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Who's in Charge Here? Requiring More Transparency in Corporate America: Advancements in Beneficial Ownership for Privately Held Companies, 42 J. Marshall L. Rev. 1049 (2009)

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WHO'S IN CHARGE HERE?

REQUIRING MORE TRANSPARENCY IN CORPORATE AMERICA: ADVANCEMENTS IN BENEFICIAL OWNERSHIP FOR PRIVATELY HELD COMPANIES

DEAN KALANT*

I. THE NEED FOR CHANGE

Do you remember the last time you went to the DMV? Besides frustration, what did you bring to prove your identity? A school ID? Maybe a passport? Perhaps, if you really wanted to avoid problems you brought an unopened piece of mail with your name and address on it. Regardless, chances are that you brought more personal identification materials to obtain a driver's license than you would need to form a non-publicly held corporation¹ or limited liability company ("LLC").²

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1. See ROBERT W. HAMILTON & JONATHAN R. MACEY, CASES & MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 192 (Thomson West 10th ed. 2007) (1994) (explaining the characteristics of a corporation). Corporations have a perpetual existence, meaning they can last forever. *Id.* Most importantly, owners and managers of a typical corporation are not personally liable for the corporation's debts. *Id.* A corporation can be either private or public. *Id.* A main difference between a public and private corporation is that a private corporation's shares are not as freely transferable as the shares of a publicly held corporation, since they are not typically listed on a major stock exchange such as the NYSE or NASDAQ. *Id.*

2. See *id.* (detailing the characteristics of an LLC). LLCs can have perpetual existence, but sometimes they are limited in duration by state law. *Id.* Additionally, LLCs' officers, directors, and owners are usually not liable for the debts of the LLC. *Id.* See also Margaret A. Miille, *Limited Liability Companies Get Bad Rap*, LAS VEGAS REV. J., Sept. 14, 2008, at 3A (noting that LLCs have "the tax advantages of partnerships and the limited liability of corporations"). See also DEPARTMENT OF THE TREASURY FINANCIAL CRIMES ENFORCEMENT NETWORK, THE ROLE OF DOMESTIC SHELL COMPANIES IN FINANCIAL CRIME AND MONEY LAUNDERING: LIMITED LIABILITY COMPANIES 7 (2006), available at http://www.fincen.gov/news_room/rp/files/LCAssessment_FINAL.pdf [hereinafter FINCEN REPORT] (stating that "[l]ike a corporation

Surprisingly, a person forming a corporation or LLC within the United States typically is required to “provide less information to the state of incorporation than is needed to obtain a bank account or driver’s license.”³ There is a current debate over the extreme lack of ownership transparency in the United States, which has been looming over corporate formation for decades. In response to this dilemma, Senator Carl Levin along with Senators Charles Grassley and Claire McCaskill introduced the Incorporation Transparency and Law Enforcement Assistance Act (“ITLEA”).⁴

In assessing this corporate disclosure problem, this Comment will first discuss the current state of beneficial ownership disclosure for corporations and LLCs. Second, this Comment will illustrate the reasons why the ITLEA was proposed. Third, this Comment will articulate specific provisions of the ITLEA. Fourth, this Comment will analyze and explain why the current state of beneficial ownership disclosure is problematic and how the ITLEA could reduce illicit activity through beneficial owner nondisclosure. Finally, this Comment will propose recommendations to improve the ITLEA in order to increase its likelihood of being enacted.

II. WHERE IT ALL WENT WRONG

Currently, “nearly two million corporations and [LLCs]” are incorporated in the United States each year.⁵ Although this is a

the LLC structure removes the members and managers from liability”). A LLC “is considered a ‘pass-through’ arrangement” because the individual owners are taxed, rather than the company as a whole. *Id.* However, companies can choose to forego individual tax liability and be taxed as a corporation. *Id.* A LLC is generally easier to establish than a corporation since they are subject to fewer procedural requirements. *Id.*

3. S. 569, 111th Cong. § 2(3) (2009) (as introduced by Sen. Carl Levin, March 11, 2009).

4. S. 569, § 1. Senator Levin, along with Senator Norm Coleman and then-Senator Barack Obama, introduced the ITLEA for the first time in May 2008. S. 2956, 110th Cong. (2008) (as introduced by Senator Carl Levin, May 1, 2008). However, the ITLEA was re-introduced in March 2009. S. 569. Currently, it has been referred to the Committee on Homeland Security and Governmental Affairs for review. *Id.* This Comment references commentary from when the ITLEA was first introduced by Senator Levin in May 2008. However, these authorities are equally relevant to its second introduction in March 2009 because the bill was essentially left unchanged since its initial introduction. *See id.* (reintroducing the same bill as S. 2956, except for the filing and reporting temporal requirements).

5. STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SECURITY AND GOV'T AFFAIRS, LEVIN-COLEMAN-OBAMA INTRODUCE BILL TO STOP MISUSE OF U.S. COMPANIES (2008), available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MinorityNews&ContentRecord_id=ba56ee34-2503-4f03-92c6-10eba1c968d1 [hereinafter SUBCOMMITTEE ON INVESTIGATIONS ARTICLE]. *See also* S. 569, § 2(1) (noting that “[n]early 2,000,000 corporations and [LLCs] are being formed under the

testament to the attractiveness of incorporating within the United States, states generally allow corporations to form without seeking the identity of a corporation's beneficial owners.⁶ Additionally, each state has established its own standards of corporation and LLC beneficial ownership disclosure, further complicating the problem. A "beneficial owner" is defined as "an individual who has a level of control over, or entitlement to, the funds or assets of a corporation or [LLC] that, as a practical matter, enables the individual, directly or indirectly, to control, manage, or direct the corporation or [LLC]."⁷

Presently, the transparency of ownership requirements vastly differs from state to state. This imbalance makes incorporating in some states more favorable than in others.⁸ Despite these differences, a lack of beneficial ownership transparency is a common theme for almost every state that allows corporation and LLC formation. In 2006, the Government Accountability Office ("GAO")⁹ conducted a study¹⁰ and found that no state collected

laws of the States each year.").

6. See S. 569, § 2(2) (explaining that "few States obtain meaningful information about the beneficial owners of the corporations and LLCs formed under their laws.").

7. S. 569, § 3(a)(1)(a)(1)(e)(1).

8. See FINCEN REPORT, *supra* note 2, at 8-9 (showing the many different levels of transparency used among individual states).

9. See United States Government Accountability Office, COMPANY FORMATION: MINIMAL OWNERSHIP INFORMATION IS COLLECTED AND AVAILABLE 3 (2006), available at http://www.iaca.org/downloads/BOS/GAO/GAO_BRIEFING_SLIDES.pdf [hereinafter GAO STUDY] (explaining that the "GAO is an independent agency in the legislative branch of the federal government."). The Comptroller General, who is appointed by the President, heads the GAO for a fifteen-year term. *Id.* The "GAO supports congressional oversight through audits, investigations, program evaluations, policy analyses, and legal decisions." *Id.*

10. See *id.* at 4 (explaining why the GAO conducted the study). The Senate Permanent Subcommittee of Investigations ("PSI") requested that the GAO "conduct a review of all states on the extent to which they collect and verify beneficial ownership information on non-publicly traded companies . . ." *Id.* Additionally, the PSI requested that the GAO determine what information formation agents should collect and verify. *Id.* The scope of the 2006 study was "to determine what kind of company information is collected by states to provide some context for understanding the extent to which ownership information is collected for company formations." *Id.* at 5. The study "[f]ocused on corporations because they have been the dominant business form and [LLCs] because they are growing in popularity." *Id.* Furthermore, to gain all necessary information, the GAO surveyed officials from all fifty states and specifically met with state officials from Delaware, Florida, Nevada, Arizona and Oregon. *Id.* at 8. The study also reviewed state statutes, forms from state websites, and "[i]nterviewed academics, companies that provide filing and related services for businesses, law firms, and financial institutions." *Id.* See also Financial Action Task Force, THIRD MUTUAL EVALUATION REPORT ON ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM: UNITED STATES OF AMERICA 2 (2006), available at <http://www.fatf->

beneficial ownership information for corporations, while only four states collected minimal information on LLCs.¹¹ Further, the study found that less than half of states collected information about management, directors, or officers of corporations on formation documents.¹² Similarly, although “[m]ost states collected information on corporate officers and directors and managers of LLCs on periodic reports,” these reports did not verify information concerning beneficial owners.¹³ Further, the GAO study found that “formation agents”¹⁴ were not required to collect ownership information or verify the information of clients who formed corporations or LLCs.¹⁵ Moreover, the study found that some states even allow corporate formation over the internet.¹⁶

Numerous law enforcement problems¹⁷ have resulted from

gafi.org/dataoecd/44/12/37101706.pdf [hereinafter FATF U.S. REPORT] (adding that the FATF, the leading international organization combating money laundering and other illicit activity of corporations and LLCs, conducted a similar study and likewise found that the United States was deficient in obtaining ownership information).

