Digital Planning Podcast (Season 6, Episode 3): Estate Planning and the Corporate Transparency Act

Speakers: Justin Brown, Jennifer Zegel, Ross Bruch, and Ashleigh Taylor

Jennifer Zegel:

Welcome back to the Digital Planning Podcast. This is Jen and I'm with my co-hosts, Justin and Ross. And today we have a very special guest, Ashleigh Taylor, who is an attorney in the business and finance department at my law firm, Kleinbard. And she's here today to discuss the Corporate Transparency Act and what advisors need to know in connection with business planning and estate planning. Ashleigh, thank you so much for taking the time to share your expertise with us on this important topic. Please tell us a little bit more about yourself.

Ashleigh Taylor:

Sure. Thank you so much everyone for having me on the podcast. Again, my name is Ashleigh Taylor. I'm a business and finance associate at Kleinbard. I've been practicing now for a little over eight years. I initially started out in some bigger law firms, both in New York and in Boston, and then eventually made my way back to Philly working at Kleinbard, and I've been here for almost four years now. My experience with the Corporate Transparency Act has been since there were murmurings that this would happen many years ago. So been tracking the evolution of the CTA. And there's a lot that has not been fleshed out with the CTA yet, but I think that's unfortunately the nature of legislation of this kind. But excited to be here and talk about the CTA and answer any questions.

Jennifer Zegel:

Excellent. So at a very high level, what is the Corporate Transparency Act and what are its primary objectives?

Ashleigh Taylor:

Sure. The Corporate Transparency Act is legislation that was passed by Congress and went into effect January 1st, 2024. The main objective of the Corporate Transparency Act ... And I'll say as an aside, it was a bipartisan effort that passed this through. And the idea was we want to be tackling these so-called shell companies. And it was the concern that money laundering, terrorism, all these things hide behind so-called shell companies. And so when law enforcement goes after XYZ LLC to figure out what's going on, they don't know who owns XYZ LLC and it's very hard to figure out. I've had to chase up the chain of these shell companies to find an actual human being that you can talk to. So it was really legislation that came out of concern to prevent these illicit activities and enhanced transparency and security in the US financial system. This is obviously a huge shift from the reporting that we've seen for companies before.

I'm sure people are aware that it's very easy to set up an entity in Delaware or most states and all you have to provide is the name of the company and an authorized signatory and take it from there. You don't know who owns the company, who are the beneficial owners, who are the equity owners. You don't really see behind the scenes, which is very different from frankly a lot of different countries around the world. Europe has a very similar and a more stringent scheme to the CTA. So those were all the concerns wrapped up, and that was the objective of the CTA was to enhance transparency, but really focus that enhanced transparency just for law enforcement. This is not like European counterparts in which you're able to as a consumer, as a non law enforcement look up on your computer in a public database and figure out who owns the company. That is not the goal here. So it's really just to aid law enforcement.

So what the CTA does is it requires that any reporting company ... And we can talk about what a reporting company is. But you have to report to FinCEN, which is the Financial Crimes Enforcement Network under the Department of Treasury. You essentially have to upload a BOI report, meaning a beneficial ownership report, that lists basic information about the company. So their EIN, address, name, that sort of information for the company itself. And then more importantly, what you have to do is report personal information about the beneficial owners of that reporting company. So there are two big

questions there. Number one, who is a beneficial owner of a reporting company? And then number two, once you decide or once you identify who that beneficial owner is, what do they have to report to FinCEN?

I'll tackle the second question because that's the easier question. But what a beneficial owner has to report to FinCEN is name, address, basic personal information, but then also you have to upload a copy of your passport or state ID. So that is where people I think get very nervous because that is much more information that has ever been asked by an owner of a company, assuming that they're not reporting to the SEC. But we're talking about your main street basic company. They've never had to provide this information before. So this is a huge shift in the expectations that owners of businesses have with federal oversight, federal involvement in their business. So those were the goals. That's what needs to be reported. And again, I'm sure we'll go into it more deeply, but a beneficial owner is anyone who owns at least 25% of the equity of the company or exercises, in air quotes, substantial control over the company. And we can get into that a little bit more, but substantial control is very broadly defined.

