



Statement of the U.S. Chamber of Commerce

ON: Beneficial Ownership: Fighting Illicit International Financial Networks Through Transparency

TO: United States Senate Committee on the Judiciary

BY: Brian O'Shea, Senior Director, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce

DATE: February 6, 2018

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The Chamber's mission is to advance human progress through an economic,
political and social system based on individual freedom,
incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Chairman Grassley, Ranking Member Feinstein, and members of the Committee on the Judiciary: My name is Brian O'Shea, and I am a Senior Director at the Center for Capital Markets Competitiveness (CCMC) at the U.S. Chamber of Commerce (Chamber). Thank you for the opportunity to appear before you here today on the important issue of beneficial ownership disclosure and the serious, real-world impacts that legislative proposals pending in Congress would have on almost every small and medium-sized business in the United States covered by these bills.

The Chamber and its members are committed to fighting criminals, terrorists, foreign powers, money launderers, and any others who would misuse the U.S. financial system to carry out illicit schemes that harm our nation. Make no mistake; no one wants to keep bad actors out of the financial system and our economy more than the law abiding American businesses that comprise the U.S. Chamber membership.

Over the course of the past decade, one concept that has been consistently put forward as a solution to money laundering and terrorist financing is the passage of legislation to require nearly all small- and medium-sized businesses in the United States to disclose information to a government entity about their "beneficial owners." S. 1454, the True Incorporation Transparency for Law Enforcement ("TITLE") Act, and previous proposals that it is based on are grounded in the same model of either directing all 50 U.S. states to rewrite their incorporation laws to collect beneficial ownership information, or the establishment of a massive new federal government database housed at the Treasury Department's Financial Crimes Enforcement Network (FinCEN).

While these proposals may be well-intentioned, they are poorly designed and fundamentally flawed. Their overly broad and vague definitions, unworkable requirements, and severe penalties would do far more to impede law abiding small and medium-sized business than to hamper the use of so-called "shell companies" to facilitate illicit activity. Bills like the TITLE Act apply to every existing corporation and limited liability company (LLC), and to any such entities that would be formed in the future, unless they meet one of the bill's exemptions. Such bills constitute an unprecedented, ongoing regulatory and paperwork nightmare for law abiding business owners and undermine the privacy rights of millions of American citizens whose names, driver's license numbers, and addresses would likely be in the public domain if the TITLE Act becomes law. Even more troubling, the TITLE Act adds to bipartisan over criminalization concerns by threatening businesses with civil and potential criminal penalties if they make paperwork errors when seeking to comply with these onerous mandates.

It is for these reasons that legislative proposals such as the TITLE Act that have been put forward in the House and the Senate have been opposed by business groups, including but not limited to the U.S. Chamber, The National Federation of Independent Businesses, The National Association of Manufacturers, the Angel Capital Association, the National Venture Capital Association, and the Real Estate Roundtable. Other beneficial ownership proposals of this kind have also been opposed by a range of non-business groups from across the ideological spectrum, including the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, the American Bar Association, the National Association of Secretaries of State, the Heritage Foundation, and FreedomWorks. Our comments regarding S. 1454 and the regime of beneficial ownership disclosures it embodies are laid out in greater detail below.

Concerns regarding S. 1454, the “True Incorporation Transparency for Law Enforcement (TITLE) Act”

S. 1454 threatens unwitting small business owners with federal civil and criminal penalties for failing to disclose information that they may neither possess nor have the legal right or ability to obtain from third parties. It would also compel many business owners to undertake complex legal analyses to determine the identity of so-called “beneficial owners” in not just their own company, but also in other entities that may have various types of interests in or derive certain benefits from their enterprise, including creditors, lien holders, and others. The TITLE Act would require this legal analysis on an ongoing basis—not just when someone forms a legal entity. It would practically guarantee that the vast majority of business owners in each of your states have their names, addresses, and driver’s license information out in the public domain simply because they are currently operating, or at some future time form, a corporation or LLC. These flaws have been part of previous iterations of this legislation that date back to former Senator Carl Levin’s Incorporations Transparency and Law Enforcement Assistance Act introduced in the 111th Congress.

Before considering the TITLE Act or any other “beneficial owner” disclosure legislation, it is important that Members of Congress clearly understand the basic problems with the mechanics of what the TITLE Act and similar bills actually require of law-abiding small business owners and anyone who forms a corporation or LLC. It is equally important to understand that, as the Chamber has consistently argued, the important priority of removing illicit activity and bad actors from the financial system does not require a “destroy-the-village-in-order-to-save-it” approach.