11. GAO STUDY, *supra* note 9, at 9.

12. *Id.*

13. *Id.* See also Leroy Baker, *Senate Bill Proposes Tougher Company Disclosure Laws*, TAX-NEWS.COM (May 27, 2008), http://www.tax-news.com/asp/story/story_print.asp?storyname=31110 (noting that “[t]he GAO report reviewed the legal requirements in all 50 states to set up corporations and LLCs”). The study “found that most states failed to request beneficial ownership information, and reported that the absence of this ownership information impeded law enforcement investigations of suspect corporations.” *Id.*

14. See S. 569, § 3(a)(1)(a)(1)(e)(3) (defining formation agents as “individuals who act on behalf of another person to assist in the formation of a corporation.”).

15. See GAO STUDY, *supra* note 9, at 10 (stating that formation agents “collect the information that states require; therefore, most do not collect ownership information.”).

16. See Senator Carl Levin, *Statement Introducing the Incorporation Transparency and Law Enforcement Assistance Act 3* (May 1, 2008), available at http://www.iaca.org/downloads/2008Conference/BOS/Levin_flr_stmt.pdf [hereinafter *Levin Introduces Bill*] (noting that the GAO study also found that many states have established automated procedures for company formation). Automated procedures allow an individual “to form a new corporation or LLC in the state within 24 hours of filing an online application without any prior review of that application by a State official.” *Id.* Furthermore, “[i]n exchange for a substantial fee, two States will even form a corporation or LLC within one hour of a request.” *Id.* Also, in some instances, states advertise automated procedures and even highlight nondisclosure of ownership information. *Id.*

17. See S. 569, § 2(5) (stating that “[l]aw enforcement efforts to investigate corporations and [LLCs] suspected of committing crimes have been impeded by the lack of available beneficial ownership information.”). For example, in Nevada, the lack of beneficial ownership information impedes criminal investigations since there is a significant “lag time of up to two months from the date an LLC organizes and the date its initial list of managers” and owners is due. Miillee, *supra* note 2. In fact, sometimes the list never even

states' failure to monitor corporate formation effectively. Criminals exploit the states' lack of beneficial ownership requirements by concealing their identities when forming corporations or LLCs, allowing them to illegally launder money and assets from these corporations and LLCs.¹⁸ Moreover, problems arise when criminals establish companies in the form of "shell corporations" because the shell corporations' formational and operational requirements actually facilitate criminals' ability to manipulate corporate conduct for illegal activity.¹⁹ Regardless, whether an entity is classified as a shell corporation or not, states individually, and the legislature as a whole, have not been responsive to this issue.²⁰ Therefore, criminals are able to use these corporations and LLCs "to commit crimes affecting

materializes. *Id.*

18. S. 569, § 2(4). *See Levin Introduces Bill*, *supra* note 16, at 1 (commenting that law enforcement authorities investigating these crimes have complained heavily about the lack of beneficial ownership information made available to them). Senator Levin went on to say that "in countless investigations" where criminals utilize corporations and LLCs, law enforcement officials' inability to gain "access to true beneficial ownership information slows, confuses or impedes the efforts by investigators to follow criminal proceeds." *Id.* "This is the case in financial fraud, terrorist financing and money laundering investigations." *Id.* For example, the IRS recently pursued three individuals who developed multiple United States companies. SUBCOMMITTEE ON INVESTIGATIONS ARTICLE, *supra* note 5. By using these companies, the criminals were able to conceal nine million dollars in taxable income to foreign countries. *Id.* Similarly, with the use of foreign owned companies, the United States Department of Justice ("DOJ") found that Russian officials used these companies in Pennsylvania and Delaware to divert more than fifteen million dollars back to Russia, intending to upgrade former Soviet Union nuclear power plant facilities. *Id.*

19. *See* FINCEN REPORT, *supra* note 2, at 2 (defining shell corporations). Shell corporations refer to non-publicly traded corporations, LLCs, and trusts that have no physical presence or major assets. *Id.* at 2-4. They typically have no more than a mailing address and generally have no employees or economic value. *Id.* at 4. "Most shell companies are formed by individuals and businesses for legitimate purposes, such as to hold stock or intangible assets of another business entity or to facilitate domestic and cross-border currency and asset transfers and corporate mergers." Department of the Treasury Financial Crimes Enforcement Network, *Potential Money Laundering Risks Related to Shell Companies* (2006), available at http://www.fincen.gov/statutes_regs/guidance/html/AdvisoryOnShells_FINAL.html [hereinafter *Shell Company Article*]. "Lack of transparency in the formation and operation of shell companies may be a desired characteristic for certain legitimate business activity, but it is also a vulnerability that allows these companies to disguise their ownership and purpose." *Id.*

20. *See Levin Introduces Bill*, *supra* note 16, at 4 (concluding that the proposal from The National Association of Secretaries of State was deficient); *see also* John G. Edwards, *Bill Would Put Limits on Secrecy*, LAS VEGAS REV. J., May 2, 2008, available at <http://www.lvrj.com/business/18481494.html> [hereinafter *Limits on Secrecy*] (noting that some critics have not found Nevada's new ownership disclosure law effective).

interstate and international commerce, such as terrorism, drug trafficking, money laundering, tax evasion, securities fraud, financial fraud, and acts of foreign corruption.”²¹ In response, the ITLEA seeks to remedy these issues.²²

III. THE PROPOSED IMPROVEMENT

The ITLEA’s purpose is to ensure that owners and formation agents²³ who form non-publicly held²⁴ companies in the United States disclose the beneficial owners of those companies. This disclosure requirement would prevent criminals from incorporating in the United States for illicit gain.²⁵ Further, the

21. S. 569, § 2(4). See also John G. Edwards, *Registered Agents Fight Bill Requiring Corporate Ownership Records*, LAS VEGAS REV. J., May 3, 2008, available at 2008 WLNR 8389953 [hereinafter *Registered Agents*] (explaining that while not all corporations and LLCs are created for illegitimate reasons, lack of beneficial owner transparency has caused numerous problems relating to money laundering, tax evasion, terrorism, and other misconduct). For example, a privately held Nevada corporation received thousands of suspicious wire money transfers totaling millions of dollars over just a couple of years. SUBCOMMITTEE ON INVESTIGATIONS ARTICLE, *supra* note 5. Law enforcement agents were unable, however, to identify the corporation’s beneficial owners; as a result, the corporation’s owners were never prosecuted. *Id.*

22. See *Levin Introduces Bill*, *supra* note 16, at 1 (quoting the U.S. Department of Treasury) (stating that “the lack of transparency with respect to the individuals who control privately held for-profit legal entities created in the United States continues to represent a substantial vulnerability.”). Additionally, Senator Levin stated that “[t]he use of U.S. companies to mask the identity of criminals presents an ongoing and substantial problem . . . for U.S. and global law enforcement authorities.” *Id.*