So the real intent there is to capture as many people as possible in what substantial control is and who a beneficial owner is. So really what they are trying to do is, again, aid law enforcement if they see a company that is suspicious, sketchy, involved in illicit crimes of some sort. They wouldn't be able to pick up a phone and call someone and haul them into questioning. So they want as many names on the BOI report as possible in order to aid law enforcement in that way. So that's the general overview and what they're really trying to target here.

Ross Bruch:

That's really helpful. Can you go back to the definition of a reporting company and help us understand who falls under those parameters?

Ashleigh Taylor:

Sure. A reporting company is a corporation, an LLC or any other entity formed under the law of a state, Indian tribe, or foreign country that is registered to do business in any state or tribal jurisdiction by filing a document with the Secretary of State or any similar officer in the United States or Indian tribe. So basically it's very, very broad. That is the initial definition of what this is supposed to capture. However, there is a very long list of exemptions to this definition of reporting company. There are actually 23 exemptions to be exact, and I will not go into every single exemption, but I'll try to highlight the ones that I think are probably most relevant and most used. The first major exemption I'll talk about is a large operating company. Large operating companies, which I'll get the definition for in a moment, are exempt from the CTA. So they are not considered reporting companies.

In order to be a large operating company, you need the following. You need to employ more than 20 full-time employees in the US, you need to have an operating presence at a physical office in the US and you have to have filed a tax return for the prior year for more than $5 million of gross receipts or sales. I'll go into each one of those because now that we've seen this around for a while, there are certain things and certain questions that continuously pop up. So going back to the first requirements, you have to employ more than 20 full-time employees in the US. This does not include independent contractors, this does not include consultants. It has to be a full-time employee of that company. They have to be in the US and you cannot aggregate employees over, let's say many companies. And I'll give an example. Let's say you have a holding company that has three subsidiaries. The holding company does not employ anyone directly. All their employees are held at their subsidiaries below them.

You might have a hundred employees and let's say a third, a third, a third in the subsidiaries below. You cannot aggregate those employees and say that holding company is a large operating company because it employs more than 20 full-time employees. That doesn't count. You can't aggregate entities to a holding company. So something to think about also ... And I'm sure this is a question going forward. But what does all of this mean for small business owners? One way in order to hopefully structure your business so that it does fall under this large operating company exemption is to make sure that you're holding your full-time employees at the entity where you operate and not necessarily at subsidiaries unless you're already going to meet that 20 employee threshold. So that's something that we've seen come up a lot, but it has to be 20 full-time employees in that entity. So you can't count any employees at subsidiaries below and they have to be full-time employees.

So number two, have an operating presence at a physical office within the US. So this does not mean a PO box. That does not count. It cannot be an empty office. Again, it has to be a physical office that has an operating presence in the US. So if we go back to what the intent of the CTA is, and you think about it in the most simplistic terms, really what they want to do is empower law enforcement to go somewhere, knock on a door and get an answer. They want someone behind that door. They want to see a person. So this is what that is really getting at. Again, I think a lot of companies have been able to operate very successfully without a physical office that's not a PO box, but you're not going to be able to use that PO box in order to be considered for the large operating company exemption.

So the third requirement is to file a tax return for the prior year of more than $5 million in gross receipts or sales. A question that comes up a lot is, I'm just starting my company. I just formed my entity. We do have more than 20 full-time employees. We have a physical office, we check the boxes for number one and two, but we're a new company. We haven't filed a tax return before. What do we do? Current guidance says then you're not a large operating company. You can't prospectively say, we feel confident that we're going to surpass this. You need to have that tax return of more than $5 million. And right now there is no working around that. Unfortunately I think that's pretty shortsighted and I think you're not going to capture in this large operating company exemption, a lot of the entities you're trying to capture if they're a new entity. So that I think is slightly frustrating, but something that we've seen going forward.

