

THE FEDERAL CORPORATE TRANSPARENCY ACT¹

Florida Community Associations

What is the Corporate Transparency Act (CTA)?

Starting January 1, 2024, the Corporate Transparency Act (CTA) will require that every new and existing community association in the State of Florida report and disclose specified information for any “beneficial owner” to the Department of the Treasury’s Financial Crimes Enforcement Network (FinCEN).² The penalty for failing to report the beneficial owner information to FinCEN can result in a civil penalty of \$500 per day that the violation continues, a potential fine of up to \$10,000, or 2-years in prison, or both.³

The CTA, which is part of the National Defense Authorization Act for Fiscal Year 2021 (NDAA), is a federal law that became effective on January 1, 2021. The primary purpose for the law is to combat the illicit use of the corporate structure to facilitate money laundering, the financing of terrorism, corruption, tax fraud, or any other unlawful activity.⁴ Unless exempt under the Act, the CTA requires that every “reporting company” must disclose specific information to FinCEN about the entity and any “beneficial owner” of the entity.⁵ For those non-exempt entities currently in existence, the corporation will have until January 1, 2025, to provide the required disclosures to FinCEN.⁶ For non-exempt entities formed on or after January 1, 2024, the CTA disclosures must be provided to FinCEN within 30-days of initial incorporation or registration.⁷ However, regarding the initial reporting requirements for non-exempt entities, FinCEN proposed a rule change at the end of September 2023, to extend the 30-day deadline to 90-days.⁸ Other than that

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² William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 (H.R. 6395), 134 Stat. 338, 116th Cong. 2d Sess. The CTA consists of §§ 6401-6403 of the NDAA.

³ N.D.A.A. § 6403(h)(3)(A); 31 U.S.C. §§ 5336(h)(1), 5336(h)(3)(A).

⁴ As part of its Congressional findings, the CTA provides that “malign actors seek to conceal their ownership of corporations, limited liability companies, or other similar entities in the United States to facilitate illicit activity, including money laundering, the financing of terrorism, proliferation financing, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud, and acts of foreign corruption, harming the national security interests of the United States and allies of the United States.” N.D.A.A. § 6402(3).

⁵ N.D.A.A. § 6403(b)(1); U.S. Treasury Dept., Financial Crimes Enforcement Network: Beneficial Ownership Information Reporting Requirements, Final Rule, 87 F.R. 59498 (Sept. 30, 2022) (cited herein as, 31 C.F.R. § 1010.380, et seq.)

⁶ N.D.A.A. § 6403(b)(1)(B); 31 C.F.R. § 1010.380(a)(1)(iii).

⁷ 31 C.F.R. § 1010.380(a)(1)(i).

⁸ Financial Crimes Enforcement Network, Notice of Proposed Rulemaking to extend the deadline for certain companies to file their beneficial ownership information reports (September 27, 2023): <https://www.fincen.gov/news/news-releases/fincen-issues-notice-proposed-rulemaking-extend-deadline-certain-companies-file>

one revision, no further rule changes to the beneficial reporting requirements were recommended by FinCEN.

What entities qualify as a “Reporting Company” under the CTA?

Generally, a “reporting company” is any legal entity that is created by the filing of a document with a Secretary of State or similar state office.⁹ The vast majority of community associations in the State of Florida are registered as not-for-profit corporations with the Florida Secretary of State. As such, a Florida not-for-profit community association (condominium association, cooperative association, or homeowners’ association), similar to other corporate entities registered with the Florida Secretary of State, would qualify as a “reporting company” under the CTA.

The CTA then identifies twenty-three (23) types of entities that are exempt from the reporting requirements.¹⁰ The only apparent exemption that could be available to a community association is provided to entities that qualify for tax exempt status under Section 501(c) of the Internal Revenue Code.¹¹ While entirely possible under the right circumstances, it is fairly rare for a condominium or homeowners’ association to qualify as a 501(c) tax exempt entity.¹² Generally, a community association collects assessments from its membership that are utilized for the private benefit of that membership. That “private purpose and benefit” will typically exclude a community association from being able to qualify as a 501(c) tax exempt entity.¹³ A Florida community association will usually utilize the tax exemption provided by Section 528 of the Internal Revenue Code.¹⁴ However, such an election under Section 528 will not exempt the community association from the CTA reporting and disclosure requirements.

Who is identified as a “Beneficial Owner” under the CTA?

⁹ N.D.A.A. § 6403(a)(11)(A); 31 C.F.R. § 1010.380(c)(1).

¹⁰ N.D.A.A. § 6403(a)(11)(B); 31 C.F.R. § 1010.380(c)(2).