23. See Bruce Zagaris, *American Bar Association Adopts Resolution Opposing Bills on Company Formation and Tax Havens*, 24 INT’L. ENFORCEMENT L. REP. 10, 2 (2008) (defining the formation agents as parties that assist in forming business entities). The ITLEA will subject formation agents to various requirements, “such as an internal compliance plan, training, and independent audit.” *Id.* Also, the ITLEA will give the Treasury Department authority “to impose suspicious activity reporting requirements” on these agents. *Id.*

24. See S. 569, § 3(a)(1)(a)(1)(e)(2)(B) (stating that the ITLEA does not apply to any issuers of securities). The ITLEA provides exemptions for certain corporations, including publicly traded corporations and the corporations and LLCs they form. *Id.* This is because the Securities and Exchange Commission (“SEC”) already oversees publicly traded companies. Press Release, Carl Levin, United States Senator, *Summary of Incorporation Transparency and Law Enforcement Assistance Act* (May 1, 2008), available at <http://levin.senate.gov/newsroom/release.cfm?id=297089> [hereinafter *Senator Levin Statement*]. Further, the ITLEA may not apply to certain corporations and LLCs where the state and Homeland Security and Justice Departments determine appropriate because requiring these sorts of corporations to provide beneficial ownership information “would not serve the public interest or assist law enforcement.” *Id.*

25. See generally S. 569 (stating the purpose underlying the introduction of the bill).

ITLEA aims at assisting law enforcement agencies in detecting, preventing, and punishing misconduct involving United States corporations.²⁶ The ITLEA proposes an amendment that would be added at the end of the Homeland Security Act²⁷ by applying, among other things, the ITLEA to both domestic and foreign owned corporations. In addition, the amendment includes penalties resulting from a state's noncompliance with the ITLEA, provisions for funding and state conformity with the ITLEA, as well as additional rules and studies that will follow the ITLEA's enactment by Congress.²⁸

A. Domestically Owned Corporations

The ITLEA would require each state that receives funding from the Department of Homeland Security ("DHS") to use an incorporation system that meets specific criteria in incorporating domestic corporations by no later than the beginning of 2012.²⁹ These requirements would mandate each applicant forming a corporation or LLC to disclose a full list of the company's beneficial owners.³⁰ The list must identify all owners by name and provide their current address.³¹ Further, if a corporation is a beneficial owner of the forming corporation or LLC, all ownership of the controlling company must also be disclosed.³² The ITLEA requires this information to remain up-to-date.³³ The ITLEA calls for each domestically owned corporation or LLC to update the list of beneficial owners depending on the filing requirements of the particular state of incorporation.³⁴ This information would be maintained by the state until "the end of the 5-year period beginning on the date that the corporation or [LLC] terminates under the laws of the State."³⁵

26. *Id.*

27. Homeland Security Act of 2002, 6 U.S.C. § 601 (2006).

28. S. 569, § 3(a)(1)(a); *Senator Levin Statement, supra* note 24.

29. *See* S. 569, § 3(a)(1)(a)(1) (requiring that each applicant provide a list of the beneficial owners of the corporation or LLC during formation under the laws of the United States); *see also Senator Levin Statement, supra* note 24 (giving states until Fall 2011 "to require beneficial ownership information for the corporations and LLCs").

30. S. 569, § 3(a)(1)(a)(1)(A).

31. S. 569, § 3(a)(1)(a)(1)(A)(i); *Senator Levin Statement, supra* note 24.

32. *See* S. 569, § 3(a)(1)(a)(1)(A)(ii) (providing that "if any beneficial owner exercises control over the corporation or LLC through another legal entity," he must identify each legal entity and each "beneficial owner who will use that entity to exercise control over the corporation or LLC.").

33. S. 569, § 3(a)(1)(a)(1)(B); *Senator Levin Statement, supra* note 24.

34. *See* S. 569, § 3(a)(1)(a)(1)(B) (explaining that beneficial ownership information will be required to be updated in an annual filing with the state, or if no annual filing is required, each time there is a modification in beneficial ownership).

35. S. 569, § 3(a)(1)(a)(1)(C).

Finally, the ITLEA addresses how and to whom the ownership information would be provided. It requires a state to make company beneficial ownership information available to a law enforcement agency upon receipt of a subpoena.³⁶ Further, the ITLEA makes ownership information regarding foreign countries available to agencies upon formal request.³⁷ The ITLEA would not require ownership information to be passed to the public for non-law enforcement related matters.³⁸

B. Foreign-Owned Corporations

The requirements of disclosure of foreign held corporations mirror those of domestically owned corporations.³⁹ But the ITLEA would impose an additional requirement on foreign owners by

36. See S. 569, § 3(a)(1)(a)(1)(D) (specifying that ownership information will be provided "upon receipt of a civil or criminal subpoena or summons from a State agency, Federal agency, or congressional committee or subcommittee requesting such information").

37. See S. 569, § 3(a)(1)(a)(1)(D)(ii) (stating that ownership information will be provided upon a "written request made by a Federal agency on behalf of another country under an international treaty, . . . or section 1782 of title 28, United States Code."); see also *Senator Levin Statement*, *supra* note 24 (requiring that states obtain a list of the beneficial owners of each corporation or LLC formed under their laws). This is in an effort to aid foreign jurisdictions, ensure the information is updated annually, and to make information available to civil or criminal law enforcement agencies, upon receipt of a subpoena or summons. *Id.*

38. See *Levin Introduces Bill*, *supra* note 16, at 5 (articulating that the ITLEA does not require public disclosure, allowing states to determine individually). The ITLEA does not "supersede, alter, or affect any statute, regulation, order, or interpretation in effect in any State, except where a State . . . receive[s] funding from the Department of Homeland Security under section 2004 of the Homeland Security Act of 2002 . . ." S. 569, § 3(b)(1). Even where the state does receive funding, the only change will be the extent that the "[s]tate statute, regulation, order, or interpretation is not inconsistent" with the ITLEA. S. 569, § 3(b)(2). Further, a state statute, regulation, order, or interpretation is not affected by the ITLEA when it "requires additional information, more frequently updated information, or additional measures to verify information" from a corporation, LLC, or beneficial owner. S. 569, § 3(b)(2)(A). Similarly, the ITLEA will not affect state law if the state imposes additional limits on public access to the beneficial ownership information obtained by the State. S. 569, § 3(b)(2)(B).

39. See S. 569, § 3(a)(1)(a)(2) (explaining that states must meet disclosure requirements for foreign owners no "later than the beginning of fiscal year 2012," as is required of domestic corporations and LLCs). Further, "the name, address, and identity of each beneficial owner that is not a United States citizen or a lawful permanent resident of the United States" must be verified. S. 569, § 3(a)(1)(a)(2)(A). Also, this information, like those of domestically held companies, is only available upon request by a law enforcement agency. S. 569, § 3(a)(1)(a)(2)(C). Additionally, this information will be retained "until the end of the five-year period beginning on the date that the corporation or [LLC] terminates under the laws of the State," just like in domestic corporations. S. 569, § 3(a)(1)(a)(2)(D).

requiring each foreign application of incorporation to be certified by a formation agent before the state accepts the corporation or LLC.⁴⁰ This certification, among other things, requires that the formation agent obtain a photocopy of the page of the government-issued passport on which a photograph of the beneficial owner appears.⁴¹

C. Penalties, Funding, and Compliance with the ITLEA

The ITLEA would also attach penalties against individuals and entities for noncompliance. In addition to any civil or criminal penalty that may be imposed by a state, any individual or company who fabricates beneficial ownership information may be further liable to the state.⁴² These additional penalties can be in the form of civil or criminal liability.⁴³

The ITLEA acknowledges that its enactment would demand additional resources from states to achieve compliance. To address this, the ITLEA would allow a state to use all or a portion of the funds it currently receives from the DHS to comply with the ITLEA.⁴⁴ Moreover, the ITLEA outlines procedures a state may use to receive additional funding to implement additions or modifications to the ITLEA.⁴⁵ In addition, the ITLEA does not

40. See S. 569, § 3(a)(1)(a)(2) (requiring that each application and each update of beneficial owner information “shall include a written certification by a formation agent residing in the State”); see also *Senator Levin Statement*, *supra* note 24 (reiterating that corporations and LLCs with non-U.S. beneficial owners must provide certification from an in-state formation agent who has verified the owner’s identity); SUBCOMMITTEE ON INVESTIGATIONS ARTICLE, *supra* note 5 (summarizing the effect of the ITLEA on non-U.S. beneficial owners).