So again, large operating company exemption seems like it would capture a lot of companies and I think that it does, but there are these certain specific trip ups that happen that you have to be aware of to make sure that you're actually complying with all three of those requirements. Some other big exemptions are ... And I'll put this in categories to make it a little bit more manageable. But if you're a company that already has some sort of federal reporting requirements, so you have to report to the SEC. So you're a broker dealer, you're a clearing agency, you're a bank, you're a credit union, you're an insurance company, you are a registered investment advisor, that bucket, you already report a lot of information to the federal government, so you're going to be exempt. And really I think it makes sense, but it's also to reduce paperwork on the federal government's part because we already have information on you. We already know where to find you and we know the natural person that we can knock on the door and say, "Hey, we have questions." So that's why those are exempt.

Again, falling into a similar type bucket are public utilities. So anything that already has strong ties to the government, you already have a lot of transparency in those companies themselves. Other exemptions are accounting firms are exempt, tax-exempt entities are exempt, pooled investment vehicles and venture capital fund advisors are exempt. I don't have a great reason on why those are exempt and other people are not exempt except for maybe these people have a lot of pull. So if you fall under those definitions, you do not have to report.

And that is something that a few of our clients have been able to make use of that exemption. And it's very helpful because if you're thinking about those type of entities, if you look at their corporate structure chart, it's a very tangled web of many, many entities. So it would've been quite burdensome to follow up the chain and report all of that. So selfishly, as an attorney, I'm glad that some of our clients have been able to make use of those exemptions. If you're talking about exemptions that are going to apply to the most companies and especially clients that most attorneys are dealing with, I think those are the big ones.

Jennifer Zegel:

So walk us through the process. What steps should clients and their advisors be taking to ensure that they are reporting or that they're exempt? Tell us what the process should be or what best practice is.

Ashleigh Taylor:

So I have given this a lot of thought because Jen and I work at Kleinbard and that was one of the first things we were thinking about. How do we get our clients on board? How do we make sure everyone is compliant? I think that this is going to be a bespoke approach for each law firm or any professional advisor that is working with clients through this. But I think personally best practices is first step determine whether you're a reporting company. And I think in terms of doing all of the CTA analysis, that's probably the easiest one. It's pretty clear whether you fall into the large operating company exemption or any of these other exemptions. So first determine if you're a reporting company. If you're not, congratulations, that's amazing. You have nothing to report. And that's actually something that I was actually surprised about.

If you are not a reporting company, you don't even have to submit a report saying I'm not a reporting company. You just don't submit it all. So something to note. So step two, if you and your attorney go through the analysis, figure it out, indeed, you are a reporting company, you're going to have to report your company's information, number one. So again, basic information, name of your company, address, EIN. Step two, you're going to have to determine who are your beneficial owners of the company. That analysis is a little bit more complicated. It's easy if you think about it in the straightforward way. Okay, who owns 25% or more of the equity of this company? That's pretty easy. You look at the cap table, you would think. But we have this definition of substantial control. So someone who's a beneficial owner needs to have hit the equity threshold or operate substantial control over the company.

So then the question becomes, what is substantial control? This, as I mentioned before, is purposely very broad, somewhat vague, but there are four general buckets of criteria. So an individual is determined to have substantial control over an entity if that individual is a senior officer. So anyone in the C-suite, automatic beneficial owner, essentially. Talking CFO, CEO, chief operating officer, or any other person who performs a similar function as these officers. Number two, any individual within the entity that has appointment or removal authority. So does this person, even if they're let's say a 5% equity owner, do they have special powers, let's say? So are they able to remove a senior officer or are they able to replace them on the board of the directors? So that assignment or removal authority is very important because I'm sure we've all had experiences in operating agreements, shareholders agreements where there might be someone who owns less than 25% of the equity of the company but does have these special powers. So if they have these appointment or removal authority powers, that would be an indication of substantial control.