¹¹ N.D.A.A. § 6403(a)(11)(B)(xix); 31 C.F.R. § 1010.380(c)(2)(xix); 26 U.S.C. § 501(c) (2022).

¹² See e.g., IRS Publication, 2023 - Private Benefit in Section 501(c)(4), (stating that “[a]n organization that primarily benefits private individuals is not exempt under Code section 501(c)(4).”) Retrieved from (<https://www.irs.gov/charities-non-profits/other-non-profits/private-benefit-in-section-501c4>); see also Rancho Santa Fe Ass'n v. United States, 589 F. Supp. 54 (S.D. Cal. 1984) (providing three elements necessary for a homeowners’ association to qualify as tax exempt under Section 501(c)(4) of the Internal Revenue Code); Flat Top Lake Ass'n, Inc. v. United States, 868 F. 2d 108 (4th Cir. 1989).

¹³ Id. If the organizational documents and purpose of the community association comply with the requirements of the Internal Revenue Code, a community association may qualify for federal tax exemption under either Section 501(c)(4) as a “social welfare organization”, or possibly Section 501(c)(7) as a “social club”. 26 U.S.C. § 501(c)(4) (2022); 26 U.S.C. § 501(c)(7) (2022).

¹⁴ 26 U.S.C. § 528 (2022). Section 528 specifically recognizes “homeowners’ associations” and “condominium management associations” as being exempt from federal income taxes. See also Harry Teichman and Jonathan Wilson, Corporate Transparency Act Poses Challenges for Homeowner Associations: Most HOAs Will Need to File in the Coming Year, Taylor English, Insights (February 14, 2023) <https://insights.taylorenglish.com/post/102i7r4/corporate-transparency-act-poses-challenges-for-homeowner-associations-most-hoas>.

A “beneficial owner” of a “reporting company” is identified as any “individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise exercises substantial control over the entity or owns or controls not less than 25 percent of the ownership interests of the entity.”¹⁵

In the Final Rule adopted by FinCEN, “substantial control” was further clarified and may “consist of directing, determining, or having substantial influence over important decisions made by the reporting company. These include, for example, ‘major expenditures or investments’ and ‘the selection or termination of business lines or ventures’ of the reporting company, among other things.”¹⁶ Further, any individual that serves as a senior officer or otherwise “directs, determines, or has substantial influence over important decisions” of the reporting company would qualify as a beneficial owner subject to the CTA.¹⁷

A director or officer on the board of a not-for-profit Florida community association has the ability and authority to “exercise substantial control” over the association and would thus qualify as a “beneficial owner” under the CTA. At this point, it is unclear as to whether an association’s community association manager would also qualify and need to be disclosed as a beneficial owner who exercises “substantial control” over the operation of the community association.

Further, while in most instances the owners of units or parcels in a community association would not be disclosed under the CTA, smaller projects comprising less than 5 parcels or units would be required to disclose all owners in the community, and not just elected directors. Arguably, in these instances, each owner would have “substantial control” over the association with at least a 25% ownership interest in the association.¹⁸

What must be disclosed to FinCEN?

The non-exempt entity (Reporting Company) must provide its full name, any D/B/A or fictitious names affiliated with the entity, its jurisdiction of formation, and a TIN, EIN, or other unique tax identification number for the entity.¹⁹ With regard to disclosure of director (Beneficial Owner) information under the CTA, the Act requires the following:

1. Full legal name of the director.
2. Date of birth for the director.
3. Current residential or business street address for the director.

¹⁵ N.D.A.A. § 6403(a)(3); 31 C.F.R. § 1010.380(d).

¹⁶ 31 C.F.R. § 1010.380(d)(1)(i)(C)(3).

¹⁷ 31 C.F.R. § 1010.380(d)(1)(ii)(A)(3).

¹⁸ N.D.A.A. § 6403(a)(3); 31 C.F.R. § 1010.380(d).

¹⁹ 31 C.F.R. § 1010.380(b)(1)(i).

4. A unique identifying number for the director.²⁰

The “beneficial owner” information provided through the disclosure requirements of the CTA are to be kept confidential by FinCEN and are not available to the public.²¹ Although, it is unclear whether supposedly confidential information held by the federal government is completely secure, given reports of recent leaks of income tax information of prominent people.²²

The Act further requires that the Reporting Company update its information within 30-days of any change to such information.²³ For a Florida community association, this means that within 30-days of an association’s annual election (or possibly a change of the community association manager), the FinCEN disclosure must be updated to include the information for any newly elected director.