41. S. 569, § 3(a)(1)(a)(2)(B).

42. See S. 569, § 3(a)(1)(b) (penalizing an individual when he/she knowingly provides, or attempts to provide, false information to the state, intentionally fails to provide information upon request, or fails to provide his/her updated information).

43. See S. 569, § 3(a)(1)(b)(1),(2) (stating that an individual who violates the ITLEA shall be “liable to the United States . . . of not more than \$10,000; and may be fined under title 18, United States Code, imprisoned for not more than 3 years, or both.”); see also *Senator Levin Statement*, *supra* note 24 (outlining how the ITLEA establishes “civil and criminal penalties under federal law for persons who knowingly provide false beneficial ownership information or intentionally fail to provide required beneficial ownership information to a State.”).

44. S. 569, § 3(a)(1)(c); *Senator Levin Statement*, *supra* note 24.

45. See S. 569, § 3 (noting that “the Administrator may use funds appropriated to carry out this title, including unobligated or reprogrammed funds.”). The ITLEA allows this to enable a state to fully obtain and manage beneficial ownership information for the corporations and LLCs. *Id.* Funding allows states to “assess, plan, develop, test, or implement relevant policies, procedures, or system modifications.” *Id.*; see also *Senator Levin Statement*, *supra* note 24 (allowing states to use an existing DHS grant program and authorizing DHS to use already appropriated funds to meet the requirements

authorize the withholding of funds from a state for failing to comply with its ownership requirements.⁴⁶ Instead, a report would be conducted to identify states that are still not compliant by June 1, 2013.⁴⁷ States not in compliance would then be advised on how to achieve compliance.⁴⁸

D. Specific Anti-Money Laundering Provision and GAO Study

The ITLEA includes a specific provision to be added to the end of the Homeland Security Act of 2002⁴⁹ that specifically addresses money laundering. The ITLEA would require that a “proposed rule” be implemented within a month and a half after enactment of the ITLEA, addressing anti-money laundering programs.⁵⁰ This “proposed rule” would then be formulated into a “final rule” within nine months after the ITLEA’s enactment.⁵¹

In addition to the “final rule,” the ITLEA would require a GAO study to be conducted within one year after the ITLEA’s enactment.⁵² The study would first identify states that allow companies to form within it and then identify which of those states have been compliant with the ITLEA.⁵³ Noncompliant states

of the ITLEA).

46. See S. 569, § 3(a)(1)(d) (explaining that nothing in the ITLEA authorizes any state’s funding to be withheld because of noncompliance with the ITLEA).

47. See S. 569, § 3(a)(1)(d) (explaining that the Comptroller General shall be in charge of submitting the report). The report will be given to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Homeland Security of the House of Representatives. S. 569, § 3(a)(1)(d); *Senator Levin Statement*, *supra* note 24.

48. See S. 569, § 3(a)(1)(d) (detailing that states not in compliance by June 1, 2013, shall be reported and will be advised how to achieve compliance).

49. 6 U.S.C. § 601 (2006).

50. See S. 569, § 4(b)(1) (stating “not later than 90 days after the date of enactment of [the ITLEA],” the Secretary of the Treasury shall publish a rule in the Federal Register establishing anti-money laundering programs).

51. See S. 569, § 4(b)(2) (elaborating that “not later than 270 days after the date of enactment of [the ITLEA], the Secretary of the Treasury shall publish the rule described in this subsection in final form in the Federal Register.”); see also *Senator Levin Statement*, *supra* note 24 (“requiring the Treasury Secretary to issue a rule requiring formation agents to establish anti-money laundering programs to ensure they are not forming U.S. corporations . . . for criminals”).

52. See S. 569, § 5 (stating that the Comptroller General of the United States will conduct the study).

53. See S. 569, § 5(1) (explaining that the study would identify each state that enables formation of “partnerships, trusts, or other legal entities.”). Further, the study would scrutinize each state that requires persons seeking to form these corporations or LLCs under the laws of the state to provide information about the beneficial owners or beneficiaries of such entities, and the nature of the required information. S. 569, § 5(1). See also *Senator Levin Statement*, *supra* note 24 (requiring the GAO to complete a study of state beneficial ownership information requirements for state entities).

would then be analyzed to determine if their noncooperation resulted in illegal corporate activity and impaired law enforcement agencies' investigations.⁵⁴ Last, the study would evaluate international perception of the ITLEA's progress and, if necessary, pinpoint further action needed to respond to the problems that have been created due to the nondisclosure of beneficial ownership.⁵⁵

IV. OLD VERSUS NEW

First, this section will analyze the interaction that the ITLEA would have with current requirements of beneficial ownership disclosure. Second, this section will analyze states' and legislature's initiatives in addressing disclosure issues thus far. Last, this section will specifically examine the ITLEA's relationship with shell corporations.

A. *The Problem This Poses to the United States*

The current undemanding requirements of beneficial ownership disclosure throughout individual state allow criminals to engage in terrorism, money laundering, and other misconduct through the use of corporations and LLCs. Each state is unique in requiring different levels of ownership disclosure, some requiring higher scrutiny than others.⁵⁶ Law enforcement officials have

54. See S. 569, § 5(3)(B) (evaluating the lack of available beneficial ownership information for legal entities). The study will determine if a lack of beneficial ownership information "raises concerns about the involvement of such entities in terrorism, money laundering, tax evasion, securities fraud, or other misconduct." S. 569, § 5(3)(A).

55. See S. 569, § 3 (stating that the GAO study will determine whether the ITLEA's progress has "elicited international criticism and what steps, if any, the United States has taken or is planning to take in response."). The United States is cognizant of international perception as it is well behind international standards of beneficial ownership disclosure. FATF U.S. REPORT, *supra* note 10, at 9. Currently, many foreign countries are already required to identify the beneficial owners of the corporations they form. S. 569, § 2(10). See also Lynne Byles, *CIFA Acknowledges US Senator's Comments on Higher Regulation of Cayman Island Corporations*, MASS MEDIA DISTRIBUTION NEWSWIRE (May 23, 2008), available at <http://www.mmdnews.wire.com/cifsa-acknowledges-us-senators-comments-on-higher-regulation-of-cayman-islands-companies-3409.html> (stating that these standards have been implemented in the Cayman Islands for years); SUBCOMMITTEE ON INVESTIGATIONS ARTICLE, *supra* note 5 (explaining that "[a]ll 27 countries in the European Union are already required to obtain beneficial ownership information for the corporations they form"); *Levin Introduces Bill*, *supra* note 16, at 4 (criticizing the fact that United States law enforcement officials often have had to "stand silent" when asked by their international counterparts about who owns a United States corporation being investigated for committing crimes in their jurisdictions). The U.S. officials cannot answer the inquiries simply because they do not have the information. *Id.*

56. See FINCEN REPORT, *supra* note 2, at 8 (noting that states that do not

emphasized that the current lack of beneficial ownership information from states impairs and, in some instances, completely stops criminal investigations.⁵⁷ This lack of information is so common that recent reports have emphasized concerns over the difficulty in acquiring accurate beneficial ownership information.⁵⁸

Enactment of the ITLEA would operate as a remedy by allowing enforcement officials to gain the information they need. This is information that both states and formations agents have failed to require in the past.⁵⁹ Under the influence of the ITLEA, past illicit activity would be substantially abridged. For example, under the current standards of beneficial ownership transparency, Immigration and Customs Enforcement ("ICE") reported that a privately held Nevada corporation received thousands of suspicious wire transfers totaling millions of dollars over just two years.⁶⁰ While law enforcement agents were quick to respond to the blatant illicit activity, their investigation was completely halted because they were unable to identify the corporation's beneficial owners.⁶¹ The case was never prosecuted, and the criminals behind the corporation were never charged.⁶² The GAO conducted a similar investigation and found that an individual was able to set up two thousand different Delaware companies and

require companies to report identities of beneficial owners are the most attractive to those seeking to use the companies for illicit gain). Fourteen states impose no requirement on companies to report the identities of owners or managers. *Id.* Eight states require companies to report the identities of managers only, with no requirement of disclosing the owners. *Id.* Twenty-four states, including Illinois, require a company to report the identities of the owners but only when the company lacks identified managers. *Id.* Therefore, forty-seven jurisdictions in the United States exist where companies may legally remain unreported. *Id.*

57. Baker, *supra* note 13. See also *Levin Introduces Bill*, *supra* note 16, at 1 (explaining that the lack of ownership information "slows, confuses or impedes" enforcement investigations).

