

KEEP THE FEDS OUT OF THE FLOWER BEDS: WHY COMMUNITY ASSOCIATIONS SHOULD BE CTA-EXEMPT

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I. INTRODUCTION

On January 1, 2024, the Corporate Transparency Act (“CTA”) came into effect in the United States.¹ Aimed at battling money laundering, tax fraud, and funding terrorism, the CTA created new reporting requirements for several business entities.² Under this statute, “beneficial owners” of businesses must file reports with the Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”).³ They must provide FinCEN with their name, address, date of birth, and a photo identification document,⁴ which will be uploaded to a federal database.⁵ Time-sensitive updates are required every time there is a change in previously reported information,⁶ and failure to comply with these rules can result in severe penalties.⁷

While the CTA provides exemptions for certain categories of entities,⁸ one particular type of entity almost always falls outside of the available exemptions: community associations. These include homeowners associations, condominium associations, and cooperatives (collectively,

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¹ 31 U.S.C. § 5336; Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59498 (Sept. 30, 2022) codified at 31 C.F.R. pt. 1010.

² *Id.*

³ *Id.*

⁴ *Beneficial Ownership Information Reporting Rule Fact Sheet*, FIN. CRIMES ENF’T NETWORK (Sept. 29, 2022), <https://www.fincen.gov/beneficial-ownership-information-reporting-rule-fact-sheet>.

⁵ Beneficial Ownership Information Access and Safeguards, 88 Fed. Reg. 88732, 88732 (Dec. 22, 2022) codified at 31 C.F.R. pt. 1010.

⁶ 31 C.F.R. § 1010.380(a)(2).

⁷ 31 U.S.C. § 5336 (imposing a fine of up to \$500 per day on the beneficial owners where they willfully provide false information or fail to report the required information). Worse yet, the United States can bring criminal charges against beneficial owners for these violations, seeking up to two years of imprisonment and fines as high as \$10,000. *Id.*

⁸ *See id.*

“community associations”).⁹ Though there are distinctions among them, for this Note’s purposes, all share a similar structure.¹⁰ Board members of incorporated community associations fit the CTA’s definition of a “beneficial owner,”¹¹ resulting in a mandatory reporting requirement. This requirement could impose unique compliance costs on community associations, borne directly by American homeowners.¹²

Since its enactment, the CTA has faced numerous legal challenges, leading to a series of injunctions and stays that created uncertainty regarding its enforcement.¹³ Amid this uncertainty, the Community Associations Institute—an international organization for educating and providing resources to community associations—filed a lawsuit seeking to exempt its community associations from reporting.¹⁴ In response to mounting concerns, the Secretary of the Treasury recently issued an interim final rule that would amend the Code of Federal Regulations to exempt all domestic entities—including community associations—from the reporting requirements.¹⁵ This regulatory adjustment, based on authority granted under 31 U.S.C. § 5336,¹⁶ is a prudent exercise of discretion. However, because the exemption arises from agency rulemaking rather than congressional repeal, the CTA and its reporting requirements remain subject to change by future administrations.¹⁷ Should FinCEN reverse course, community associations would once again fall within the CTA’s statutory scope.¹⁸ Thus, this Note contends that a particularized exemption—whether through statutory amendment or agency rulemaking authority—is warranted for community associations.

⁹ Denise L. Palmieri, *Bah, Humbug - Community Association Rule Enforcement*, 7 PROB. & PROP. 40, 41 (1993).

¹⁰ Wayne S. Hyatt & James B. Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 WAKE FOREST L. REV. 915, 917 (1976); *see id.*

¹¹ 31 U.S.C. § 5336.

¹² *See* FOUND. FOR CMTY. ASSN RSCH., COMMUNITY ASSOCIATION FACT BOOK 2021, 65 (Clifford J. Treese et al. eds., 2022), https://foundation.caionline.org/wp-content/uploads/2022/10/FB_Narrative_2021.pdf [hereinafter, FACT BOOK 2021]; *see also* 31 U.S.C. § 5336.

¹³ Alexandria P. Murphy, *Corporate Transparency Act Compliance Still on Hold, For Now*, NAT’L L. REV. (Feb. 11, 2025), <https://natlawreview.com/article/corporate-transparency-act-compliance-still-hold-now>.

¹⁴ *Protecting Community Associations: CAI Files Lawsuit Against the United States Department of Treasury*, CMTY. ASS’N INST. (Sept. 14, 2024), <https://advocacy.caionline.org/protecting-community-associations-cai-files-lawsuit-against-the-united-states-department-of-treasury/>.

¹⁵ Beneficial Ownership Information Reporting Requirement Revision and Deadline Extension, 90 Fed. Reg. 13688, 13691 (Mar. 26, 2025) codified at 31 C.F.R. pt. 1010.

¹⁶ 31 U.S.C. § 5336.

¹⁷ *See* Maeve P. Carey, *Can a New Administration Undo a Previous Administration’s Regulations?*, FAS PROJECT ON GOVERNMENT SECRECY (Nov. 21, 2016), <https://sgp.fas.org/crs/misc/IN10611.pdf>.

¹⁸ *See* 31 U.S.C. § 5336.

This Note proposes that the regulation of community associations be left to the states, which are already equipped to handle the financial oversight of the industry. Part II of this Note will explore the CTA's history and purpose, emphasizing its intended role in preventing money laundering, tax evasion, and the funding of terrorism. This section will outline the general reporting requirements set out by the CTA. Part III, divided into two parts, explains why community associations qualify for a CTA exemption under the CTA's terms. The first section of Part III argues that requiring community associations to report is not in the public interest. It assesses the CTA's costs and benefits and potential impacts on volunteerism. The second section of Part III shows that board member BOI reports are not highly useful in investigations by discussing existing safeguards against crime in community associations. Part IV then argues that, regardless of the recent implementation rules exempting all domestic entities from reporting, state governments are already equipped for financial oversight and should continue to handle community association regulations.

II. BACKGROUND OF THE CTA

To understand why the reporting requirements should not apply to community associations, it is essential to first examine the background and purpose of the CTA.

A. Rise, Purpose, and General Reporting Requirements of the CTA

The CTA was established through the Anti-Money Laundering Act of 2020 with the creation of 31 U.S.C. § 5336.¹⁹ It aims to protect national security, impose reporting requirements, and combat money laundering and the funding of terrorism.²⁰ The CTA requires some business entities to file a report with FinCEN,²¹ called a Beneficial Ownership Information ("BOI") report.²² This report does not require disclosing financial information about entities.²³ Rather, it is focused on obtaining private information²⁴ about the

¹⁹ *Anti-Money Laundering Act of 2020*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/sites/default/files/shared/20210615%20AMLA%20FinCEN%20One%20Pager_FINAL.pdf (last visited Aug. 18, 2024); Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 17557, 17560 (Apr. 5, 2021) codified at 31 C.F.R. pt. 1010.

²⁰ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. at 17559-60.

²¹ 31 U.S.C. § 5336.

²² *Beneficial Ownership Information Report Filing Instructions*, FIN. CRIMES ENF'T NETWORK (Jan. 2024)

https://boiefiling.fincen.gov/resources/BOIR_Filing_Instructions.pdf.

²³ Diane Ring, *The 2021 Corporate Transparency Act: The Next Frontier of U.S. Tax Transparency and Data Debates*, 18 PITT. TAX REV. 249, 262 (2021).

