HOAMCO hub

Bulletin for Board Members

New Federal Reporting Requirement for Community Associations

In 2021, the United States Congress passed the Corporate Transparency Act as another part of the 2020 Anti-Money Laundering Act. Effective January 1, 2024, this act created a new beneficial ownership information reporting requirement as part the U.S. government's efforts to monitor and prevent financial crimes, such as money laundering. Although one may not think this pertains to association finances, the definition of companies required to make this report is inclusive of community associations.

The Financial Crimes Enforcement Network (FinCEN), part of the U.S. Treasury, handles the submissions of the Beneficial Ownership Information (BOI). FinCEN defines Beneficial Owner as an individual who either exercises substantial control over the reporting company (in our case the association) or owns or controls at least 25% of the reporting company's ownership interests (in our case at least 25% of the lots/units in the community). For associations these Beneficial Owners are the members of the Board of Directors (who exercise substantial control) and any owner who owns at least 25% of the lots/units in the association, often a builder or developer.

In filing the report with FinCEN, the association must report for each Beneficial Owner the following:

1. The individual's name
2. Date of birth
3. Residential address
4. An identifying number from either a passport or U.S. driver's license, and the name of the issuing state or jurisdiction of the identification document. An image of the identification document must also be included.

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For all associations existing before January 1, 2024, the deadline to make the initial report is December 31, 2024. Once the initial report is made, further reports only need to be made when information changes. In most cases this will be any time that the composition of the board changes.

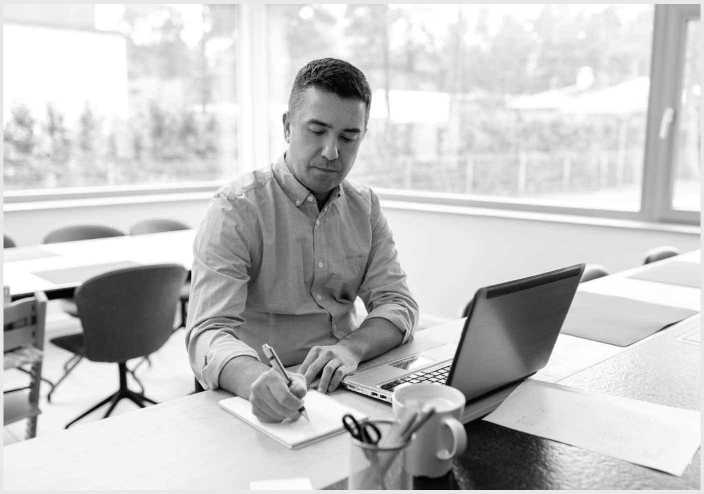
HOAMCO is committed to assisting our clients in complying with this new federal requirement. Although 11 months may sound like a large window of time, we want to make sure everything is completed well ahead of the deadline, while being conscientious about anticipated Board of Directors changes that we would expect to see during this year, such as after an annual meeting. We will be coordinating the filings with your Community Manager to coincide with annual meetings, and will be reaching out accordingly to complete the filings at the appropriate time.

In the meantime, if you wish to have additional information, the following links may be of help:

- https://www.fincen.gov/boi-faqs
- https://www.fincen.gov/sites/default/files/shared/BOI_Small_Compliance_Guide.v1.1-FINAL.pdf
- https://www.fincen.gov/boi

Mandatory vs. Discretionary Authority

The language of the governing documents of an association provides what an association's board and owners are allowed and required to do. However, the governing documents often use words that at first glance seem to mean the same thing, such as "power" versus "duty," "can" versus "will," and "may" versus "shall." Some of these words indicate a requirement, while the other words merely provide authority to do something at the party's discretion. Knowing the difference between these words can be key to understanding what the governing documents require of an association's board or owner versus what the governing documents allow an association's board or owners to do.



Words Indicating Requirement

Ultimately, the governing documents tend to outline a board's powers and duties and may even present a list of a board's powers and duties without differentiating between the two, but powers and duties are not the same thing. If the board has a duty, the board is required to act on that duty, as duties are mandatory. The board cannot refuse to do something that is indicated as being a board duty without violating the governing documents. However, it is not always specified that an item is a "duty," but other words are used which indicate that the action is required to be pursued. The most common word indicating a requirement is "shall," although occasionally, the word "will" may also be seen. If the governing documents indicate that the association or owner "shall" or "will" do something, this means that it must be done.