58. Baker, *supra* note 13.

59. See *id.* (emphasizing that law enforcement officials need the names of the true owners of a corporation in order to determine who is responsible for illegal activity, but law enforcement cannot acquire those names when the states do not ask companies for this information); *Levin Introduces Bill*, *supra* note 16, at 1 (addressing complaints received by law enforcement agents about states' lack of beneficial ownership information).

60. See SUBCOMMITTEE ON INVESTIGATIONS ARTICLE, *supra* note 5 (explaining that a Nevada-based company received more than 3,700 wire transfers totaling eighty-one million dollars); see also Baker, *supra* note 13 (stating that ITLEA supporters complained that the lack of corporate ownership records in Nevada blocked their investigation).

61. Baker, *supra* note 13; SUBCOMMITTEE ON INVESTIGATIONS ARTICLE, *supra* note 5.

62. Baker, *supra* note 13; SUBCOMMITTEE ON INVESTIGATIONS ARTICLE, *supra* note 5.

establish bank accounts for each.⁶³ Again, law enforcement's pursuit of this matter was impaired by the lack of available beneficial ownership information. These two examples are a mere sample of a plethora of other instances where corporations and LLCs are being used for illegal gain.⁶⁴

Under the ITLEA, criminal investigations would no longer be impeded or impaired,⁶⁵ since section three of the Act requires the application of equal disclosure laws to all states.⁶⁶ The ITLEA would give law enforcement agencies the name and specific address of each beneficial owner of a privately held company.⁶⁷ Therefore, the disparity and confusion of ownership requirements between states would cease. As a result, every state would enjoy increased corporation and LLC formation and stimulate local economies by offering companies clear and consistent disclosure standards.⁶⁸

Additionally, the ITLEA would safeguard against illegal

63. SUBCOMMITTEE ON INVESTIGATIONS ARTICLE, *supra* note 5. Without revealing his identity, he was able to move billions of dollars through these bank accounts and companies for personal gain. *Id.*

64. See Baker, *supra* note 13 (stating that there are numerous examples of law enforcement problems relating to beneficial owner transparency). The Financial Crimes Enforcement Network found that between 1996 and 2004, financial institutions filed 397 suspicious activity reports, which involved billions of dollars. *Id.* "Additionally, the Federal Bureau of Investigation ("FBI") reported that United States companies are being used to launder roughly \$36 billion from the former Soviet Union." *Id.* The FBI also stated that it currently has approximately 103 open cases investigating manipulation of privately held United States corporations. *Id.*

65. See GAO STUDY, *supra* note 9, at 12 (identifying a case where company disclosure documents helped facilitate a law enforcement investigation). In Michigan, the IRS tracked down four criminals who formed fifteen corporations in Michigan and Indiana. *Id.* Through these companies, the criminals were able to obtain lines of credit from a bank to purchase luxury items that eventually cost the bank a loss of more than nine million dollars. *Id.* The IRS, through the use of ownership information required by the states where the fifteen companies were formed, was able to find key pieces of evidence necessary to prosecute the criminals. *Id.*

66. S. 569 § 3(a)(1)(a).

67. S. 569 § 3(a)(1)(a)(1)(A)(i); *Senator Levin Statement*, *supra* note 24.

68. See FINCEN REPORT, *supra* note 2, at 9 (explaining that states with more transparency have shown higher growth on average than those with less transparency; states that require "the greatest level of transparency averaged an increase of 138.75%" of company formation between 2001 and 2005). Requiring companies to report more information on beneficial owners would not negatively affect the number of companies formed within a particular state. *Id.* Thus, the vulnerabilities of the states which require less ownership disclosure could be reduced through requiring more disclosure without a major adverse affect on the state's revenue. *Id.* Also, the benefits realized by law enforcement agencies through readily available ownership information "could prove significant." *Id.* See also *Levin Introduces Bill*, *supra* note 16, at 5 (emphasizing that federal legislation is needed to level the playing field among the states and set a minimum standard for obtaining ownership information).

activity through beneficial owner nondisclosure by making ownership information available to the government for up to five years after a corporation or LLC stops operating.⁶⁹ This would allow law enforcement agencies to acquire information needed to investigate parties, even if a dispute arises years later.⁷⁰

B. Improvements That Are a Long Time Coming

The United States is generally perceived by the rest of the world as a leader in free trade and prosperity. The ITLEA would ensure that the United States' leadership role continues into the future by bringing beneficial ownership disclosure requirements up to par with the rest of the world. Outside of the ITLEA, both Congress and individual states have proposed faulty and ineffective initiatives to improve the current system of beneficial ownership disclosure.⁷¹ In July 2006, the Financial Action Task Force ("FATF")⁷² criticized the United States for surprisingly being one of the only countries that fails to require beneficial ownership information.⁷³ The FATF urged the United States to remedy its lack of disclosure regulations, but the United States failed to respond to these requests as well.⁷⁴

Some states, such as Nevada, have criticized the ITLEA and

69. S. 569, § 3(a)(1)(a)(1)(C).

70. *See id.* (requiring states to hold beneficial ownership information for five years after a corporation or LLC ceases its operation). This applies equally to all domestically owned and foreign-owned entities. *Id.*

71. *See Registered Agents*, *supra* note 21 (providing that a new law initiated solely by the state of Nevada allows law enforcement officers to request ownership records for the state's corporations and LLCs). If the corporation or LLC does not respond to the request, "the Secretary of State's office can revoke its charter and dissolve the corporation." Miille, *supra* note 2. However, the Secretary of State of Nevada Mr. Ross Miller "acknowledged that a fraudulent corporation might [still] fail to respond to a request for ownership records" under the Nevada law. *Limits on Secrecy*, *supra* note 20. *See also* Miille, *supra* note 2 (noting that Nevada officials believe the Nevada law inadequately addresses beneficial ownership problems). The Nevada law cannot remedy the problem because it still leaves actual ownership undiscovered. *Id.* Essentially, the law would revoke the company's charter but would fail to reveal who was controlling the illicit company in the first place. *Id.*

72. *See FATF U.S. REPORT*, *supra* note 10, at 9 (reiterating that the FATF is the leading international organization combating money laundering and other illicit activities of corporations and LLCs). Requiring more beneficial ownership information is "one of 40 FATF standards that this country has publicly committed itself to implementing." *Levin Introduces Bill*, *supra* note 16, at 2.

73. *See Levin Introduces Bill*, *supra* note 16, at 3 (stating that during the 2006 FATF evaluation, the United States was criticized for failing to comply with FAFF requirements).

74. *See id.* at 3 (emphasizing that the United States has "yet to make any real progress" in requiring more beneficial ownership information).

disagree with Senator Levin.⁷⁵ Nevada State legislators argue that beneficial ownership transparency has not posed a significant problem and that states have in fact been responsive to issues that have arisen.⁷⁶ The FATF did acknowledge that the United States currently possesses a range of investigatory powers to compel the disclosure of beneficial ownership information.⁷⁷ But the FATF also noted that the system is only as good as the information that is available,⁷⁸ and in the context of beneficial ownership, this is close to nothing.⁷⁹ The ITLEA and its amendments to the Homeland Security Act⁸⁰ would bring the United States up to the FATF's standards, while simultaneously easing critics'⁸¹ and corporations' fear of too much transparency in the corporate marketplace.⁸²

Also, the meager efforts by the legislature to remedy the issue thus far have been to no avail. The National Association of Secretaries of State ("NASS") created a 2007 task force to find a solution to beneficial ownership disclosure problems.⁸³ At the request of NASS, Senator Levin agreed to postpone the introduction of the ITLEA while NASS worked on a proposal "to require the collection of beneficial ownership information."⁸⁴ The

75. *Limits on Secrecy*, *supra* note 20.