²⁴ *Id.* at 263.

individuals who hold significant control over, or ownership stakes in, these entities.²⁵

B. How Community Associations are Subject to the CTA

Under the statutory language,²⁶ for the CTA to apply, two criteria must be met. There must be (1) a “beneficial owner” and (2) a “reporting company.” A beneficial owner is an individual who exercises substantial control over an entity or owns at least twenty-five percent of it.²⁷ Individuals who serve as “senior officer[s]” or influence significant company decisions tend to have “substantial control.”²⁸ This can include indirect control through board representation.²⁹

Under § 5336, board members of community associations are beneficial owners. In community associations, board members have significant control over the entity’s powers.³⁰ Community associations may also have board members who serve as officers³¹ such as president, vice president, secretary, or treasurer.³² Officers have additional responsibilities.³³ For this reason, both officers and regular board members are considered to be beneficial owners.

The CTA defines a reporting company as “a corporation, limited liability company, or other similar entity that is . . . created by the filing of a document with a secretary of state or a similar office under the law of a State[.]”³⁴ When a community association incorporates, it files Articles of Incorporation to the secretary of state as a non-profit entity.³⁵ This fits the definition of a reporting company.³⁶ As a result, even with FinCEN’s changes to the language in the Code of Federal Regulations,³⁷ board

²⁵ 31 U.S.C. § 5336.

²⁶ *Id.*

²⁷ 31 U.S.C. § 5336.

²⁸ 31 C.F.R. § 1010.380(d)(1).

²⁹ *Id.*

³⁰ See Hyatt & Rhoads, *supra* note 10, at 920.

³¹ *Id.* at 920-21.

³² See MARLENE M. COLEMAN & WILLIAM H. HUSS, WORKING WITH YOUR HOMEOWNERS ASSOCIATION: A GUIDE TO EFFECTIVE COMMUNITY LIVING 94-5 (Sphinx Pub’g, 2nd ed. 2003).

³³ See Hyatt & Rhoads, *supra* note 10, at 921.

³⁴ 31 U.S.C. § 5336.

³⁵ *How to Start a Nonprofit, Step 3: Incorporation and State Forms*, NAT’L COUNCIL OF NONPROFITS, <https://www.councilofnonprofits.org/running-nonprofit/how-start-nonprofit/how-start-nonprofit-step-3-incorporation-and-state-forms> (last visited Aug. 16, 2024).

³⁶ 31 U.S.C. § 5336.

³⁷ 31 C.F.R. § 1010.380(d)(4); see also Beneficial Ownership Information Reporting Requirement Revision and Deadline Extension, 90 Fed. Reg. 13688, 13691 (Mar. 26, 2025) codified at 31 C.F.R. pt. 1010.

members of incorporated community associations are subject to BOI reporting requirements under the language in the United States Code.³⁸

C. CTA Exemptions

The CTA includes a list of twenty-three entities that may seek exemption from reporting.³⁹ Prerequisites must often be met to get an exception.⁴⁰ Yet community associations do not tend to meet the prerequisites. For example, a “large operating company” may seek an exemption only if it nets over \$5 million per year and has over twenty employees.⁴¹ Similarly, only non-profit entities whose tax-exempt status falls under Internal Revenue Code (“IRC”) § 501(c) may seek an exemption.⁴² However, most community associations have difficulties obtaining such a tax exemption,⁴³ causing many to file under IRC § 528 instead.⁴⁴ There has been a recent push in the House of Representatives to exempt entities whose tax exempt status falls under IRC § 528.⁴⁵ But thus far, this effort has not succeeded.⁴⁶ Even if it did, some associations file under IRC § 216 or § 277 and would still be required to comply with the reporting requirements if they were again enforced.⁴⁷

One method for securing an exemption is through the proposal of legislation that would amend the United States Code to explicitly exempt

³⁸ 31 U.S.C. § 5336.

³⁹ *Id.*; *Corporate Transparency Act (CTA): Anti-Money Laundering Law to Present Ongoing Compliance Challenges to Small Entities*, 3, BCLP LLP, <https://www.bclplaw.com/a/web/320896/Corporate-Transparency-Act-Full-Review-604831733.11.pdf> (last visited Apr. 29, 2025) (citing Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920 (Dec. 8, 2024) codified at 31 C.F.R. pt. 1010).

⁴⁰ *See* 31 U.S.C. § 5336.

⁴¹ 31 C.F.R. § 1010.380(c)(2).

⁴² *Id.*

⁴³ I.R.S., 1982 IRS EXEMPT ORGANIZATIONS CPE TECHNICAL INSTRUCTION PROGRAM TEXTBOOK, R. HOMEOWNERS’ ASSOCIATIONS UNDER IRC 501(C)(4), 501(C)(7) AND 528 11 (1982) (“The legislative history of IRC 528 indicates that Congress recognized the difficulty most homeowners’ associations have in meeting the requirements of Rev. Rul. 74-99.”).

⁴⁴ *See* FACT BOOK 2021, *supra* note 12, at 65, 67.

⁴⁵ H.R.9045 - 118th Congress (2023-2024): To Amend Title 31, United States Code, to Exempt Entities Subject to Taxation Under section 528 of the Internal Revenue Code of 1986 From Certain Beneficial Ownership Reporting Requirements, H.R.9045, 118th Cong. (2024), <https://www.congress.gov/bill/118th-congress/house-bill/9045> (A Senator is seeking exemption for entities that file under Section 528 of the Internal Revenue Code.).

⁴⁶ *Id.* As of the time of this Note, no activity has yet occurred on the bill, other than referring the bill to a House Committee.

⁴⁷ *Tax Status: Condo Association and HOAs*, MCGRATH N. (Aug. 4, 2022), <https://www.mcgrathnorth.com/tax-status-condo-association-and-hoas> (Associations have the option to file under Section 277 of the Internal Revenue Code.); FACT BOOK 2021, *supra* note 12, at 65 (“Condominiums & Planned Communities are Tax protected under IRC 528. Alternatively, they are taxed as a membership organization under IRC 277. Cooperatives are tax protected under IRC 216 and usually file under Sub-Chapter T.”).

community associations.⁴⁸ Another avenue for exemption exists, however. Section 5336(a)(11)(B)(xxiv) permits the Secretary of the Treasury to create a regulation that would exempt entities if the reporting requirements “(I) would not serve the public interest; and (II) would not be highly useful in national security, intelligence, and law enforcement efforts to detect, prevent, or prosecute money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or other crimes.”⁴⁹ In fact, this exception enabled the recent amendment to the Code of Federal Regulations exempting all domestic reporting companies.⁵⁰ During the statute’s initial commentary period, FinCEN “welcome[d] comments” on what a business must establish to meet this two-pronged test.⁵¹ Commentators suggested various entities they believed should qualify for this exception.⁵² FinCEN then adopted its final rule but did not clarify how an entity can satisfy the test.⁵³ Even after recently invoking this exemption, FinCEN offered little insight into the specific reasoning behind its decision.⁵⁴ This leaves satisfaction of the test open to interpretation, but opens a door for creativity in arguing that each prong has been met.

III. COMMUNITY ASSOCIATIONS QUALIFY FOR AN EXEMPTION

Section 5336(a)(11)(B)(xxiv) offers a method to seek an exemption for community associations. This section argues that community association BOI requirements are neither in the public interest nor “highly useful” in furthering FinCEN’s objectives.

A. It Does Not “Serve the Public Interest” to Require Community Association Board Members to File BOI Reports

The BOI reporting requirement for community association board members does not serve the public interest, as it (1) likely does not pass muster under a cost-benefit analysis and (2) reduces board volunteerism.