Similarly, the third bucket is, is this individual an important decision maker? Again, that's pretty vague. But the guidance that's come out, the FAQs, really what they're trying to capture here, is there any individual who has substantial influence over making important decisions like what is scope of this business? Whether this business can terminate certain lines of the business, entering into significant contracts, making major expenditures, investments, issuance of new debt or equity. Do you need this person's authority to amend a governing document, amend the shareholders agreement? What I think of this as is if it's in a shareholders agreement or an operating agreement, oftentimes it via a provision that says the board of directors or the manager or whoever the entity is in that company, they can do whatever they want except for you need special permission to do any of these things. And it's usually a list of three to 10 things. And it's the things that I mentioned.

I'll use the example of an LLC. So the managing member can do anything they want to run this business, but if you want to take out a line of credit or you want to issue new equity or a new member wants to come in, you will need the approval of a majority of the equity owners or the people owning a majority of the equity in this company. This becomes important because even if you are a 2% owner, equity owner in this company, if there is major decision language in your governing documents or let's say this important decision making language that says you need a majority of the equity owners to allow this to happen, even if you're a 2% owner, you are now coupled in with substantial control because even your 2% vote gives you substantial control to make decisions.

So even though your 2% equity would not allow you to have a determinative vote, the fact that you get to participate in a vote that says whether or not the company can do certain things gives you substantial control, which is something that I found surprising and before going into this would not have thought that's what they were trying to capture. But again, I think if you look back to the intent of the CTA, is they want as many names on this beneficial ownership report as possible. So it's anyone who has even slight control of the company and in not ways that we would typically think about.

And then the fourth bucket of is of course a catchall in that any individual has any other form of substantial control over the reporting company. So as you can see, the definition of substantial control is very broad. There is no limit to the number of individuals who can be reported for exercising substantial control. And I'll give a little anecdote here. When we were preparing internally at Kleinbard the forms that we're going to be working with our clients to fill out ... We call it the CTA questionnaire. And I had left a bunch of lines in the PDF saying ... Let's say it was 15 lines for potential people who could be beneficial owners, and I passed along to a colleague to look it over. They're like, "Ashleigh, obviously you can't do math because there should only be max four lines here because it's 25% or more equity ownership." And I said, "I wish. But really it's an unlimited potentially number of people depending on who has substantial control over this company." So again, hypothetically, you could have zero equity in this company and yet still have substantial control. I don't think that's typical, but again possible.

Justin Brown:

Ashleigh, let me jump on that of who can be the beneficial owners and who has substantial control. Because we all work in the trust and estates field and one of the common planning techniques that we would do is have an entity created within a trust. And so if the entity now has that trust wrapper, how does that change everything? I think of you've got trustees, you've got beneficiaries, you've got the settlor. What does the trust wrapper do to all of this analysis?

Ashleigh Taylor:

Unfortunately, it does make it more complicated. But really again, it comes down to this idea of substantial control. So there is no one size fits all approach to trusts. I think you really have to read the trust agreement and analyze what each individual's role is, and it's going to hinge on this idea of substantial control. So for example, a trustee of a trust can exercise substantial control over a reporting company. Again, it depends on the trust agreement. But if that person is able to make decisions ... For example, if they're ... Really any of the hallmarks of substantial control I talked about, but I'm going to go ... I'm looking at my notes to specifically talk about trusts. First off, a trustee as well as any other individual who owns or controls ownership interests and has the authority to dispose of trust assets is a beneficial owner.

This is a recent FAQ that just came out from treasury and prior to this FAQ, it wasn't clear whether a person who was designated as a trustee was a beneficial owner merely because of that status as a trustee. It's been made clear now that it's not because you've been given the title of the trustee, that automatically makes you a beneficial owner. It is the role that you play in that trust. For example, in a direct trust. If an administrative trustee does not have the authority to dispose of trust assets, then that trustee is not a beneficial owner. A second item is a beneficiary is a beneficial owner if he or she is the sole permissible recipient of income and principle from the trust or has a right to demand a distribution of or withdraw substantially all of the assets from that trust. Again, that's very limited in scope. But again, I think it gets at this idea of if this person can direct where the money goes or how decisions are made, then even a beneficiary can be a beneficial owner. Again, that's very limited in scope. But I think the point there in that particular FAQ was to show titles don't matter as much. So just because you are a beneficiary, it does not absolve you from being a beneficial owner if you have certain powers and control.