76. John G. Edwards, *Nevada Officials See Millions of Lost Dollars with Proposed Disclosure Bill*, LAS VEGAS REV. J., June 19, 2009, available at <http://www.lvrj.com/business/48598602.html>. See also John G. Edwards, *Transparency Bill Draws Mixed Reactions*, LAS VEGAS REV. J., May 3, 2008, available at <http://www.lvrj.com/business/18544189.html> [hereinafter *Transparency Bill*] (stating that "Senator Levin is introducing this bill as though the states have been completely unresponsive, and that simply isn't the case.").

77. FATF U.S. REPORT, *supra* note 10, at 236.

78. *Id.*

79. See *id.* (stating that information concerning companies and LLCs whose shares are not listed on the major exchanges are often minimal regarding beneficial ownership information). Reporting requirements are such that the necessary information is often not "adequate, accurate or available on a timely basis." *Id.* at 9. "This is a vulnerability for the U.S." *Id.*

80. 6 U.S.C. § 601 (2006).

81. See *Transparency Bill*, *supra* note 76 (stating that opponents of the ITLEA have criticized the bill, calling it an "unnecessary government intrusion into the investments of businesspeople who are legitimate.").

82. See *Levin Introduces Bill*, *supra* note 16, at 6 (clarifying that the ITLEA does not require states to make beneficial ownership information available to the public). Therefore, the ITLEA counters critics' presumptions that it would expose companies' classified information to the public. Rather, the bill leaves the choice to make information available up to the particular state. *Id.* See also Miille, *supra* note 2 (noting that states could keep the owners' names anonymous from the general public; "state officials would [only] be only required to provide records in response to a law enforcement agency's subpoena or summons.").

83. *Levin Introduces Bill*, *supra* note 16, at 4.

84. *Id.* Levin and his staff suggested provisions and comments to NASS,

NASS proposal, however, was full of deficiencies and would not have remedied the current problems facing corporation and LLC ownership disclosure.⁸⁵ For example, the proposal only required states to collect a record of a company's owners, which is usually incomplete and outdated.⁸⁶ The NASS proposal's failure to explicitly require that the information for each corporation or LLC be updated would render a great deal of ownership information inaccurate.⁸⁷ Therefore, the NASS proposal would not thoroughly address beneficial ownership problems, allowing criminals to continue to illegally manipulate the system.⁸⁸ Thus, the response from Congress, like that of individual states, has not been sufficient in addressing the issue.

In June 2009, NASS once again requested postponement of the ITLEA's consideration.⁸⁹ In a hearing before the Senate Homeland Security and Governmental Affairs Committee,⁹⁰ North Carolina Secretary of State and NASS Co-Chair Elaine F. Marshall explained that a new model law⁹¹ on company formation

but their efforts were to no avail. *Id.* Around July 2007, the U.S. Department of Treasury sent NASS a letter, notifying them that the NASS proposal did not fully address the problems in beneficial owner transparency. *Id.*

85. See *Levin Introduces Bill*, *supra* note 16, at 4 (quoting the U.S. Dept. of Treasury's statement that "the NASS proposal 'falls short' and does not fully address the problem of legal entities masking the identity of criminals."). The NASS proposal made states unaccountable because it did not require the states themselves to maintain and produce the ownership information upon a law enforcement agency's request. *Id.* Also, ownership information under this proposal would not always be accurate since it did not specify that the information needs to be updated. *Id.*

86. *Id.*

87. *Id.*

88. Criminals could have continued to manipulate corporations and LLCs under the NASS proposal. They would not update their company's beneficial owners through the years, which would create just as much confusion for law enforcement agents as before. Under Section three of the ITLEA, however, beneficial owners are required to disclose themselves in annual filings or whenever any change in beneficial ownership occurs. S. 569, § 3.

89. Elaine F. Marshall, North Carolina Secretary of State, Co-Chair, NASS, *Testimony Before the Senate Homeland Security and Governmental Affairs Comm.: Examining State Business Incorporation Practices: A Discussion of the Incorporation Transparency and Law Enforcement Assistance Act* 3 (June 18, 2009), available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=ef10e125-2c1d-4344-baf1-07f6061611c1 [hereinafter *Testimony from Elaine F. Marshall*].

90. *Examining State Business Incorporation Practices: A Discussion of the Incorporation Transparency and Law Enforcement Assistance Act: Hearing on S. 569 Before the Senate Homeland Security and Governmental Affairs Comm.*, 111th Cong. (2009), available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=ef10e125-2c1d-4344-baf1-07f6061611c1; *Today on the Hill*, THE WASH. POST (June 18, 2009), available at http://voices.washingtonpost.com/capitol-briefing/2009/06/today_on_the_hill_98.html.

91. *Testimony from Elaine F. Marshall*, *supra* note 89, at 3. The new UCL

would be completed, with the help of NASS, by the Uniform Law Commission⁹² (“UCL”) in July 2009.⁹³ Secretary of State Marshall is opposed to the ITLEA and argues that the UCL’s Act should be considered in place of the ITLEA.⁹⁴ But even though “[NASS] ha[s] worked with [UCL] since they began their drafting in 2007” on the Uniform Act,⁹⁵ these efforts should not stop the ITLEA from being enacted now. The last two years have seen too much wrangling over speculative legislation. Enacting the ITLEA now would undoubtedly guarantee that the United States complied with FATF standards, by requiring states to obtain thorough and updated beneficial ownership information for the corporations formed under its laws.⁹⁶ Also, the ITLEA would ensure that the United States met its international commitment to foreign nationals.⁹⁷ The guidelines of the ITLEA, as opposed to the NASS proposals and the meager efforts by the states, thoroughly address provisions that remedy the beneficial ownership transparency problem in the United States. Without the ITLEA, there is no indication that any concrete remedial actions will be presented in the near future to alleviate these issues.

C. *Shell Corporations: The Straw That Broke the Camel’s Back*

Beneficial owner disclosure issues are particularly prevalent in the formation of shell corporations.⁹⁸ Since shell companies

and NASS proposed model law titled the Uniform Law Enforcement Access to Entity Information Act (the “Uniform Act”). *Id.* This act deals with two principle issues: first, a “provision that prohibits all filing entities from issuing certificates of bearer shares[,]” and second, law enforcement’s access “to ownership and control information about filing entities.” Harry J. Haynsworth, DRAFTING COMMITTEE ON UNIFORM LAW ENFORCEMENT ACCESS TO ENTITY INFORMATION ACT UNIFORM LAW COMMISSION, CHAIR, TESTIMONY BEFORE THE UNITED STATES SENATE COMM. ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS ON THE INCORPORATION TRANSPARENCY AND LAW ENFORCEMENT ASSISTANCE ACT 5 (June 18, 2009), *available at* http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=ef10e125-2c1d-4344-baf1-07f6061611c1). However, the Uniform Act, with minor exceptions, only applies to “filing entities having 50 or fewer interest holders.” *Id.*

92. *Testimony from Elaine F. Marshall, supra* note 89, at 3.

93. *Id.*

94. *See generally Testimony from Elaine F. Marshall, supra* note 89 (expressing opposition for the ITLEA).

95. *Id.* at 3.

96. *Levin Introduces Bill, supra* note 16, at 2.

97. *See* Byles, *supra* note 55 (explaining that most offshore jurisdictions may request beneficial owner information). This includes the Bahamas, Cayman Islands, Jersey, and the Isle of Man. *Id.* *See also* SUBCOMMITTEE ON INVESTIGATIONS ARTICLE, *supra* note 5 (noting that all “countries in the European Union are required to obtain beneficial ownership information for the corporations they form.”).