Common requirements that can be found in an association's governing documents include the board's and owners' responsibilities or board procedural requirements. For example, a statement that "the association shall maintain and keep in good repair all common elements" means that the association is required to maintain the common elements in the association. Another example of a requirement is a statement that "any assessment which is not fully paid within 10 days after the due date will bear interest from the due date..." This statement means that the association is required to apply interest on delinquent assessments (although boards also have the discretion to waive such interest after such application).

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Mandatory vs. Discretionary Authority

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Words Indicating Discretionary Authority

When a board has the authority to do something that is not actively required, this describes a "power" of the board. The board is usually provided many powers in the association's governing documents, but the board is not actively required to use all such powers, unlike a duty. Powers are discretionary in that they provide the board authority to pursue an action without such action being mandatory. But again, instead of referring to such actions as being a "power," governing documents more often use the terms "may" or "can" to indicate that something is allowed, but not mandatory.

For example, most association declarations address special assessments as being a discretionary power, using such language as, "the board may levy a special assessment applicable to that year only." The "may" indicates that this is discretionary, and the board is not actually required to levy a special assessment at any time. Another example of discretionary language is a statement that "amendments can be executed in counterparts." This indicates that it is allowed for amendments to be executed in counterparts but does not require that amendments be executed in counterparts. It is important to note that if the language is permissive, but not required, that a board is not violating the governing documents if it chooses not to pursue such action.

Conclusion

In sum, when navigating an association's governing documents, some actions are required to comply with the governing documents and others are discretionary. Differentiating between what is mandatory versus discretionary can be as simple as knowing that the words "shall," "will," and "duty" indicate a requirement whereas the words "may," "can" and "power" indicate a discretionary option. Knowing the difference is important, as not pursuing a required action would be a violation of the governing documents, whereas if an action is discretionary, not pursuing such action is acceptable and within the board's discretion.

Covenant Enforcement

As members of an HOA board, it is crucial to recognize the importance of consistently enforcing community rules and regulations. Inconsistencies in handling rule violations not only jeopardize the overall harmony and order within the community but also expose the board to potential legal liabilities.

Sacrificing Accountability

One common scenario that often arises within homeowners associations is the disparity in enforcing rules. Members may question why they receive violation letters while others seemingly get away with similar infractions. While members don't know who has received notifications and who hasn't, they make assumptions that they are being targeted. If there is a disparity, this inconsistency erodes trust and can lead to frustration and disputes among community residents.

Sense of Entitlement

To better understand the impact of inconsistent rule enforcement, let's draw a parallel to a situation we encounter on the roads. When a driver is pulled over for speeding, they cannot absolve themselves by pointing out other

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Covenant Enforcement

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speeding vehicles. Similarly, community members must be held accountable for their own actions and violations, irrespective of how others may or may not be penalized.
For instance, let's imagine an HOA community where there is a strict rule against parking recreational vehicles (RVs) on the street. Emily, a diligent homeowner, abides by this rule and ensures her RV is parked off-site. However, she notices that several of her neighbors have been violating the same rule without facing any consequences. This inconsistency in enforcement creates frustration and a sense of unfairness among community members.

Emily decides to bring up the issue during an HOA board meeting, highlighting the importance of consistent rule enforcement. She points out that if the board fails to address the ongoing violations, it sends a message that some members are exempt from adhering to the rules. This not only undermines the integrity of the community but also creates an environment where certain individuals believe they can flout the rules without consequences.

By addressing this inconsistency and enforcing the RV parking rule uniformly, the board can ensure fairness and maintain the integrity of the community. It is crucial for HOA boards to understand that consistent enforcement is essential to upholding the principles and values of the association.

Legal Liabilities and Discrimination

Beyond the erosion of trust, inconsistent rule enforcement opens the door to potential legal liabilities for HOA boards. Discrimination claims can arise if it can be demonstrated that certain individuals or groups are treated preferentially while others face penalties. Such discrimination can result in costly lawsuits that tarnish the reputation of the association and deplete financial resources.

Risk Management and Fairness

Consistency is key when it comes to enforcing rules and regulations. HOA boards should strive to establish fair and transparent procedures for addressing violations, ensuring that no individual or group receives special treatment. By adhering to a consistent enforcement policy, the board not only minimizes the risk of discrimination lawsuits but also fosters a sense of unity, trust, and fairness among community members.

Best Practices for Rule Enforcement

To mitigate the hazards associated with inconsistent rule violations, HOA boards should consider implementing the following best practices:

1. **Clear and Well-Communicated Rules:** Develop comprehensive and unambiguous community rules that are easily accessible to all members. Clear guidelines leave little room for misinterpretation and contribute to fair enforcement.