Again, a third item is just if a grantor or settler is a beneficial owner, if such individual has the right to revoke the trust or otherwise withdraw the assets of the trust. So if I take a larger view, really what I think they're trying to get at is if there is someone who makes distribution or investment decisions or can control disposition of assets within a trust, that individual is going to have substantial control and therefore be a beneficial owner.

Jennifer Zegel:

So to just jump right in there, we talked about settlors, beneficiaries, trustees, but another type of role that could come into play is a trust protector, which is a technique to impart an individual or a third party as a watchdog over the trust that can do a lot of different things and those powers can be customized depending on the trust agreement. But even in that situation, a trust protector under these guidelines could potentially be a required reporter.

Ashleigh Taylor:

That's correct. So they could be a beneficial owner. Again, if they're pure watchdog in the sense that they are not making active decisions on disposition of assets, then probably not a beneficial owner. But the fact that they're a trust protector, that title in and of itself does not absolve them from being a beneficial owner. And like you said, if they do have a certain role or they're able to do certain things within the trust that resemble the things that we talked about, then they would be a beneficial owner.

Justin Brown:

So let's assume that for general purposes, trustees are going to be beneficial owners and certain types of beneficiaries could be beneficial owners and trust protectors will be beneficial owners. Those positions, those roles change over the lifetime of a trust. Trustees resign, they die, new trustees come in, new trust protectors come in. Is there an additional reporting requirement when these new positions are filled? And if so, what is the timeframe for those reporting requirements?

Ashleigh Taylor:

Sure. Something we haven't touched on yet ... And thank you for the question because this is important. If there is any change to the information that you have submitted on your BOI reports, your beneficial ownership information report, whether that be information about the company itself or whether that be information about the beneficial owners, you have 30 days from the time that that change occurs to submit an update to your BOI report. So in that situation, if a trustee changes, then you have 30 days from the change to submit a new BOI report with the new information about the new trustee. Currently, there has been an extension of that timeline. So for 2024 ... This is for currently existing entities and also entities that were formed in 2024. But they've extended it to 90 days because they know, again, this is a new piece of legislation, people are trying to wrap their heads around it. So they've made that extension. So you have now 90 days rather than 30 days to update your BOI report. I can't say how long they'll allow that extension to last. It might be January 1st, 2025, it goes back to the original 30 days. But yeah. You do have to report any of those changes.

Justin Brown:

So as somebody who drafts those types of changes ... I draft trustee changes quite a bit for clients and ordinarily I'm not as concerned about the specific assets that are owned in a trust when I'm doing a trustee change. But now it sounds like as the person who's drafting the document, I need to be much more aware of what the assets are and if there are any entities inside of a trust in which a trustee is changing so that we can then communicate with the company so that they can update their BOI report. Right?

Ashleigh Taylor:

That's correct. This is another broader issue, but what the CTA has really brought to the forefront is how important it is to be communicating as a company. Intra company communications. So it can be as simple as your partner in your business has moved. Obviously that's not something you would ever think about would have any impact on your company whatsoever, and now it does. So I think that's really important and it's something that we as attorneys should be educating our clients on. To your point, there are things that as an attorney you would never even really be considering when you're making you would think are pretty ministerial routine changes to documents that are going to have significant impact now. And I think it's something to be aware of as an attorney of the work that you're doing and also educating your clients.