98. *See supra* note 19 and accompanying text (explaining that shell

have become vehicles for money laundering and other financial crimes, the ITLEA would effectively address this particular corporate exploitation.

Similar to standard privately held corporations, shell corporations are detrimental to effective government enforcement.⁹⁹ This is principally because shell companies are easier to establish and operate than privately held corporations and LLCs,¹⁰⁰ which magnify the problems concerning beneficial ownership. Through the use of shell companies, criminals enjoy myriads of ways to manipulate United States corporations and LLCs without a corresponding increase in beneficial ownership transparency requirements.¹⁰¹ The ITLEA, however, would require all non-publicly traded companies, including shell companies, to conform to its provisions.¹⁰² The fact that shell companies are usually less substantive¹⁰³ than regular corporations and LLCs would not make a difference under the ITLEA. Thus, law enforcement agencies would have greater access to readily available and accurate owner information to facilitate their investigations of shell corporation abuse.

In addition, blatant ownership deceptiveness is facilitated by states allowing advertisements on the ease of setting up a shell corporation within its borders.¹⁰⁴ In some instances, shell companies can purchase "corporate office service packages," which are provided solely to create the impression of a more established local presence in a particular area.¹⁰⁵ To add insult to injury, in order to preserve a client's anonymity, some formation agents even promote and offer a variety of services that allow for absolutely no

corporations refer to non-publicly traded corporations, LLCs, and trusts that have no physical presence or major assets).

99. See *supra* note 18 and accompanying text (noting examples where a lack of thorough beneficial ownership requirements has resulted in criminals earning millions of dollars at the expense of the United States).

100. *Shell Company Article*, *supra* note 19.

101. *Id.*

102. S. 569, § 2(11).

103. See *Shell Company Article*, *supra* note 19 (explaining that shell companies typically have no physical presence and usually do not gross substantial independent revenue).

104. See FINCEN REPORT, *supra* note 2, at 5-6 (indicating that service providers advertise services for shell companies through resident-agent and mail-forwarding services); see also *Levin Introduces Bill*, *supra* note 16, at 4 (identifying one such state advertisement: "DELAWARE – An Offshore Tax Haven for Non US Residents"). The advertisement goes on to say that "[o]wners' names are not disclosed to the state." *Id.*

105. See FINCEN REPORT, *supra* note 2, at 5-6 (detailing what these packages include). Corporate office service packages often contain "a state business license, a local street address and an office that is staffed during business hours, a local telephone listing with a live receptionist, and 24-hour personalized voicemail"). These packages range in price from \$900 to \$1,950 per year. *Id.*

identity disclosure.¹⁰⁶

These problems are compounded by states permitting corporations, general partnerships, trusts, and other business entities to own and manage other shell companies under the current disclosure requirements.¹⁰⁷ When another entity is the beneficial owner, it enables the owning entity to further conceal its involvement in the activities of the shell company.¹⁰⁸ Currently, the layers of ownership that can be created by a shell company make it highly unlikely that the relationships between various individuals and companies can be discerned, even if one or more of the owners are actually discovered.¹⁰⁹

Despite the schemes used by states to entice a shell corporation to form within its borders, the ITLEA would apply the same standard of disclosure.¹¹⁰ This would have the positive effect of assuring that shell corporations have legitimate presence, operation, and disclosure, while still allowing states to compete for a company's business. Further, this eases critics' perception that states will be negatively affected by the ITLEA.¹¹¹ Moreover, the ITLEA would make it impossible for criminals to hide behind shell corporations to create unnecessary layers of owner identity. Thus, the ITLEA has the ability to create a far reaching remedy that specifically addresses the deficiencies that have beset corporation

106. See *id.* at 6 (explaining that these service providers facilitate and promote beneficial anonymity). Providers set up offices for the shell company, which are used to eliminate the owner's name from state records. *Id.* Also, an owner of a shell company can "retain ownership and operational control through confidential stock ownership or appointment to [key] offices," such as vice president, that do not appear on public records. *Id.* In addition, the beneficial owner may use "nominee stockholders to create an additional layer of privacy while maintaining control through an irrevocable proxy agent." *Id.* See also *Shell Company Article*, *supra* note 19 (reiterating that these features, while currently legal, may be attractive to criminals to launder funds or finance terrorism).

107. FINCEN REPORT, *supra* note 2, at 10.

108. *Id.*

109. See *id.* (explaining that in Delaware, for example, an LLC serving as a beneficial owner or manager for another LLC is not considered to be doing business in the state just because of being an owner or manager of the other LLC).

110. See S. 569, § 3 (stating that the ITLEA would amend the Homeland Security Act of 2002, which applies equally to all states).

111. See *Levin Introduces Bill*, *supra* note 16, at 6 (clarifying that the ITLEA would not withhold funds from a state for failing to modify its incorporation practice obligation under the ITLEA). This is an area that needs to be developed and specifically addressed within the ITLEA itself since states are especially concerned that requiring more information will dissuade companies from incorporating within states with higher disclosure requirements. Derek Rowley, *The Incorporation Transparency & Law Enforcement Assistance Act: "They Are from the Government, and They Say They Are Here to Help,"* NEV. REGISTERED AGENT ASS'N. (2008), available at <http://www.nraa.biz/incorporation-transparency-law-enforcement-assistance-act.aspx>.

and LLC ownership transparency in the past.

V. BUILDING IT TO LAST

The ITLEA provides a strong foundation for the United States to address its current problem of beneficial ownership transparency. It introduces key provisions and regulations that have the ability to prevent criminals from utilizing corporations and LLCs illegally.¹¹² The ITLEA, however, is not perfect; additions to the ITLEA itself and supplemental legislation are needed. Therefore, this Comment proposes that Congress pass and sign into law a form of the current ITLEA. The concept of increased beneficial ownership transparency and reporting is remarkable in thought but would be extremely difficult and problematic to implement in practice with the current interpretation of the ITLEA.

A. Details, Details, Details

The enactment of the ITLEA would finally bring the United States into compliance with FATF standards.¹¹³ Although the ITLEA is in line with current international regulations concerning beneficial ownership transparency,¹¹⁴ the Act still requires more detail that clearly and pointedly addresses its reach to the individual states, and how the states can conform to the ITLEA without significant financial or organizational burdens. Accomplishing this would effectively address critics concerns that the ITLEA is deficient and overbroad, while simultaneously gaining increased public support for the ITLEA by making its goals appreciably attainable.¹¹⁵

Also, the ITLEA needs to reinforce the notion that its passage

112. S. 569, § 3.

113. *Levin Introduces Bill*, *supra* note 16, at 2.

114. *See* Byles, *supra* note 55 (noting that the Cayman Islands Financial Services Association ("CIFSA"), for example, is encouraging the United States to enact the ITLEA, which would require companies to "supply information along the same high standards which have been implemented in the Cayman Islands for years."). Surprisingly, the Cayman Islands already "directly regulates all service providers who are responsible for incorporating companies" and make such companies subject to onsite inspections by the Cayman Islands Monetary Authority (CIMA). *Id.* This onsite verification is an example of the detail and follow-through needed to make the ITLEA effective.