However, requiring volunteer directors to disclose personal information to the Federal government to be included in a Federal financial crimes database operated by FinCEN, will certainly be a further hinderance to obtaining director volunteers from an association’s membership. The number of board volunteers will likely plummet when the volunteer learns that there are steep Federal sanctions for not reporting his or her personal information as required by the current CTA.

Not only must identifying information be disclosed for a “beneficial owner” of the reporting company, but the applicant who files the documents to initially form or maintain the corporation must also provide their own identifying information.

Who qualifies as an “applicant” under the CTA?

An applicant is any individual who “registers or files an application to register a corporation, limited liability company, or other similar entity formed under the laws of a foreign country to do business in the United States by filing a document with the secretary of state or similar office under the laws of a State or Indian Tribe.”²⁴ Applicant also includes “the person who is primarily responsible for directing such filing.”²⁵ For a Florida community association, the “applicant” will likely be one of the following people, (1) a director, (2) a community association manager, or (3) the Developer’s or Association’s attorney (and the attorney’s paralegal if applicable).

²⁰ N.D.A.A. § 6403(b)(2); 31 C.F.R. § 1010.380(b). This can be provided through a government issued passport, social security number, tax id number or an identification number from a state issued driver’s license or other state issued identification card.

²¹ N.D.A.A. § 6403(c)(2)(A).

²² Brian Faler, UPDATED: IRS consultant charged in massive leak of taxpayer data, Politico (Sept. 29, 2023), <https://www.politico.com/news/2023/09/29/irs-leak-charge-00119190>

²³ 31 C.F.R. § 1010.380(a)(2).

²⁴ 31 C.F.R. § 1010.380(e).

²⁵ Id.

There has been some commentary concerning an attorney’s disclosure of private client information to FinCEN, and whether there is an attorney-client privilege implication.²⁶ In an abundance of caution, the community association’s attorney may want to obtain appropriate waivers and acknowledgments from the “beneficial owners” specifically consenting to the disclosure of that information; particularly where the disclosure may include personal identifying numbers like social security, passport, or driver’s license numbers.

For non-exempt entities formed on or after January 1, 2024, the person providing FinCEN with the information, the “applicant”, must also provide their full legal name, date of birth, mailing address, and a “unique identifying number from an acceptable identification document.”²⁷ For those non-exempt entities that exist prior to January 1, 2024, the “applicant” is not required to disclose their own information.²⁸

The Future and Implementation of the CTA

The U.S. Department of the Treasury has estimated that the CTA will affect over 32 million existing companies and an additional 5 million new businesses every year.²⁹ Generally, the CTA only applies to small businesses with less than 20 employees and less than \$5,000,000 in annual gross income.³⁰

The potential risk factors for money laundering or the financing of terrorism through the illicit use of not-for-profit corporations in the United States is generally low.³¹ However, the detrimental effect and burden, both financial and administrative, that the FinCEN beneficial owner reporting requirements will place on small businesses nationwide is substantial. It is likely that not for profit community associations are simply collateral damage to the primary purpose behind the beneficial owner database being compiled by FinCEN. As of 2021, with approximately 358,000 community associations nationwide, actual instances or examples of a not-for-profit community association

²⁶ Johnathan Warner, Corporate Transparency Act To Have Major Impact On Clients And Attorneys, The Florida Bar Journal, Vol. 95, No. 6 (November/December 2021).
<https://www.floridabar.org/the-florida-bar-journal/corporate-transparency-act-to-have-major-impact-on-clients-and-attorneys/>

²⁷ N.D.A.A. § 6403(b)(2)(A); 31 C.F.R. § 1010.380(b)(1)(ii).

²⁸ 31 C.F.R. § 1010.380(b)(2)(iv).

²⁹ Letter from coalition of small business organizations to the Honorable Patrick McHenry, Chairman of the Committee on Financial Services, U.S. House of Representatives (September 12, 2023). (<https://www.caionline.org/Advocacy/Priorities/CTA/Documents/Joint-Trades-Letter-Protecting-Small-Business-Information-Act-9-12.pdf>)

³⁰ 31 C.F.R. § 1010.380(c)(2)(xxi) (Providing that companies with more than 20 employees and who generate more than \$5,000,000 in annual income are exempt from the reporting requirements.)