And something that I do recommend, and I know this is a point that we wanted to discuss perhaps later in the podcast, but I think it's worth bringing up now. How do you now knowing that there is this CTA compliance regime, how does that play out day to day in your company and how do you perhaps revise your organizational documents to reflect that you have to do this reporting now? And I have been advising clients to again revise their operating agreements to make sure that there are both carrots and sticks I'll say. So first you want to be very clear that the CTA ... This is just the way that I'm imagining it and the way that I've counseled clients. This is an additional provision in your shareholders' agreement, in your operating agreement that says this company and the members of this company are going to have to provide certain information for governmental reporting purposes and you need to comply and if you fail to comply, there are going to be consequences.

I think one issue we've run into when we talk to clients about the CTA is, first of all, "I don't want to do that." Understandable. Not many people want to scan their passport and send it to the federal government. And then once you educate them, walk them through with the process, I think they understand a little bit more. And the second question usually is, "Wow. How am I going to get my partners to do this? How am I going to socialize it to them to make them realize this is important?" And I think one of the ways you can do that is, again, carrots and sticks. I'll talk about carrots first to be a little bit more optimistic. But what I've seen people do is you require your equity holders to certify their beneficial ownership information annually as a prerequisite to receiving their tax distributions. So you make it more of a routine practice in your company.

For example, let's say your company, you get the financial reports, let's say quarterly. In order to get your financial report. Can you please look at this piece of paper and make sure all this is true. You haven't moved, you don't have a new passport. All these things, make sure they haven't changed. Sign, yes, it hasn't changed. Okay. Here's your quarterly financial report. So baking it in to the quarterly or day-to-day machinery of your company. I think it number one, makes it more palatable. Number two, you don't miss things, you don't forget. Because I think all these things seem to us to be so small that they're ...

When you're trying to run a company, whether or not your partner moved to a new house is not on your radar and this forces you and bakes into your operating agreement and hopefully the operations of your company that it becomes part of just a checklist item that you have to do.

I also think generally what companies have been doing now, now that they've been forced to reckon with the CTA is people are looking at their capitalization table much more closely that they have been in previous years. I personally think as an M&A attorney that this is great news because oftentimes when someone goes to sell their company, they totally forget the 1%, 2% equity owners at a cap table. And having to go back and do the analysis of who is a beneficial owner who is on our cap table, I think is really important. And again, baking it in to either a quarterly or annual process I think is really helpful. Just for also corporate clarity really. On the other side, so sticks for let's say noncompliance, you can get as severe as you want to. I've seen people do fines or suspension of voting rights or even more severe measures like if you are not responding to us, if you're not providing this information, then we're going to be forced to buy you out for a fraction of the cost of your equity, all these things. So again, totally varies in the spectrum of how severe you want to be. And I think personally anecdotally what I've seen is that is a function of how big or small the company is.

So if you have a company with three partners and one partner is just not responding, not wanting to do this, I've seen people get a little bit more severe because I think they need to show their partners that this is serious. But all these things are totally customizable and it absolutely depends on what you want to do. But I do think it's helpful for every company who is a reporting company who has to make these disclosures under the CTA to look at their organizational documents and try to bake in these items.

Justin Brown:

Would you put these in the organizational documents or the governing documents or more in a policy manual for the entity?

Ashleigh Taylor:

Personally I would put it in an operating agreement, a shareholder's agreement, something like that. Because I think, again, it really depends on the approach and I think it depends how you feel like your partners are going to react to this. The good thing about having it in an organizational document is that you have real consequences for not doing it. And I think it's a little less actionable in a way if it's just a policy in a handbook. But again, I think that really depends on the environment, the culture of the company, et cetera. I found that when I'm working with clients who are nervous about, again, they're fellow partners maybe not providing the information they need to provide, they're like, "We need to put it into the shareholders' agreement because that's what they look at." The shareholders' agreement is going to be the governing document of the ... It's the constitution of the company. When do I get my distributions? When do I get to see the financials? All of that is in one document. And if that document also says you need to provide X, Y, Z, it feels more real than if it's in a policy handbook. But I think again, that totally depends on the environment of the company itself.

Jennifer Zegel:

So we're talking about non-compliance amongst partners or shareholders at an entity level, but what happens with non-compliance of a reporting company at the FinCEN level?

