

Corporate Transparency Act: What Housing Developers Need to Know Now

Congress enacted the Corporate Transparency Act ("CTA") as part of the National Defense Authorization Act for Fiscal Year 2021 to help law enforcement detect and deter illicit financial activities, such as money laundering and terrorist financing. Because illicit actors may use corporate and other legal entities to hide their identity and illicit activity, the CTA now requires certain U.S. companies to report owner and true beneficiary information to the Financial Crimes Enforcement Network ("**FinCEN**").

The CTA has broad application to entities commonly used by housing developers. As of January 1, 2024, the CTA requires compliance through Beneficial Ownership Interest Reporting ("**BOIR**") for all new and existing reporting companies (as defined below), although with differing reporting deadlines depending on when the entity was created. Penalties for noncompliance are punishable by civil penalties of up to \$500 per day and a criminal fine of up to \$10,000, a prison term of up to two years, or both.

CTA reporting requirements target smaller, more lightly regulated entities that may not be subject to other beneficial ownership reporting requirements and will affect many businesses, including LIHTC limited partnerships and LLCs. Under Title 31 of the Code of Federal Regulations, § 1010.380 (the "**Reporting Rule**"), limited partnerships, nonprofits, and LLCs all fall under the definition of "reporting

company" and must meet an exemption to avoid reporting obligations. For limited partnerships and LLCs, each partner or member must satisfy an exemption for the limited partnership or LLC itself to qualify for an exemption.

Additionally, these new obligations are already making their way into LIHTC limited partnership agreements and LLC operating agreements, as well as leases, loan documents, and guaranty agreements. Appropriate provisions in agreements addressing CTA compliance will help minimize risk.

Reporting Companies

The CTA requires domestic and foreign "reporting companies" to file beneficial ownership information and company applicant information with FinCEN. A domestic "reporting company" is defined very broadly under the CTA as any corporation, limited liability company, or "other similar entity," that is formed under the laws of the States or an Indian Tribe. This definition includes limited partnerships.

Exemptions

The CTA specifically excludes 23 types of entities from BOIR requirements, including:

- Most financial services institutions and entities that already report to and are regulated by government agencies, such as banks, investment companies, and insurance companies;

- Large operating companies employing more than 20 people on a full-time basis in the United States, reporting revenues of more than \$5 million in gross receipts or sales, and having an operating presence at a physical office in the United States;
- Tax-exempt entities described in section 501(c) of the Internal Revenue Code and a narrow range of entities assisting tax-exempt entities;
- Entities in which "the ownership interests are owned or controlled, directly or indirectly, by one or more" exempt entities ("**Subsidiary Exemption**").

Note that FinCEN interprets the Subsidiary Exemption as requiring an entity to be owned *entirely* by exempt entities to qualify for the Subsidiary Exemption.

BOIR Requirements

Under the CTA, both newly formed and previously existing companies are required to report "beneficial owner(s)" and company "applicants" to FinCEN. No filing is necessary if an entity qualifies for an exemption.

Beneficial Owner

A "beneficial owner" is an individual who, directly or indirectly, through any contract, understanding, or otherwise: (i) exercises substantial control over an entity; or (ii) owns or controls at least 25% of the ownership interest in an entity. The Reporting Rule

offers three indicators of "substantial control": (1) service as a senior officer of a reporting company; (2) authority over the appointment or removal of any senior officer or majority of the board of directors; and (3) direction or substantial influence over important matters of a reporting company. Substantial control can take a form not specifically listed in the regulation. Under the Reporting Rule, "ownership interests" includes both equity in the reporting company and other types of interests, such as capital or profit interests (including partnership interests) or options to acquire an ownership interest.

Company Applicant

An "applicant" means any individual who actually submits or files the document that creates the domestic reporting company.

Required Information

A reporting company is required to report the following information for each beneficial owner and applicant: individual's full legal name, date of birth, current residential or business address, and a unique identifying number from an acceptable identification document (e.g., driver's license number, passport number, or a FinCEN identifier).

Reporting Timelines, Changes and Continuing Obligations, Privacy

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Nonexempt reporting companies created on or after January 1, 2024, and before January 1, 2025, are required to submit BOIR to FinCEN within 90 calendar days of formation. Therefore, entities created this year require urgent attention. Nonexempt reporting companies formed before January 1, 2024, have until December 31, 2024, to comply and those formed on or after January 1, 2025, must comply within 30 calendar days of formation.

BOIR obligations are continuing, and changes require evaluation to determine whether additional reporting obligations arise. Reporting companies submitting BOIR have 30 calendar days to file an updated report if any information changes. Any company that reports inaccurate information to FinCEN must file a corrected report within 30 calendar days after the date on which the company knew, or should have known, of the error. Entities that are not reporting companies by virtue of one or more exemptions but then later fail to meet any exemption criteria have 30 calendar days after the date on which the entity no longer meets any exemption criteria to make the filing.

The FinCEN filings will be confidential and not available for public access. However, they will be available to certain federal and state agencies for national security, intelligence, and law enforcement activities, and, when authorized by the customer, to

financial institutions for their own customer due diligence.

Application to Nonprofits and their Affiliate LLCs

Nonprofits and their affiliate LLCs should be aware of the rules but those entities, as created and operated by most nonprofit housing developers, will generally avoid BOIR because of the tax-exempt organization exemption and the Subsidiary Exemption.

Application to LIHTC Partnerships

For LIHTC limited partnerships, all partners must meet a reporting company exemption for the LIHTC limited partnership to be exempt from BOIR requirements. For example, if a 501(c)(3) corporation, which meets the tax-exempt entity exemption, forms a wholly controlled limited liability company subsidiary, that LLC would meet the Subsidiary Exemption and would not need to submit BOIR to FinCEN. If the exempt LLC then forms a limited partnership with another 501(c)(3) corporation or exempt entity, the new limited partnership would also meet the Subsidiary Exemption since each partner of the limited partnership separately is exempt. No BOIR is necessary to claim the exemption. However, when a new investor limited partner that is a reporting company enters the limited partnership, that new investor limited partner must meet an exemption for

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the limited partnership to maintain its status as exempt. If the investor limited partner is a nonexempt reporting company, then the limited partnership must submit BOIR to FinCEN since the limited partnership would no longer meet the Subsidiary Exemption. Additionally, any entity with an option to purchase the limited partnership interests, as is common for Year 15 investor exit purposes, factors into the analysis.

Application to Housing Authorities and Housing Authority Affiliates

Housing Authorities should themselves be exempt from BOIR compliance by virtue of an exemption for governmental entities that exercise governmental authority. However, FinCEN guidance on what constitutes the exercise of "governmental authority" is currently lacking and Housing Authority qualification under this exemption may be open to interpretation. Housing Authority-controlled affiliates must be evaluated independently but would appear to generally qualify for the Subsidiary Exemption, assuming Housing Authorities are exempt and the affiliate is entirely owned by the Housing Authority and other exempt entities.

Application to For-Profit Developers

Smaller, for-profit housing developers, most likely will need to report beneficial owner and applicant information to FinCEN since they probably will not

qualify for an exemption. However, for-profit developers should carefully review the Reporting Rule, the Small Entity Compliance Guide published by FinCEN, and applicable statutes, and seek guidance as necessary to determine whether they may qualify for an exemption not specifically discussed above.

The CTA makes sweeping changes to the corporate compliance landscape in the United States, as was its intent. It has been estimated that over 33 million entities are now subject to its provisions.

Housing developers should inventory their entities, confirm reporting deadlines, and evaluate whether reporting obligations are triggered. Goldfarb & Lipman is ready to assist our clients with compliance questions under this new regime.

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