⁴⁸ *E.g.*, H.R.9045 - 118th Congress (2023-2024): To Amend Title 31, United States Code, to Exempt Entities Subject to Taxation Under section 528 of the Internal Revenue Code of 1986 From Certain Beneficial Ownership Reporting Requirements, *supra* note 45.

⁴⁹ 31 U.S.C. § 5336.

⁵⁰ *See* Beneficial Ownership Information Reporting Requirement Revision and Deadline Extension, 90 Fed. Reg. 13688, 13691 (Mar. 26, 2025) codified at 31 C.F.R. pt. 1010.

⁵¹ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69941 (Dec. 8, 2021) codified at 31 C.F.R. pt. 1010.

⁵² *Id.* at 69940-41.

⁵³ *See* 31 U.S.C. § 5336.

⁵⁴ *See* Beneficial Ownership Information Reporting Requirement Revision and Deadline Extension, 90 Fed. Reg. at 13691.

i. It Does Not Pass Muster Under a Cost-Benefit Analysis

All federal agencies must follow the Administrative Procedure Act, which establishes the framework for the rulemaking process.⁵⁵ As part of this process, agencies often conduct a cost-benefit analysis, with legal requirements mandating it in certain cases.⁵⁶ In 1993, President Clinton signed Executive Order 12866, which called for a regulatory system that benefits Americans, respects local governance and private sectors, and avoids unnecessary costs.⁵⁷ It requires rules “likely to result in . . . an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy” or “a sector of the economy” to pass a cost-benefit analysis.⁵⁸ In other words, since FinCEN anticipates the annual total estimated costs for the CTA to be in the billions, the agency must conduct a cost-benefit analysis on the likely outcome of the CTA.⁵⁹ Public interest is at the heart of the cost-benefit analysis since Executive Order 12866 states that regulatory agencies must “tailor [their] regulations to impose the least burden on society.”⁶⁰ Thus, if a regulation does not survive a cost-benefit analysis, it is not in the public interest. This principle is especially relevant to the CTA, as the Secretary of the Treasury recently justified the exemption for domestic businesses by concluding that the regulation imposed substantial burdens without delivering commensurate benefits.⁶¹

The cost-benefit analysis typically considers four elements: purpose, alternatives, costs, and benefits.⁶² The Department of the Treasury and FinCEN stated that the CTA’s purpose was to “promote financial

⁵⁵ FED. DEPOSIT INS. CORP., OFFICE OF INSPECTOR GENERAL, EVAL-20-003, COST BENEFIT ANALYSIS PROCESS FOR RULEMAKING, 1 (Feb. 2020), <https://www.fdicigov/sites/default/files/reports/2022-08/20-003EVAL.pdf>.

⁵⁶ CONG. RSCH. SERV., R44813, COST-BENEFIT ANALYSIS AND FINANCIAL REGULATOR RULEMAKING (Apr. 12, 2017), <https://sgp.fas.org/crs/misc/R44813.pdf>.

⁵⁷ Exec. Order No. 12866 of Sept. 20, 1993, 58 Fed. Reg. 190 (Oct. 4, 1993).

⁵⁸ CONG. RSCH. SERV., R4282, INDEPENDENT REGULATORY AGENCIES, COST-BENEFIT ANALYSIS, AND PRESIDENTIAL REVIEW OF REGULATIONS, 10 n.45 (Nov. 16, 2012), https://www.congress.gov/crs_external_products/R/PDF/R42821/R42821.3.pdf

[hereinafter, CONG. RSCH. SERV., R4282] (quotations omitted) (quoting 5 U.S.C. §804(2)).

⁵⁹ Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59549 (Sept. 30, 2022) codified at 31 C.F.R. pt. 1010 (“Given the estimated number of reporting companies, FinCEN estimates that the rule will have total estimated costs in the billions of dollars on an annual basis.”).

⁶⁰ CONG. RSCH. SERV., R4282, *supra* note 58, at 3.

⁶¹ See Beneficial Ownership Information Reporting Requirement Revision and Deadline Extension, 90 Fed. Reg. 13688, 13691 (Mar. 26, 2025) codified at 31 C.F.R. pt. 1010.

⁶² U.S. GOV. ACCOUNTABILITY OFF., GAO-14-714, FEDERAL RULEMAKING AGENCIES INCLUDED KEY ELEMENTS OF COST-BENEFIT ANALYSIS, BUT EXPLANATIONS OF REGULATIONS’ SIGNIFICANCE COULD BE MORE TRANSPARENT, 18 (Sept. 11, 2014), <https://www.gao.gov/assets/gao-14-714.pdf> [hereinafter, U.S. GOV. ACCOUNTABILITY OFF., GAO-14-714] (“[A] statement of purpose; monetized, quantified, or qualitatively discussed costs; monetized, quantified, or qualitatively discussed benefits; and a discussion of alternatives.”).

transparency” and “protect U.S. national security.”⁶³ FinCEN considered several regulatory alternatives in crafting the rule, adopting some and rejecting others,⁶⁴ but did not directly address state-level regulation as an alternative option.⁶⁵ Identifying and calculating costs and benefits remains a challenge for agencies.⁶⁶ While they attempt to assign monetary values when possible, they often must resort to relying on qualitative and quantitative data.⁶⁷

FinCEN presented an analysis of anticipated costs.⁶⁸ It estimated that initial BOI reports could cost an entity anywhere between \$85.14 and \$2,614.87, and updated BOI reports could cost between \$37.84 and \$560.81.⁶⁹ Anticipated costs to FinCEN included \$72 million for IT development and \$25.6 million in annual system maintenance.⁷⁰ FinCEN also acknowledged that governmental authorities expect to experience indirect costs,⁷¹ and that costs are also likely to be incurred by companies seeking assistance from professionals.⁷²

FinCEN stated it was “not aware of disproportionate budgetary effects of this rule” on specific communities or private sector segments.⁷³ Yet, community associations would face a disproportionate impact. Most funds in community associations are collected by levying assessments on members.⁷⁴ This means the cost of compliance falls on average American homeowners. Although entities can file reports with FinCEN at no fee, FinCEN acknowledged that many will likely seek professional assistance.⁷⁵ This seems particularly likely to occur in a community association, where board member business experience and technological sophistication could

⁶³ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69920 (Dec. 8, 2021) codified at 31 C.F.R. pt. 1010.

⁶⁴ Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. at 59559-62.

⁶⁵ See *infra* Part IV(B).

⁶⁶ U.S. GOV. ACCOUNTABILITY OFF., GAO-14-714, *supra* note 62, at 25 (showing that locating quality data upon which to perform the CBA is difficult, and a regulation’s comment period may not help in obtaining it.).

⁶⁷ *Id.* at 26.

⁶⁸ Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59549 (Sept. 30, 2022) codified at 31 C.F.R. pt. 1010 (“FinCEN has made efforts to calculate the cost of the rule realistically, but notes that because the rule is a new requirement without direct supporting data, the cost estimates are based on several assumptions.”).

⁶⁹ *Id.* at 59586.

⁷⁰ *Id.* at 59578.

⁷¹ *Id.*

⁷² *Id.* at 59554 (“Commenters gave examples of lawyers, accountants (many comments cited CPAs), and U.S. tax preparers as professionals that companies would likely consult to understand the reporting company definition, identify beneficial owners pursuant to the rule’s definition and their business structure, and prepare initial and updated reports, among other compliance steps.”).

⁷³ *Id.* at 59579.