Ashleigh Taylor:

So I will give a few answers to that. I think there are pretty severe penalties. So the willful failure to complete or update beneficial ownership information to FinCEN or attempting to provide false or fraudulent information could result in civil or criminal penalties. So the civil penalties are up to $500 for each day that the violation continues. Criminal penalties including imprisonment from up to two years and or a fine of up to $10,000. Senior officers of an entity that failed to file a BOI report may be held accountable for that failure. So the penalties for non-compliance are real. And I think that obviously signals that this should be taken very seriously. And on the other hand, obviously not to diminish the penalties or the importance of the CTA, but I think like most things we have to look at how is this going to be enforced? And I think that the Department of Treasury has an enforcement issue here. As I understand it, there is no, there's no active enforcement in the sense that there is no team currently at the Department of Treasury or at FinCEN who is going through Secretary of State registrars to make

sure, cross-reference, well, I know this entity exists, where's their BOI report? That is not happening right now. And I have talked to certain people who are in the know, and I don't think that that is the intent anytime in the near future.

So I think if you are trying your best and if you are not willfully providing bad information and if you are getting your things in essentially on time, I do not think that there's going to be a crackdown on enforcement of someone who is a beneficial owner who moves down the street and on the 32nd day after they moved address doesn't update their BOI report. I don't think that you're going to be getting a letter in the mail saying you owe a thousand dollars fine. I don't personally see that happening, but it is possible and these penalties are very real. And every single time that I've been involved in a CLE or attended one of the Department of Treasury or FinCEN's update reports, this is one of the first things they talk about. They want to make sure that people know that there are real penalties to this. So I think they are serious, but I think that there's going to be just the logistical problems of enforcing these things.

Ross Bruch:

Ashleigh, if you could get out your crystal ball for a moment, let's talk about technology and the future of this law. So it seems to me like there might be technology solutions to help companies understand there are reporting requirements. Where do you see that going? And if you can tie in how you see the evolution of this law since it's just being implemented, I'm sure there's some hiccups that need to be addressed or will be addressed in the future. Where are we in five years?

Ashleigh Taylor:

So I'll tackle the first part of that question when it comes to technology and how technology is going to help both businesses and professional service providers, help those people being compliant to the CTA. I think that's already happening. I think there were a lot ... Not a lot, but there were a few software companies that were started at the very beginning when CTA rumblings were happening. They realized there was an opportunity there. And one software company that I will mention because Kleinbard uses them and I've been happy with it so far, is The FinCEN Report Company. And that was started by actually an attorney who I think saw this as an opportunity. And what it does is really helps both individual business owners and professional service providers like law firms be in compliance with the CTA. One of the most salient point to the CTA is that you do have to upload this personal information including companies of either your license or your passport and how do you do that in a secure way? So I think that's what a lot of the initial push to get these software companies out there. And it does provide that. It's super secure. It's much more secure than scanning your passport and sending it to your attorney to then upload to the BOI report.

So number one, I think in terms of security of your information, uploading through a software provider like The FinCEN Report or something similar is going to give you much security when it comes to your personal information. Number two, I think technology is going to help and the software that we use does this in terms of analyzing who is, who is not a beneficial owner. So I know that the software we reuse has a wizard as part of the software that allows business orders to walk through is this person a beneficial owner or not? It's a series of yes or no questions that guides you through the analysis.

Is that going to replace a conversation with an attorney who does an analysis for you? Not completely. Does that help a small business owner who is probably not going to pay for an attorney to do that analysis and help them? Of course. So I do think that the technology is going to make it number one, safer in terms of your personal identifying information being uploaded. It makes it safer for that. And number two, I think it does ease the burden of that beneficial owner analysis for small business owners who are just doing this DIY. So I think that software technology is going to be very big in this space.

