the owner as a lien against the property at the time of sale. If so, the association may have a claim to the Excess Funds.

If the association was owed money for assessments at the time of the tax sale or foreclosure, the association often has a superior claim to the Excess Funds relative to the other Respondents. Association covenants often contain a provision addressing lien priority. Commonly, the covenants express that the association's lien has priority over all liens except for the first mortgage or security deed and county taxes. Similarly, the Georgia Condominium Act and the Georgia Property Owners' Association Act both provide that the association's lien has priority over all other liens except for the mortgages or security deeds taken to purchase the property and the lien for county taxes.

Over the past several years, many of the tax sales and lender foreclosures have generated enough proceeds to cover the back taxes and balances owed to the foreclosing lender due to the increased value of real property in the past several years. Under such circumstances, the association, generally, has priority over every other interested party. For associations that file timely claims, this has been a tremendous benefit. The Excess Funds are often enough to cover everything that the association was owed at the time of sale. Often, there is no dispute among the parties that the association should receive the funds.

When served with a petition for Interpleader, do not panic. Contact your association's attorney immediately to review the petition to determine if the association may be entitled to recover from the Excess Funds.

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