⁷⁴ FACT BOOK 2021, *supra* note 12, at 65.

⁷⁵ See Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59549 (Sept. 30, 2022) codified at 31 C.F.R. pt. 1010.

widely vary. On top of that, accountants are concerned that offering CTA-related advice and assistance could amount to the unauthorized practice of law.⁷⁶ This may explain why clients of accountants have received quotes of thousands of dollars for CTA guidance.⁷⁷ Regardless, even if an association were to file a report at no fee, significant costs can still arise in other ways.

FinCEN did not address the non-monetary cost that BOI reports may cause community associations to try to circumvent the requirements and become less visible than before. Under § 5336's definition of "reporting company," only incorporated entities must file a BOI report.⁷⁸ However, community associations can be incorporated or unincorporated.⁷⁹ Board members in unincorporated associations may avoid BOI rules by not incorporating or letting their status lapse. Not only would this cause an association to lose the legal status that incorporation provides, but this creates a problem for FinCEN. The new reporting requirements might encourage entities to avoid public filings⁸⁰ and audits often tied to state registration.⁸¹ Ironically, FinCEN's attempt to increase visibility could lead to community associations unincorporating, making them—despite FinCEN's interest—harder to investigate.⁸²

Reporting imposes significant costs on both community associations and FinCEN. For a rule to pass a cost-benefit analysis, FinCEN must demonstrate that its benefits justify its costs,⁸³ as agencies are generally

⁷⁶ See *Risk Alert: Navigating Corporate Transparency Act/Beneficial Ownership Reporting*, AICPA MEMBER INS. PROGRAMS (Mar. 1, 2024), <https://www.cpai.com/Education-Resources/my-firm/Tax-Services/What-accounting-firms-need-to-know-about-CTA>; see also J. Michael Reese, *Oh BOI: The Corporate Transparency Act and CPA Firms*, J. OF ACCT. (Jan. 1, 2024), <https://www.journalofaccountancy.com/issues/2024/jan/oh-boi-the-corporate-transparency-act-and-cpa-firms.html>.

⁷⁷ Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. at 59554 ("Regarding potential cost estimates for hiring this expertise, one comment noted having been quoted "1000s" (of dollars, presumably) by CPAs to fill out the BOI report.").

⁷⁸ 31 U.S.C. § 5336(11)(A).

⁷⁹ Palmieri, *supra* note 9, at 41.

⁸⁰ E.g., *FAQs – Personal Information in Public Filings*, CAL. SEC'Y. OF STATE, <https://www.sos.ca.gov/business-programs/pi-faqs> (last visited Aug. 18, 2024) ("Please be aware that when you submit documents for filing with the Secretary of State you are making a public record."); e.g. *Ordering Copies of Documents Help*, OR. SEC'Y. OF STATE, <https://sos.oregon.gov/business/Pages/ordering-copies-help.aspx> (last visited Aug. 18, 2024) ("All documents filed with the Secretary of State are a public record in Oregon.").

⁸¹ Russell Munz, *Auditing Requirements for Condominium Associations and HOAs*, CMTY. FINS. (Mar. 4, 2021), <https://communityfinancials.com/auditing-requirements-for-condominium-association-and-hoas/>.

⁸² See Beneficial Ownership Information Access and Safeguards, 88 Fed. Reg. 88732, 88732 (Dec. 22, 2022) codified at 31 C.F.R. pt. 1010 (The objective of the CTA is "establishing a database of BOI that will be highly useful in combatting illicit finance and the abuse of shell and front companies by criminals, corrupt officials, and other bad actors.").

⁸³ U.S. GOV. ACCOUNTABILITY OFF., GAO-14-714, *supra* note 62, at 24.

required to assess whether a regulation's economic impact is reasonable and supported by evidence.⁸⁴ However, a Government Accountability Office study found that agencies have a difficult time assigning a monetary value to a benefit.⁸⁵ FinCEN acknowledged "there are several potential, interrelated benefits" from this rule, but only appeared to monetize the number of proceeds estimated to be annually generated by tax evasion crime.⁸⁶ Non-monetary impacts included higher investigative efficiency, enhanced counterterrorism efforts,⁸⁷ a more transparent economy, and improved international cooperation.⁸⁸

Agencies must still address a rule's costs for it to pass a cost-benefit analysis,⁸⁹ as shown in *Business Roundtable v. SEC*.⁹⁰ In 2011, the Securities and Exchange Commission's ("SEC") proposed Rule 14a-11 failed this analysis and was vacated.⁹¹ Rule 14a-11 aimed to mandate that public companies disclose information to shareholders and grant them voting rights for board nominees.⁹² The SEC mistakenly believed that "policy goals and the benefits of the rule" justified the increased costs and reduced board efficiency for investment companies.⁹³

The D.C. Circuit found that the SEC's arguments, such as proposed methods to reduce the rule's impact, failed to show benefits for investment companies.⁹⁴ This decision rested on three points. First, the SEC did not consider that investment companies would use the rule less, reducing its benefits.⁹⁵ Second, the proposed mitigation technique lacked evidence.⁹⁶ Third, the court rejected the SEC's "unutterably mindless" claim that costs would arise only if the rule were enforced.⁹⁷

⁸⁴ See *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011) ("We agree with the petitioners and hold the Commission acted arbitrarily and capriciously for having failed once again...adequately to assess the economic effects of a new rule. Here the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.").

⁸⁵ U.S. GOV. ACCOUNTABILITY OFF., GAO-14-714, *supra* note 62, at 24.

⁸⁶ Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59579 (Sept. 30, 2022) codified at 31 C.F.R. pt. 1010.

⁸⁷ *Id.*

⁸⁸ *Id.* at 59580.

⁸⁹ See *Bus. Roundtable*, 647 F.3d at 1148-49.

⁹⁰ *Id.*

⁹¹ *Id.* at 1156.

⁹² *Id.* at 1146.

⁹³ See *id.* at 1155.

⁹⁴ *Id.* ("These observations do not adequately address the probability the rule will be of no net benefit as applied to investment companies.").

⁹⁵ *Bus. Roundtable*, 647 F.3d at 1155.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1556.

Applying this same analysis, FinCEN's benefits from requiring community associations to file BOI reports likely do not exceed the costs imposed on these entities. Like the SEC, FinCEN did not address the argument that the rule's benefits would be minimized if certain entities already have low rates of money laundering or terrorist funding.⁹⁸ The agency also failed to provide entities with evidence-supported mitigation techniques for the anticipated BOI costs.⁹⁹

FinCEN itself admitted that "the rule ... has significant benefits that currently are not quantifiable."¹⁰⁰ Since net benefits require subtracting costs from measurable benefits,¹⁰¹ FinCEN's lack of quantifiable benefits hinders this analysis. If criminal activity such as money laundering or financial fraud in community associations were minimal or nonexistent, the reporting requirement would net a near-zero to zero benefit for FinCEN.¹⁰² Thus, based on the seeming lack of a thorough cost-benefit analysis, similar to the SEC's failure in *Business Roundtable v. SEC*,¹⁰³ the BOI reporting requirements likely do not justify the costs for community associations and are therefore not in the public interest.

ii. It Reduces Volunteerism for Community Association Boards

Not only does the CTA seem to fail a cost-benefit analysis, suggesting it may not be in the public interest, but the potential reduction in board volunteerism due to the reporting requirement further underscores why community association board member BOI reports would not serve that interest. The CTA does not define "public interest,"¹⁰⁴ but when statutes lack specific definitions, courts typically apply common meanings.¹⁰⁵ Public interest generally refers to the "welfare or well-being of the general public."¹⁰⁶ Americans show strong interest in joining community associations, as seen in their rapid growth over recent decades.¹⁰⁷ Between

⁹⁸ See Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59568-80 (Sept. 30, 2022) codified at 31 C.F.R. pt. 1010.