S. 1454’s vague and ill-defined definition of “beneficial owner” places a complex and never-ending burden on small businesses

S. 1454 is not just about collecting the names of the people that may colloquially be considered the “owners” of a business. Rather, this legislation requires any person who sets up a legal corporation or LLC under the law of a State to disclose the name and personal information of every individual who is a “beneficial owner.” This term is defined to include *every* single individual who “directly or *indirectly*” has “a substantial interest in or receives substantial economic benefits from”, or exercises “substantial control” over the legal entity, through “ownership interests, voting rights, agreement, *or otherwise*.” However, the bill does not define what is “substantial,” or what it means to “otherwise” exercise substantial control over a corporation or LLC. This creates a legal gray area that would make compliance difficult if not impossible.

The bill’s vague and inchoate definition of direct and indirect “beneficial owners” who must be disclosed stands in stark contrast to the approach taken by FinCEN in its recent rulemaking on Customer Due Diligence Requirements for Financial Institutions (“CDD Rule”).¹ While the CDD Rule and its implementation are far from perfect, FinCEN has at least acknowledged the burdens associated with requiring the disclosure of too many individuals as direct and indirect “beneficial owners.” As a result, FinCEN limited its “beneficial owner” definition to: (1) those individuals who hold a 25% or greater equity interest in an entity; and (2) “a single individual with significant responsibility to control, manage, or direct” the entity. In fact, FinCEN rejected the requests in written comments from the leading advocates for S. 1454 to forgo a numerical threshold and instead rely on inchoate and ill-defined notions of direct or indirect control over or receipt of benefits from an entity, like those in the TITLE Act. FinCEN concluded that the “incremental benefit” of any suggested approach requiring the disclosure of more than a maximum of potentially five individuals “does not outweigh the burdens associated with having to collect and verify the identities of more [beneficial owners].”²

¹ <https://www.gpo.gov/fdsys/pkg/FR-2016-05-11/pdf/2016-10567.pdf>

² In his 2014 comments on the FinCEN Customer Due Diligence Rule, Senator Carl Levin, who first introduced the beneficial ownership disclosure legislation on which S. 1454 is based (including its definition of beneficial owner) argued that “[s]pecifying a disclosure threshold is an ineffective approach.” While he advocated a more inchoate standard without any numerical threshold, Levin requested in the alternative that if “rulemakers insist on specifying a numerical ownership threshold” that it “should be lowered.” Comment Letter of Senator Carl Levin, Chairman, U.S. Permanent Subcommittee on Investigations, to FinCEN at 3 (Dec. 10, 2014) (herein after, “Levin Comments”). Levin also unsuccessfully urged FinCEN to adopt the concept that was in his bill and is in S. 1454 of making individuals beneficial owners based on their entitlement “to the economic benefits produced by [an] entity.” Levin Comments at 6. The FACT Coalition, which has consistently endorsed S. 1454 and its predecessor beneficial ownership bills, made the same arguments in its comments to FinCEN. Comment Letter from the FACT Coalition to FinCEN (October 3, 2014).

The vague provisions included in the TITILE Act would likely lead many businesses to retain an attorney on a recurring basis to help them determine how far the bill's definition of direct and indirect "beneficial owner" extends. Beneficial owners under the legislation might include trusts, corporations, partnerships, venture capital firms, lenders, creditors, contractors, and lien holders. Furthermore, beneficial ownership under S. 1454 could change daily as loans are sold, as new lines of credit or financing are accepted, as owners get divorced and convey interests in entities as part of property settlements, or as trusts are formed and amended.

S. 1454 would also require entities to "look through" various layers of corporate ownership in order to report the personal information of those who may constitute "beneficial owners" of the entity

S. 1454 also compels the owner of a non-exempt corporation or LLC to "look through" an entity that qualifies as a beneficial owner and to disclose the personally-identifiable information of the individuals who constitute beneficial owners of *that* entity. It is not uncommon for even small businesses to have, for example, other corporations, LLCs, or trusts as members or shareholders. Under the TITILE Act a business owner would have to look through these other entities and determine whether any individual with an interest in such a corporation, LLC, or trust constituted an "indirect" beneficial owner who they must report. Similarly, a business owner would have to request information on the individuals who have an interest in entities that provide them venture capital funding, credit or loans. Such inquiries could have to extend through several layers of entities under the disclosure regime the TITILE Act would impose.