115. *See also* Doug Batey, *Big Brother Wants to Crack Open Your LLC*, LLC LAW MONITOR (2009), available at <http://www.llclawmonitor.com/tags/incorporation-transparency-and/> (claiming that the ITLEA has "many things wrong with it" and that its definition of a beneficial owner is "breathtakingly broad"); *see generally* *Testimony from Elaine F. Marshall*, *supra* note 89 (expressing concerns that the proposed legislation financially burdens state governments).

would positively level the playing field for all states to form corporations and LLCs within its borders. No particular state would be favored over another.¹¹⁶ This reinforcement is needed because there is criticism that more ownership disclosure will make potential corporations and LLCs decide not to incorporate in a particular state.¹¹⁷ Without uniformity across the nation, state revenue may decrease or cause foreign companies to move their businesses to another country entirely. The ITLEA would not favor certain states; however, the Act fails to specifically and thoroughly articulate that.¹¹⁸

B. Rewarding Good Behavior

To promote compliance, a provision should be added to the ITLEA that rewards states for effectively disclosing beneficial ownership information. These “rewards” should be in the form of tax incentives or increased funding for state sponsored projects and initiatives. Currently, the ITLEA only provides punishment provisions for non-compliant beneficial owners.¹¹⁹ Although these punishments could be somewhat effective in enforcing compliance; punishment will not effectively stimulate states to take an active role in complying with the ITLEA. Instead, states would criticize rather than support the ITLEA because of the punishment. The “rewards” provision, on the other hand, would give skeptical states the incentive to comply. The ITLEA, a nationwide act, would have a local impact by allowing states to use rewards to respond to individual state needs, ranging from the construction of public venues, to increasing the funding for public schools. Further, with the turbulent state of the economy and unpredictable financial

116. See generally S. 569, § 3 (outlining the minimum incorporation system a state must implement).

117. See *Transparency Bill*, *supra* note 76 (arguing that the ITLEA is a huge impediment to new business); see also Rowley, *supra* note 111 (arguing that no state that seeks to build its economy is going to volunteer to impose higher reporting and disclosure requirements than is necessary so as to not deter potential businesses from incorporating within its borders).

118. FINCEN REPORT, *supra* note 2, at 9. The ITLEA should explicitly highlight that the average increase in new companies being formed from 2001 to 2005 in the states with the least transparency requirements was 120.09%, compared to states that require the greatest level of transparency during that time of 138.75%. *Id.* The ITLEA needs to detail in its first section that the vulnerabilities experienced by states that require less disclosure could be eliminated by requiring higher levels of disclosure for all states, which would not result in a major adverse effect on the revenue generated by those states. Each state would thus be more prone to comply with, rather than criticize, the ITLEA.

119. See S. 569, § 3(a)(1)(b) (penalizing beneficial owners up to 10,000 dollars for knowingly providing false ownership information); see also *Senator Levin Statement*, *supra* note 24 (emphasizing that criminal penalties can be imposed in addition to civil penalties for intentionally providing false information).

markets, a rewards provision would significantly encourage states to comply with the ITLEA.

C. International Flexibility

A more elaborate and flexible provision should be required for the beneficial owners of foreign corporations and LLCs to ensure the ITLEA's compatibility with foreign corporations. The current ITLEA requirements would not pose a problem for European nations already subject to laws requiring strict scrutiny of beneficial ownership disclosure.¹²⁰ The ITLEA's strict requirements, however, may cause compliance difficulties for potential foreign corporations that are not required to disclose beneficial ownership information in their own countries.

The ITLEA's current requirements would make it very difficult, if not impossible, for foreign owners who have never had to disclose ownership in the past to incorporate in the United States as they may not be able to conform to the requirements.¹²¹ In response, the ITLEA should specifically outline a method to accommodate foreign corporations that have never been required to provide ownership disclosure. Flexible requirements should be implemented to uniquely fit the foreign corporation's situation, giving it the greatest opportunity to incorporate in the United States. Additionally, the ITLEA should require more frequent checks on corporations and LLCs to deter illegitimate activities.¹²² This combination would entice foreign entities to establish

120. See SUBCOMMITTEE ON INVESTIGATIONS ARTICLE, *supra* note 5 (noting that the European Union already has beneficial ownership disclosure requirements similar to the ITLEA); see also S. 569, § 2(10) (distinguishing the United States' practices from all countries in the European Union that already require corporations and LLCs to identify its owners); Byles, *supra* note 55 (recognizing that most offshore jurisdictions already request this information).

121. See S. 569, § 3(a)(1)(a)(2) (stating that a foreign beneficial owner applications must include a written certification by a formation agent residing in the state); see also Baker, *supra* note 13 (articulating that the ITLEA requires corporations and LLCs with non-United States beneficial owners to provide certification from an in-state formation agent stating he/she has verified the identity of those owners). Verification entails including the owner's name, address, and copy of the owner's picture on his/her United States passport. S. 569, § 3(a)(1)(a)(2). Requiring a foreign individual to provide a picture of identification, specifically from his/her United States passport, can deter many legitimate businesses from incorporating in the United States since many owners may not, or simply cannot, acquire one.

122. See S. 569, § 3(a)(1)(a)(1)(B) (stating that the ITLEA requires that both foreign and domestic beneficial information be updated in an annual filing with the state, or if no such filing is required, each time a change is made in the beneficial ownership of the company). For the ITLEA to be truly effective, it needs to provide for more updated surveillance of foreign-owned companies; one possible solution is mirroring the CIFSA's practices and subjecting all privately owned companies to random on-site visits to verify that ownership information is updated. Byles, *supra* note 55.

businesses in the United States, while simultaneously protecting the United States and its consumers from criminal activity. Thus, a more flexible approach to foreign incorporation would likely have the positive effect of stimulating international business and increasing corporate confidence.

D. Additional Help

The United States would need to go beyond the current context of the ITLEA and take further action to stop the abuse of the lack of beneficial ownership transparency for corporations and LLCs. A supplemental rule should be introduced prohibiting states from actively advertising the low levels of transparency requirements, or other formation characteristics that appeal to criminals, with the intent to entice potential companies to incorporate within a particular state's borders.¹²³ The United States cannot solely rely on the current articulation of the ITLEA to fix its corporation and LLC ownership disclosure problems because states are actively highlighting these problems to encourage companies to form in their states.¹²⁴

VI. CONCLUSION

The ITLEA would ensure that persons who form corporations in the United States disclose the beneficial owners of their companies. This disclosure would work to directly prevent exploitation of the United States as a whole and its citizens individually.¹²⁵ The ITLEA would deter current problems in corporate ownership disclosure that have forced law enforcement agencies to cease their investigations because of the impossibility of acquiring essential ownership information.¹²⁶ The significant ease with which one can create and operate corporations and LLCs in the United States has been a primary concern because these companies have been used to conduct illegal activities.¹²⁷

123. See S. 569, § 2 (warning that “dozens” of internet websites advertise the anonymity of beneficial owners requirements under the states’ incorporation practices; some states point to these requirements as a reason to incorporate within their borders). Some websites go so far as listing states together with offshore jurisdictions as preferred locations for corporations and LLCs, essentially providing easy access for criminals to research the ideal place to form their illegal entities in, or outside of, the United States. S. 569, § 2; *Levin Introduces Bill*, *supra* note 16, at 4.

124. S. 569 § 2; *Levin Introduces Bill*, *supra* note 16, at 4.

125. S. 569; *Levin Introduces Bill*, *supra* note 16, at 1; Baker, *supra* note 13; *Senator Levin Statement*, *supra* note 24.

126. *Registered Agents*, *supra* note 21; SUBCOMMITTEE ON INVESTIGATIONS ARTICLE, *supra* note 5.

127. S. 569; *Registered Agents*, *supra* note 21; SUBCOMMITTEE ON INVESTIGATIONS ARTICLE, *supra* note 5; *Levin Introduces Bill*, *supra* note 16, at 1; Baker, *supra* note 13; *Senator Levin Statement*, *supra* note 24.

While the ITLEA should be passed by Congress, provisions need to be modified. The states need to be assured that the ITLEA will have a positive effect on the nation and give added incentives for complying through an additional "rewards provision." Also, the ITLEA should be amended to specifically detail how it would require ownership information from foreign corporations that are not familiar with corporate ownership disclosure, allowing them the opportunity to compete in the United States. Lastly, a requirement needs to be added that prohibits states from highlighting the loopholes in beneficial ownership requirements through advertisements of nondisclosure.

The ITLEA is a significant piece of legislation that, just like a simple driver's license, serves a function in our domestic and global structure. The United States cannot afford to be victimized by illicit activity because of its reliance on overbroad or inapplicable disclosure rules. With the tumultuous and unpredictable trend in the economy, similar to the unpredictable DMV, the ITLEA with a few amendments would help bring stability and confidence to corporate America. Thus, the ITLEA acts as a brick to a wall of reform that is necessary in order for the United States to remain a world leader.