⁹⁹ See *id.*

¹⁰⁰ *Id.* at 59580.

¹⁰¹ EMMA HUTCHINSON ET AL., *PRINCIPLES OF MICROECONOMICS* 21-23 (University of Victoria 2017) (2016).

¹⁰² See *id.*

¹⁰³ *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011).

¹⁰⁴ See 31 U.S.C. § 5336.

¹⁰⁵ E.g. *Schuerman v. State*, 522 P.3d 145, 149 (Wyo. 2022) ("When terms are not defined by statute, we apply their common definition."); e.g., *Robinson v. Shell Oil Co.*, 70 F.3d 325, 328 (4th Cir. 1995) ("In examining statutory language, generally, words are given their common usage . . .").

¹⁰⁶ *Public Interest*, Dictionary.com, <https://www.dictionary.com/browse/public-interest> (last visited Aug. 18, 2024).

¹⁰⁷ See Ron Cheung & Rachel Meltzer, *Why and Where Do Homeowners Associations Form?* 16 *Cityscape* 69, 71 (2014).

1962 and 2012, the number of community associations rose by 64,500%.¹⁰⁸ Of the approximately 335 million people in the U.S. in 2023,¹⁰⁹ about 75.5 million lived in a community association.¹¹⁰ The vast number of affected individuals represents a segment of the “general public,” making it a matter of public interest.¹¹¹

Developers usually establish community associations to govern planned property developments.¹¹² Homeowners automatically join when they purchase property within a development governed by an association’s declaration or master deed.¹¹³ Members elect a board of volunteer homeowners to manage governance, maintenance, and budgeting.¹¹⁴ However, the Community Associations Institute warns that BOI reporting requirements may have a “chilling effect” on volunteerism for these boards.¹¹⁵

One aspect of the CTA that may discourage volunteerism involves FinCEN’s creation of a database.¹¹⁶ Concerns have arisen over the number of entities with access to the CTA database.¹¹⁷ To address this, the Access Rule was introduced to restrict BOI data access to authorized entities only.¹¹⁸ Yet, security risks, such as hacking and data leaks, often accompany

¹⁰⁸ See *id.* (“In 1962, roughly 500 RCAs overall existed nationally, and that number increased to more than 323,000 by 2012.”).

¹⁰⁹ *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045223#PST045223> (last visited Aug. 10, 2024).

¹¹⁰ FACT BOOK 2021, *supra* note 12, at 67.

¹¹¹ *Public Interest*, *supra* note 106.

¹¹² Karen Ellert Pena, *Reining in Property Owners’ Associations’ Power: Texas’s Need for a Comprehensive Plan*, 33 ST. MARY’S L.J. 323, 329 (2002); Cheung & Meltzer, *supra* note 107, at 71.

¹¹³ Hyatt & Rhoads, *supra* note 10, at 917.

¹¹⁴ Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1523 (1981-1982) (“Much as citydwellers choose a city council, association members elect a board of directors to manage association affairs.”); Nicole M. Lacoste, *Legal Implications for Green Buildings within Condominium and Homeowners Association Regimes in Maryland: Striking a Balance between the Promotion of Green Retrofits to Existing Housing Stock and Maintaining Aesthetics by Homeowners Associations and Condominium Associations*, 38 U. BALT. L. REV. 411, 417-18 (2009) (“The members in a board in an emblematic homeowners or condominium association usually are uncompensated volunteers who are resident owners within the community.”); see FACT BOOK 2021, *supra* note 12, at 65.

¹¹⁵ *CAI Lawsuit: Frequently Asked Questions*, CMTY. ASS’N INST. (Jun. 14, 2024), [caiohttps://www.caionline.org/Advocacy/Priorities/CTA/Documents/FAQ%20FINAL.pdf](https://www.caionline.org/Advocacy/Priorities/CTA/Documents/FAQ%20FINAL.pdf) [online.org](https://www.caionline.org/Advocacy/Priorities/CTA/Documents/FAQ%20FINAL.pdf).

¹¹⁶ Beneficial Ownership Information Access and Safeguards, 88 Fed. Reg. 88732, 88732 (Dec. 22, 2022) codified at 31 C.F.R. pt. 1010.

¹¹⁷ See Jonathan H. Warner, *Corporate Transparency Act Reporting Rules Finalized, But Will Access Issues Cause Delay?*, 97 FLA. BAR JOUR. 26, 26 (2023).

¹¹⁸ *Fact Sheet: Beneficial Ownership Information Access and Safeguards Final Rule*, FIN. CRIMES ENF’T. NETWORK, <https://www.fincen.gov/news/news-releases/fact-sheet->

the creation of federal databases, regardless of the number of people with access.¹¹⁹ For instance, agencies like the IRS have struggled to secure sensitive data.¹²⁰ In response to these threats, some federal entities, like the Judicial Conference of the United States, have reverted to paper filing and disconnected storage devices for highly sensitive information.¹²¹ Given these risks, board members may be hesitant to provide their personal details, fearing potential misuse or exposure.

A second factor that could discourage volunteerism is the need for repeated filings.¹²² Each time previously reported information changes, such as a board member's driver's license expiring, community associations have just thirty days to submit a new report.¹²³ This requirement—especially for large boards—may be more difficult to achieve when a member refuses to submit their information, potentially exposing the rest to compliance risks or penalties. More significantly, an updated BOI report is required each time a board member joins, resigns, or their term ends.¹²⁴ Since board member terms are often staggered,¹²⁵ filings are frequent. Problems could arise if a turnover occurs without someone assigned to manage these updates.

A third deterrent to board participation is the risk of noncompliance. The CTA subjects “any person” to penalties for noncompliance.¹²⁶ Although FinCEN does not define “any person,” the term appears to apply to individuals rather than the entity.¹²⁷ Thus, if a board member provides false information or fails to report required details, they may face fines of up to \$500 per day until the violation is corrected.¹²⁸ The United States can also seek fines of up to \$10,000 and imprisonment for up to two years.¹²⁹

Because of all these drawbacks with reporting, the CTA's reporting requirements may reduce volunteerism for the board. Without enough volunteers, self-managed associations may need to hire a management

beneficial-ownership-information-access-and-safeguards-final-rule (last visited Aug. 12, 2024).

¹¹⁹ See Ring, *supra* note 23, at 255-57.

¹²⁰ *Id.* at 256-57.

¹²¹ *Id.* at 257.

¹²² Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59573 (Sept. 30, 2022) codified at 31 C.F.R. pt. 1010.

¹²³ *Id.* at 59573-74.

¹²⁴ *Id.* at 59574.

¹²⁵ Leon Hoke et al., *The Moral Hazard of Mandatory Membership in Private Clubs*, 8 RSCH. IN BUS. AND ECON. J. 1, 3 (2013) (“The terms of members are usually staggered so that only part of the BOD is elected at any given time.”).

¹²⁶ 31 U.S.C. § 5336.

¹²⁷ Nat'l Small Bus. United v. Yellen, No. 5:22-cv-1448-LCB, 2024 U.S. Dist. LEXIS 36205, at *8-9 (N.D. Ala. Mar. 1, 2024).

¹²⁸ 31 U.S.C. § 5336.