The second question being where is this going to be in five years? I hear a lot of people debating this and I think especially with the upcoming election, there are people who say, "This is going to be thrown out immediately. This is going to be wildly unpopular. We're going to hear about this a lot more in the popular press. People are going to get upset. People want to give out their information." I think that's probably true. I think that we're going to hear this a lot more once we get closer to Jan 1, 2025. Do I think that this is going to be completely repealed? No. I think what we're going to see going forward is the CTA is going to persist, but the way in which it persists will be different. I think we're going to number one, get a lot more clarity from the Department of Treasury and FinCEN in about these nitty-gritty questions that legislators and rule makers didn't consider when they're putting together the CTA and a lot of questions, what we've discussed on this podcast already. These

are perhaps what people see as niche questions that really do play out in people's lives. Dollar and cents and people need answers.

So I think as time goes on, you're going to build up more of these FAQs from Vincent and people feel more confident in what they have to report and what they don't. Also, I think we're going to see an increase in the type and amount of exemptions. I think people are going to react to the fact that there are a lot of people who don't want to do this. So you are going to see more exemptions tailored to those groups. I think you'll see an expansion of those. I think it was those 23 exemptions I talked about. I think there'll be more of those exemptions. And the types of exemptions that those companies have I think will become more broad. So for example, what is an investment advisor? I can see that becoming more broad to include more people and more companies so they're not reporting companies. So again, I think the short answer is CTA will persist. The way in which it persists will be different and I think we will see more exemptions down the road.

Jennifer Zegel:

So to add on to that, what challenges are you seeing to the CTA now at the state level? Are you seeing anything on the horizon there?

Ashleigh Taylor:

Yes. So there was a court case that came out of Alabama district court, but essentially there was a declaratory judgment that was very specific to the plaintiff in that case. It did not enjoying the federal government from enforcement, the CTA generally, which I think is important to note. But really the argument there was, oh my god, this is so over broad. It does not sufficiently invoke Congress's foreign affair powers or the commerce clause or anything like this. This is unconstitutional. This can't happen. It doesn't properly invoke the taxing power or federal authority to get into areas traditionally governed by states. I do not see the courts as the way that the CTA is going to be curtailed. I just don't see that.

And again, if I had my crystal ball out, we'll see. I'm not great at reading the tea leaves, but my sense is I don't think that court cases are going to be the way of trimming down the CTA. I do think that there will be copycat suits. I think you're going to see that popping up in a lot of different districts. So we'll see what happens. I personally think that there is strong constitutional arguments for having the CTA, so I just don't think it's going to be successful in that way. And actually what you have seen on the state by state level is that there are states who are passing their own version of the CTA at that state level. So for example, New York has implemented the New York LLC Transparency Act, which has very similar goals to the CTA, but it's on the state level and it requires disclosure of beneficial ownership information for LLCs who are formed or registered to do business in the state of New York.

I know California is also contemplating similar legislation. Pennsylvania, there's ongoing discussion about introducing legislation similarly would follow the CTA. So I think you're seeing more and more actually state level efforts to be part of this broader initiative to fight illicit activities like money laundering, terrorist financing, that sort of thing. And I think you see at least from these state legislatures, a push to have more of that transparency. But I think you have two opposing forces. I think you'll see a lot and I think it'll be state by state. And I think you'll see probably more in states that lead more red or more conservative, more of these suits that pop up. And I think on the other side you'll see more liberal leaning state legislatures passing CTA type legislation.

Jennifer Zegel:

Excellent. Thank you for that. And just to clarify on some of the compliance timelines you had specified for entities being created in 2024, what the reporting timelines are, but what about for entities created before 2024.

Ashleigh Taylor:
Thanks for asking that question, Jen. For all entities that were created prior to 2024, they have until January 1st 2025 to submit their beneficial ownership report to FinCEN.

Justin Brown:

Ashleigh thanks so much for joining us today and helping us to navigate through the Corporate Transparency Act, and I am sure that we will be calling upon you again as we help our clients and as we work with entities that need to be filing the necessary reporting's with FinCEN. So, thank you so much for joining us today on the Digital Planning Podcast. For Jen and Ross, I'm Justin, thanks so much for joining and we'll see you next time.