2. **Regular Inspections and Documentation:** Conduct regular inspections to identify rule violations and maintain detailed records of all infractions observed. This documentation will serve as evidence of consistent enforcement practices.

3. **Timely and Uniform Enforcement**: Respond promptly to reported violations and ensure that penalties or corrective actions are applied uniformly to all offenders. This consistency reinforces the board's commitment to fairness and equal treatment.

4. **Appeal and Review Mechanisms:** Establish an appeal process for members who believe they have been treated unfairly. This allows for a fair review of individual cases and provides an opportunity to rectify any potential mistakes or oversights.

5. **Education and Awareness:** Promote awareness among community members about the importance of adhering to the established rules. Regularly communicate updates, reminders, and explanations regarding rule enforcement to ensure everyone is informed and accountable.

Inconsistent rule enforcement within an HOA can have far-reaching consequences, including the erosion of trust, legal liabilities, and the potential for discrimination claims. HOA boards must prioritize fair and uniform treatment of all community members to maintain a harmonious living environment and protect the association from legal risks. By implementing clear policies, maintaining consistent enforcement practices, and fostering open communication, boards can ensure a fair and accountable community that benefits everyone involved.

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Understanding Insurance for HOA's

Property Insurance: This policy covers physical structures within the community, such as buildings, clubhouses, pools, and common areas, against damage from perils like fire, vandalism, and natural disasters (flooding is not covered–flood insurance must be purchased separately). It should also include coverage for common property and assets.

General Liability Insurance: General liability insurance provides protection in case someone is injured or their property is damaged on common areas or as a result of the association's activities. It can also cover legal expenses in the event of a lawsuit. General Liability Insurance provides insurance coverage for claims arising from bodily injury or property damage occurring in or on common areas, and also personal injury or advertising injury.

Directors and Officers (D&O) Insurance: D&O insurance protects board members and officers from personal liability if they are sued for decisions or actions taken on behalf of the HOA. This coverage is crucial for attracting and retaining board members. It can also provide coverage for wrongful acts by certain other volunteers. Policies should also provide coverage for non-monetary claims.

Fidelity Bond/Crime Insurance: This policy protects against theft or embezzlement by employees or volunteers who handle HOA funds or assets. This provides coverage for losses resulting from dishonest or fraudulent acts on the part of anyone who handles or is responsible for funds held or administered by the HOA including directors, officers, trustees, employees, or volunteers. The coverage should also include protection for forgery or alteration as well as computer and funds transfer fraud.

Workers' Compensation Insurance: If the HOA has employees (e.g., maintenance staff), workers' compensation insurance is typically required by law to cover medical expenses and lost wages in case of work-related injuries or illnesses. Non-employee workers' compensation insurance can protect the association if a vendor's insurance policy may have lapsed, or may also protect the association in the case of community volunteers' injuries.

Employment Practices Liability Insurance (EPLI): EPLI covers the HOA against claims of discrimination, wrongful termination, harassment, and other employment- related issues brought by employees.

Umbrella/Excess Liability Insurance: This policy provides additional liability coverage beyond the limits of the general liability policy and sometimes the directors' and officers' liability policy. It can be especially important for larger associations or in situations where higher liability protection is needed.

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Flood Insurance: If the community is located in a flood-prone area, flood insurance may be required. Standard property insurance typically does not cover flood damage. Flood insurance pertains to a rising body of water, as opposed to damage from a broken water pipe.

Earthquake Insurance: In regions prone to earthquakes, earthquake insurance can be important to cover damage caused by seismic events.

Cyber Liability Insurance: As HOAs increasingly use digital systems for managing information and communication, cyber liability insurance can protect against data breaches and cyberattacks.

Insurance for Common Area Amenities: Specialized insurance might be necessary for amenities like pools, tennis courts, playgrounds, or golf courses to cover liabilities associated with these areas.

Mechanical Breakdown Coverage: This coverage is also known as boiler and machinery coverage, and provides coverage for physical damage caused by certain sudden, accidental events that originate inside machinery or electrical equipment. It can also provide coverage for building damage caused by steam boiler explosions.

Hired and Nonowned Automobile: This provides coverage for claims arising out of the use of vehicles that are not owned by the association, but are used while acting on its behalf, such as in the case of a board member or community volunteer.

Bailee Coverage: This provides coverage for a party who has temporary custody of the property of another, such as in the association staff holding packages or parcels delivered for residents until they pick them up.