¹²⁹ *Id.*

company to remain functional, regardless of whether the expense was budgeted.¹³⁰ Even associations already budgeting for a management company would see an increase in their expenses, since greater involvement by property managers generally leads to higher costs.¹³¹ Also, hired managers lack the fiduciary duties owed by board members.¹³² This means that their decisions may not always align with the association's best interests. In extreme cases, like when no members are on the board, courts may appoint receivers to assume the board's responsibilities.¹³³ Both situations increase costs, which are then passed on to association members.¹³⁴ The negative downstream effects of BOI reports—a decline in board volunteerism and an increase in costs imposed on community association members—do not serve the public interest.

B. It Is Not “Highly Useful” in Investigations Related to Money Laundering, Terrorism Financing, or Other Objectives of FinCEN

BOI reporting requirements for community associations also appear unlikely to be “highly useful” in achieving FinCEN’s objectives due to (i) existing transparency through record reviews¹³⁵ and tax filing requirements,¹³⁶ (ii) the frequent outsourcing of financial management,¹³⁷ and (iii) their domestic non-profit structure.¹³⁸ To reach these conclusions, it is important to first understand FinCEN’s purpose for BOI requirements.

i. The Purpose of BOI Reports

FinCEN seeks BOI reports to prevent “terrorists” and “proliferators” from “raising, hiding, or moving money in the United States through anonymous shell or front companies.”¹³⁹ Thus, the CTA requires entities

¹³⁰ See *What Happens to an HOA With No Board?*, HOA MGMT. (Aug. 8, 2024), <https://www.hoamanagement.com/what-happens-to-an-hoa-with-no-board>.

¹³¹ *Are HOA Management Fees Worth It?*, FIRSTSERVICE RESIDENTIAL (Oct. 31, 2023), <https://www.fsresidential.com/corporate/news-and-articles/articles/hoa-is-it-worth-the-property-management-fees>.

¹³² See *HOA Board vs HOA Management Company Responsibilities*, CEDAR MGMT. GRP., <https://www.cedarmanagementgroup.com/hoa-board-vs-hoa-management/> (last visited Aug. 18, 2024).

¹³³ *What Happens to an HOA With No Board?*, *supra* note 130; *Exploring HOA Receivership: Consequences When an Organization Faces Difficulty*, LANES MGMT. SERVICES, <https://www.lanesmgmt.com/hoa-receivership> (last visited Oct. 27, 2024).

¹³⁴ *What Happens to an HOA With No Board?*, *supra* note 130; *Are HOA Management Fees Worth it?*, *supra* note 131.

¹³⁵ *State Laws on Rights To Review And Copy Governing Documents*, HOA MGMT., <https://www.hoamanagement.com/review-and-copy-governing-documents/> (last visited Aug. 18, 2024).

¹³⁶ FACT BOOK 2021, *supra* note 12, at 58.

¹³⁷ See *id.* at 44.

¹³⁸ *Id.* at 65.

¹³⁹ Beneficial Ownership Information Access and Safeguards, 88 Fed. Reg. 88732, 88732 (Dec. 22, 2022) (to be codified at 31 C.F.R. pt. 1010).

seeking the 31 U.S.C. § 5336(a)(11)(B)(xxiv) exemption to prove that BOI information would not be “highly useful” in money laundering, funding terrorism, tax fraud, or other investigations.¹⁴⁰ The CTA fails to define “highly useful.”¹⁴¹ Applying a common meaning, “highly” means “in or to a high degree or amount.”¹⁴² “Useful” means “capable of being put to use.”¹⁴³ Community associations would likely demonstrate that BOI information is not “highly useful” in investigations if they show that money laundering or other crimes within their structure are rare or unlikely to occur.

ii. The Structure of Community Associations Can Prevent Money Laundering and the Financing of Terrorism

The structure of community associations helps prevent money laundering, the financing of terrorism, and tax crimes. First, every state requires that association records be accessible to members upon request.¹⁴⁴ For example, Kentucky requires condominium associations to grant members access to “[a]ll financial and other records” including an annual financial report prepared by an independent accountant.¹⁴⁵ Similarly, Kentucky homeowners are permitted to examine and copy records under “reasonable standards” outlined in the governing documents.¹⁴⁶ This allows for random financial reviews by the owners of anywhere between 2 to 2,000 lots.¹⁴⁷ Even the smallest incorporated associations are subject to financial audits.¹⁴⁸ These audits involve a detailed look into various reports, including an association’s balance sheets and cash flows.¹⁴⁹

Second, community associations are controlled by volunteer boards that most often outsource the management of the association to external management companies.¹⁵⁰ Amongst other things, these companies govern the association by budgeting, managing financial activities, and maintaining the property.¹⁵¹ While many for-profit businesses outsource certain

¹⁴⁰ See 31 U.S.C. § 5336.

¹⁴¹ *Id.*

¹⁴² *Highly*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/highly> (last visited Aug. 18, 2024).

¹⁴³ *Useful*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/useful> (last visited Aug. 18, 2024).

¹⁴⁴ *State Laws on Rights To Review And Copy Governing Documents*, *supra* note 135.

¹⁴⁵ KY. REV. STAT. ANN. § 381.9197 (2024).

¹⁴⁶ KY. REV. STAT. ANN. § 381.795 (2024).

¹⁴⁷ Cheung & Meltzer, *supra* note 107, at 71.

¹⁴⁸ FACT BOOK 2021, *supra* note 12, at 66.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 44 (“The Statistical Review also points that the 7,000 – 8,000 community association management companies employ nearly 100,000 people to assist the 60% to 70% of associations that require professional management to deliver the core services previously discussed.”).

¹⁵¹ See *id.* at 44, 65.

functions, such as financial management and IT services,¹⁵² community associations stand out in that they can effectively choose to delegate near-full operational control to an external management company.¹⁵³ This transfer of control not only enables professional oversight of finances but also reduces the need for a detailed database of board members who have minimal involvement in financial management.

Third, and most importantly, community associations cannot realistically function as shell companies. In a 2017 advisory, FinCEN defined shell companies as “typically non-publicly traded corporations, limited liability companies (LLCs), or trusts that have no physical presence beyond a mailing address and generate little to no independent economic value.”¹⁵⁴ Unlike shell companies, community associations inherently require a physical presence, as they are responsible for managing and maintaining a designated area of real property.¹⁵⁵ Regarding financial and real estate assets, homeowners associations may own real property within their “territorially defined” area,¹⁵⁶ while condominium associations do not own property or assets.¹⁵⁷ Instead, the common areas they manage are jointly owned by all lot owners in the community.¹⁵⁸

To fund budgeted activities and cover unexpected expenses, boards usually levy periodic assessments on each member,¹⁵⁹ making up between ninety-five and ninety-eight percent of their revenue.¹⁶⁰ This revenue is classified into “operating” and “replacement” funds¹⁶¹ and is used for activities like property maintenance, landscaping, or legal fees.¹⁶² As volunteers,¹⁶³ board members receive no compensation. Also, state laws often require that any year-end surplus go into reserves or be distributed

¹⁵² Jessica Edgson, 27 *Eye-Opening Outsourcing Statistics (2024 Update)*, CAPITALCOUNSELOR (Apr. 2, 2021), <https://capitalcounselor.com/outsourcing-statistics/>; Max Lillard, *Adaptability is Key for Small Businesses as They Navigate the Accountant Shortage*, CAPTERRA (Mar. 21, 2023), <https://www.capterra.com/resources/outsourced-accounting/>.