³¹ Federal Financial Institutions Examination Council (Nov. 2021). Charities and Nonprofit Organizations, FFIEC BSA/AML Examination Manual. <https://www.ffiec.gov/press/PDF/Charities-and-Nonprofit-Organizations.pdf>

being suspected or used as a front for money laundering or to finance a terrorist group are very few and far between if existing at all.³²

Another issue faced by community associations and other reporting companies is that the process to facilitate and implement the reporting requirements now mandated by the CTA has yet to be determined or established by FinCEN.³³ January 1, 2024, is fast approaching. There is a significant concern with regard to the current capability of FinCEN to handle and appropriately catalog the deluge of corporate information it will be inundated with starting January 1, 2024. FinCEN provides that all initial filings and reports can, supposedly, be submitted electronically.³⁴ However, there is currently no government system in place to handle the upcoming reporting deadline and there is commentary on the issue concerning FinCEN's apparent inability to implement this far-reaching bill.³⁵

On the national level, the Community Association Institute, based out of Virginia, is spearheading an effort to have the CTA amended and are attacking the Act on three fronts:³⁶

1. Amend the CTA to provide a specific exemption for community associations from the Act and its reporting requirements.
2. Support current proposed federal legislation that provides for a delay in the implementation of the reporting requirements mandated by the CTA (H.R. 4035/S. 2623 and H.R. 5119).
3. Urge confidentiality and protection of the individual corporate filings through the continued rulemaking process.

³² That said, there is a well-publicized case out of Miami-Dade County, Florida, involving several board members from the Hammocks Community Association who were charged with theft, fraud, and money laundering, among other charges, in late 2022. The factual basis for most of these claims was related to kickbacks and contract steering as opposed to money laundering, financing terrorism, or otherwise endangering national security interests. <https://wsvn.com/news/local/miami-dade/5-members-of-hammocks-hoa-charged-with-theft-accused-of-stealing-2-million/>

³³ See Letter from coalition of small business organizations to the Honorable Patrick McHenry, Chairman of the Committee on Financial Services, U.S. House of Representatives (September 12, 2023).

³⁴ Financial Crimes Enforcement Network, Beneficial Ownership Information Reporting, Frequently Asked Questions, Question B-5 (March 23, 2023), <https://www.fincen.gov/boi-faqs>.

³⁵ Alan Granwell and Jeffery Korenblatt, The Corporate Transparency Act: An Update, Holland & Knight Alert (September 28, 2023) <https://www.hklaw.com/en/insights/publications/2023/09/the-corporate-transparency-act-an-update>; Robert Downes, Scott Ludwig, Thomas Ritlege, and Lorraine Smiley, The Corporate Transparency Act – Preparing for the Federal Database of Beneficial Ownership Information, American Bar Association, Business Law Today (May 2021) https://www.americanbar.org/groups/business_law/resources/business-law-today/2021-may/the-corporate-transparency-act/;

³⁶ Dawn Bauman, CAE, How the Corporate Transparency Act Applies to Community Associations, Community Association Institute (Oct. 12, 2023), <https://advocacy.caionline.org/how-the-corporate-transparency-act-applies-to-community-associations/>; CAI Action Center - <https://www.voterveice.net/CAI/Campaigns/108066/Respond>

Further, National Small Business United, a small business advocacy group, has filed suit in federal court challenging the constitutionality of the CTA.³⁷ The constitutional challenge asserts that the CTA violates the following rights:³⁸

1. The CTA infringes on the sovereign power of the state to govern entities within its jurisdiction.
2. The CTA actually regulates entity formation and does not regulate commerce or “commercial activity” pursuant to Congressional authority under the Commerce Clause. Most affected businesses confine their “business activities” to within their state’s borders and does not imply interstate commerce or any federal interest.
3. The reporting requirements in the CTA violate the business owners right to free speech and association under the First Amendment.
4. The reporting requirements in the CTA amount to an unreasonable search and seizure of private information in violation of the Fourth Amendment.
5. Compelling disclosure on the threat of hefty fines and jail time may also be a violation of a person’s right against self-incrimination under the Fifth Amendment and certain privacy rights recognized under the Ninth Amendment.
6. The CTA is “unconstitutionally vague.”

This case was filed in November 2022 and the parties have been engaging in pre-trial pleading practice. The Plaintiff and the Defendants have filed dispositive motions which are currently pending before the Federal District Court in the Northern District of Alabama.

As stated above, the beneficial owner reporting requirements under the CTA would apply to a not-for-profit Florida community association and the volunteer directors on the association’s board of directors. The potential penalty for failing to report to FinCEN within the required time frame can be steep. The proposed statutes or regulations being supported by CAI may address some of the initial filing burdens by extending the initial filing deadlines. However, the CTA should be revised and amended to specifically provide an exclusion for not-for-profit community associations from the CTA disclosure requirements.

³⁷ Nat’l Small Bus. United v. Yellen, No. 5:22-cv-01448-LCB (N.D. Ala. 2022).

³⁸ Complaint, Nat’l Small Bus. United v. Yellen, No. 5:22-cv-01448-LCB (N.D. Ala. 2022)