¹⁵³ See FACT BOOK 2021, *supra* note 12, at 44, 65.

¹⁵⁴ FIN. CRIMES ENF'T NETWORK, FIN-2017-A003, ADVISORY TO FINANCIAL INSTITUTIONS AND REAL ESTATE FIRMS AND PROFESSIONALS (Aug. 22 2017), https://www.fincen.gov/sites/default/files/advisory/2017-08-22/Risk%20in%20Real%20Estate%20Advisory_FINAL%20508%20Tuesday%20%28002%29.pdf.

¹⁵⁵ Hyatt & Rhoads, *supra* note 10, at 917.

¹⁵⁶ Ellickson, *supra* note 114, at 1522.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Cheung & Meltzer, *supra* note 107, at 71.

¹⁶⁰ FACT BOOK 2021, *supra* note 12, at 65.

¹⁶¹ See *id.* at 66.

¹⁶² E.g., *Raven's Cove Townhomes, Inc. v. Knappe Dev. Co.*, 171 Cal. Rptr. 3d 334 (Cal. Ct. App. 1981); e.g., *Springs v. Lake Toxaway Cmty. Ass'n*, 870 S.E.2d 313 (N.C. Ct. App. 2022).

¹⁶³ Nicole M. Lacoste, *supra* note 114, at 417-18.

among association members,¹⁶⁴ leaving little to no flexibility for redirecting the funds elsewhere.

FinCEN explains that shell companies act as a vehicle for criminals who engage in money laundering,¹⁶⁵ the process of “disguising financial assets so they can be used without detection of the illegal activity that produced them.”¹⁶⁶ This process involves layering illicit funds through “several financial transactions” before ultimately integrating them as legitimate income.¹⁶⁷ FinCEN states that “money laundering provides the fuel for drug dealers, terrorists, arms dealers, and other criminals to operate and expand their criminal enterprises.”¹⁶⁸ However, it is hard to imagine a criminal expanding an enterprise by channeling illicit funds through a community association, where the money would ultimately fund activities such as installing petunias in the entryway. Occasionally, when allowed by state law, associations may redistribute any surplus from assessments to members.¹⁶⁹ By then, however, any laundered funds would have been used in the annual operating budget and then evenly shared across the association’s membership. It seems unlikely that a criminal would go to such lengths to move money around for minimal returns. For this same reason, a community association is an improbable vehicle for funding terrorism.

Like other entities, community associations are not entirely free of financial misconduct, including issues like fund misappropriation¹⁷⁰ and embezzlement.¹⁷¹ Some board members have even attempted to defraud their associations.¹⁷² In 2022, several board members faced fraud-related charges, with at least one accused of money laundering.¹⁷³ However, this laundering did not occur through the association itself.¹⁷⁴ Instead, funds

¹⁶⁴ E.g. MINN. STAT. ANN. § 515B.3-114 (2024); e.g. KY. REV. STAT. ANN. § 381.9189 (2024).

¹⁶⁵ FIN. CRIMES ENF’T NETWORK, FIN-2017-A003, *supra* note 154.

¹⁶⁶ *What is Money Laundering?*, FIN. CRIMES ENF’T NETWORK, <https://www.fincen.gov/what-money-laundering> (last visited Aug. 16, 2024).

¹⁶⁷ FIN. CRIMES ENF’T NETWORK, FEASIBILITY OF A CROSS-BORDER ELECTRONIC FUNDS TRANSFER REPORTING SYSTEM UNDER THE BANK SECRECY ACT (2006).

¹⁶⁸ *What is Money Laundering?*, *supra* note 166.

¹⁶⁹ *How to Handle HOA Surplus Funds*, CLARK SIMSON MILLER, <https://clarksimsonmiller.com/hoa-surplus-funds/> (last visited Oct. 26, 2024).

¹⁷⁰ *State v. Esterle*, No. 06CA0003-M, 2007 Ohio App. LEXIS 1268, at *1 (Ohio Ct. App. Mar. 26, 2007) (“The indictment against Appellant arose from her misuse of funds of her homeowners’ association while she served as its treasurer.”).

¹⁷¹ See *Autumn Trace Homeowners Ass’n v. Brooks*, 517 S.E.2d 836 (Ga. Ct. App. 1999).

¹⁷² E.g., *Cinco v. Coquina Palms Homeowners Ass’n*, 325 So.3d 137, 138 (Fla. Dist. Ct. App. 2020).

¹⁷³ Lidia Dinkova, *South Florida’s Biggest HOA’s Leaders Charged in Massive Fraud*, THE REAL DEAL (Nov. 15, 2022), <https://therealdeal.com/miami/2022/11/15/south-floridas-biggest-hoas-leaders-charged-in-massive-fraud/>.

¹⁷⁴ See *id.*

were stolen via fake checks written to shell companies,¹⁷⁵ which are FinCEN's true target.¹⁷⁶

Of course, these instances underscore the need for financial safeguards, whether by the community association itself or by local or state governments. Yet given the limited number of potential offenders, creating an exhaustive federal database of information seems disproportionate to the level of misconduct that may occur. This disproportion becomes even more evident considering many financial crimes in associations are committed by independent managers,¹⁷⁷ who, as non-members, would not be included in a community association's BOI report.¹⁷⁸ On top of that, unlike organizations with globally dispersed ownership, community association board membership is closely tied to property ownership within a specific development.¹⁷⁹ Therefore, any investigation into financial misconduct would likely involve a smaller, more easily identifiable group of individuals compared to a larger corporation with more complex structures. Given this structure, requiring community associations to submit BOI reports is unlikely to be "highly useful" in investigating money laundering, the funding of terrorism, or other financial crimes.

IV. THE DECISION TO COLLECT BOARD MEMBERS' AND FINANCIAL INFORMATION FOR COMMUNITY ASSOCIATIONS SHOULD REST WITH THE STATES

Since community associations could likely succeed in arguing that federally required board member BOI reports would not be in the public interest nor highly useful to FinCEN, the discretion and responsibility for collecting such information should remain at the state level.

A. Community Associations Are Generally State-Regulated

State-level regulation of community associations is well-established. State non-profit laws typically govern the creation and operation of

¹⁷⁵ *Id.*

¹⁷⁶ Beneficial Ownership Information Access and Safeguards, 88 Fed. Reg. 88732, 88732 (Dec. 22, 2022) (to be codified at 31 C.F.R. pt. 1010).

¹⁷⁷ See Brittany Freeman, *Nearly \$30K Vanished From the HOA's Account. The State Can't Investigate the Management Company*, PROPUBLICA (Aug. 30, 2022), <https://www.propublica.org/article/colorado-hoa-management-companies-investigation>; see also Matt Humphrey, *Manager Steals from HOA Clients (Allegedly); How to Avoid the Same Fate*, HOALEADER.COM (Feb. 12, 2016), <https://www.hoaleader.com/public/Manager-Steals-from-HOA-Clients-Allegedly-How-Avoid-Same-Fate.cfm>.

¹⁷⁸ See 31 U.S.C. § 5336.

¹⁷⁹ Jeffrey A. Goldberg, *Community Association Use Restrictions: Applying the Business Judgement Doctrine*, 64 CHI.-KENT L. REV. 653, 653 (1988).

community associations.¹⁸⁰ Only a few key federal laws apply, like the Fair Housing Act, the Americans with Disabilities Act of 1990, and the Fair Debt Collection Act.¹⁸¹ States can set their own rules for reporting if they choose. Ohio, for example, requires non-profits to file a “Certificate of Continued Existence” with the Secretary of State every five years, signed by a board member, officer, or other member.¹⁸² These filings are public records,¹⁸³ accessible to investigative agencies.

B. All Relevant Information in a BOI Report is Available to the Government

Even if money laundering were to occur within an association, investigators could still access all necessary information from state-mandated filings. Community associations already follow reporting standards set by the Financial Accounting Standards Board.¹⁸⁴ As to concerns about tax fraud,¹⁸⁵ community associations are not-for-profit corporations and must file annual taxes.¹⁸⁶ When filing a BOI report, associations only need to provide FinCEN with their name, employer identification number, country of formation, and their current United States business address.¹⁸⁷ However, they already report this information to the Department of the Treasury’s Internal Revenue Service when filing taxes.¹⁸⁸

While FinCEN claims the CTA aims to increase ownership visibility, rather than association visibility,¹⁸⁹ basic membership information can still

¹⁸⁰ FACT BOOK 2021, *supra* note 12, at 65.

¹⁸¹ *Federal Laws to Know for HOAs*, HOMEOWNERS PROT. BUREAU, LLC, <https://www.hopb.co/federal-laws> (last visited Aug. 18, 2024).

¹⁸² OHIO REV. CODE ANN. § 1702.59 (2024).

¹⁸³ *E.g.*, *FAQs – Personal Information in Public*, *supra* note 80 (“Please be aware that when you submit documents for filing with the Secretary of State you are making a public record.”); *Ordering Copies of Documents Help*, *supra* note 80 (“All documents filed with the Secretary of State are a public record in Oregon.”).

¹⁸⁴ FACT BOOK 2021, *supra* note 12, at 58 (“Federal taxes for the association generally are paid under either Section IRC 528 using form 1120-H or under Section IRC 277 using form 1120.”).

¹⁸⁵ Beneficial Ownership Information Access and Safeguards, 88 Fed. Reg. 88732, 88732 (Dec. 22, 2022) (to be codified at 31 C.F.R. pt. 1010 (“The disclosure of BOI to authorized recipients in accordance with appropriate protocols and oversight will help law enforcement and national security agencies prevent and combat . . . tax fraud . . .”).

¹⁸⁶ *See* FACT BOOK 2021, *supra* note 12, at 58.

¹⁸⁷ *See* FIN. CRIMES ENF’T NETWORK, OMB NO. 1506-0076, BENEFICIAL OWNERSHIP INFORMATION REPORT (2024).

¹⁸⁸ *See* INTERNAL REVENUE SERV., FORM 1120, U.S. CORPORATION INCOME TAX RETURN (2023); INTERNAL REVENUE SERV., FORM 1120, U.S. INCOME TAX RETURN FOR HOMEOWNERS ASSOCIATIONS (2023).

¹⁸⁹ *See* Beneficial Ownership Information Access and Safeguards, 88 Fed. Reg. at 88732.

be found through a title search.¹⁹⁰ This is because covenants are attached to homes in community associations.¹⁹¹ From there, FinCEN could simply ask if an individual serves on the board. This would reveal most information required in a BOI report, excluding a photo identification document with a birthdate and unique identification number.¹⁹² Yet, federal law enforcement agencies have been developing comprehensive facial recognition databases by using DMV photos.¹⁹³ Police are also often gaining access to records as DMV and driver's license databases are being developed.¹⁹⁴ FinCEN could adopt similar strategies to enhance its investigations, leveraging its existing access to community association board member BOI information from other sources and the growing use of facial recognition or DMV photo databases. As such, state-level regulation would not hinder its investigative efforts.¹⁹⁵

V. CONCLUSION

In conclusion, community association reporting requirements are neither in the public interest nor highly useful for investigations into money laundering or terrorism funding.¹⁹⁶ The reporting costs imposed on community associations are significant,¹⁹⁷ and FinCEN has arguably not shown that these costs are balanced by public benefits. Making board members file BOI reports is not in the "public interest," as it is unlikely to pass a cost-benefit analysis. Also, the negative impact on board volunteerism could harm community associations, ultimately raising costs for average homeowners or condominium owners.

The structure of community associations also supports exemption from the CTA. Their structure makes them unlikely candidates for use as shell

¹⁹⁰ See *Hauge v. Bay Landing POA, Inc.*, No. 2020-0361-PWG, 2022 Del. Ch. LEXIS 165, at *10 (Del. Ch. July 7, 2022) (citing *New Castle Cty. v. Pike Creek Rec. Servs., Ltd. Liab. Co.*, 82 A.3d 731 (Del. Ch. 2013)) ("[C]onstructive notice suggests there is a properly recorded deed or other instrument that includes details of the restriction and which is readily available via a routine title search.").

¹⁹¹ Goldberg, *supra* note 179, at 653.

¹⁹² *Beneficial Ownership Information Reporting Rule Fact Sheet*, *supra* note 4.

¹⁹³ U.S. GOV. ACCOUNTABILITY OFF., GAO-19-579T, FACE RECOGNITION TECHNOLOGY DOJ AND FBI HAVE TAKEN SOME ACTIONS IN RESPONSE TO GAO RECOMMENDATIONS TO ENSURE PRIVACY AND ACCURACY, BUT ADDITIONAL WORK REMAINS (June 4, 2019), <https://www.gao.gov/assets/gao-19-579t.pdf>; Drew Harwell, *FBI, ICE Find State Driver's License Photos Are A Gold Mine For Facial-Recognition Searches*, THE WASH. POST (July 7, 2019), <https://www.washingtonpost.com/technology/2019/07/07/fbi-ice-find-state-drivers-license-photos-are-gold-mine-facial-recognition-searches/>.

¹⁹⁴ Mariah M. Kauder, *Out of the Shadows: Regulating Access to Driver's License Databases by Government Agencies*, 69 DRAKE L. REV. 463, 464-65 (2021).

¹⁹⁵ *Beneficial Ownership Information Access and Safeguards*, 88 Fed. Reg. 88732, 88732 (Dec. 22, 2022) (to be codified at 31 C.F.R. pt. 1010).

¹⁹⁶ 31 U.S.C. § 5336.

¹⁹⁷ See *supra* pp. 8-18.

companies, rendering BOI information far from “highly useful.”¹⁹⁸ This is likely due to their (i) visibility through record reviews¹⁹⁹ and annual tax filings,²⁰⁰ (ii) frequent outsourcing of financial management to professionals,²⁰¹ and (iii) domestic, non-profit orientation.²⁰² For this reason, board member BOI reports would not contribute meaningfully to investigations into money laundering, terrorism, or other financial abuses. Should an agency need to investigate a community association, all relevant information is already available through public records or other databases in development.

For these reasons, community associations meet the two-pronged test in 31 U.S.C. §5336(a)(11)(B)(xxiv).²⁰³ Thus, even if a future administration were to reverse course and reinstate the reporting requirements, community associations in particular merit an exemption, whether through a future amendment to the Code of Federal Regulations or a formal revision of the United States Code. Leaving financial oversight to the states ensures that community associations are governed effectively without the federal government planting itself in flower beds where it does not belong.

¹⁹⁸ See *supra* pp. 18-23.

¹⁹⁹ *State Laws on Rights To Review And Copy Governing Documents*, *supra* note 135.

²⁰⁰ FACT BOOK 2021, *supra* note 12, at 58.

²⁰¹ See *id.* at 44.

²⁰² *Id.* at 65.

²⁰³ 31 U.S.C. § 5336.