The only time a business owner is relieved of the burden of chasing down and evaluating whether individuals with interests in such entities are "indirect" beneficial owners is when the entity itself is exempt from the bill's definition of a corporation or limited liability company. As a practical matter this means a business owner is responsible for keeping track of changes of not only when she sells an interest in the company, but also when there are changes to the information about the people significantly involved with *another* entity that has certain kinds of common business ties or other relationships with her company. In other words, the TITILE Act would make many business owners wholly reliant on third parties that have no obligation to assist them or to voluntarily convey any changes in beneficial ownership information. This would only serve to create impossible reporting burdens for many businesses and inhibit capital investment from angel or other types of investors.

S. 1454 exempts publicly-traded companies, financial institutions, insurance companies, and other large, sophisticated entities from its complex, burdensome web of disclosures, but has no meaningful exceptions for the vast majority of American small businesses

This legislation is especially problematic for people running or starting small companies—“mom-and-pop” businesses—and small start-ups that will be subject to ongoing disclosure requirements. While S. 1454 exempts from its mandates corporations and LLCs that are highly-regulated entities (*e.g.*, banks, utilities, insurance companies, investment companies, commodities brokers, publicly-traded companies, and the subset of accounting firms certified to conduct audits of public companies under the Sarbanes-Oxley Act), there is no workable exception for the vast majority of your law-abiding constituents currently running or starting small businesses.

The bill’s “operating company” exception that its proponents sometimes mistakenly assert will protect existing and future small businesses is useless to the vast majority of law abiding small and medium-sized enterprises. It only applies to U.S. businesses that meet all of the following requirements:

- 1) Have a physical operating presence in the U.S.;
- 2) Have *more than* 20 “full-time” employees (“full-time” is not defined in the bill);
- 3) Have filed income tax returns demonstrating more than \$5,000,000 in gross receipts or sales; *and*
- 4) Have *more than* 100 Shareholders.

In other words, the TITL Act is quite literally targeted at only small and mid-sized businesses in America. Sixty-two percent of all U.S. businesses have less than five employees. Even more substantial small and medium-sized companies that meet the 20 full-time employee and \$5,000,000 thresholds would be subject to the TITL Act because few of them would have more than 100 shareholders.

The potentially burdensome disclosures that S. 1454 imposes on your constituents would be ongoing and the bill does not give them the authority to obtain information they may be legally required to provide to the States

S. 1454 would further require business people and others who may form (or have already formed) a legal entity to continuously update the government within 60 days of “*any* change” in the list of beneficial owners *or* the information required to be provided relating to each beneficial owner. This obligation to update extends to

changes in the name, the address, or passport/driver's license number issued to any individual initially disclosed as or who becomes a direct or indirect "beneficial owner."

To be clear, under this bill, people are compelled to make amendments "not later than 60 days after the date of any change." The 60 days begins to run when the change occurs—not 60 days from the date a business owner subject to this legislation becomes *aware* of the change in either the list of beneficial owners or information (*e.g.*, name, address, driver's license or passport number) disclosed about any previously-identified beneficial owner. Moreover, S. 1454 would require covered individuals to confirm by an annual report the identity and personal information of each beneficial owner. This would effectively require at least annual follow up to confirm that nothing has changed as far as the list of beneficial owners or the identifying personal information associated with any of them.

Even more troubling than the broad scope and ongoing nature of the disclosure obligations this bill imposes is the fact that it compels disclosure of information that people generally have no legal means to obtain—much less on a timely basis. For example, if a former spouse or ex-business partner who could easily be a "beneficial owner" under the vague standards of this bill by means of a divorce settlement or business agreement either forgets or willfully refuses to timely inform the person responsible for a covered business of changes to their personal information (perhaps following a second marriage), the business person could face federal civil or criminal penalties of up to \$1 million and/or 3 years in federal prison for failing to update the government within the required 60-day period. As the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, and FreedomWorks recently noted in a letter to the House Financial Services Committee on a House proposal similar to the TITLE Act, "[n]one of these offenses require a specific intent to violate the law, a specific intent to assist others in violating the law, or require the showing of any harm to another individual or the U.S. This is, quite simply, a punishment that does not fit the crime."³

This legislation applies retroactively and actually covers *all* existing legal entities—not just entities formed after its enactment

Under S. 1454's "Existing Entities" provision, within two years of the bill's enactment all non-exempt existing entities "formed under the laws of the State before [the] effective date of [changes to State incorporation law required by the Act] shall be considered to be a corporation or limited liability company for purposes of [the bill's

³ NACDL-ACLU-FreedomWorks Letter, pg. 4.

<https://www.nacdl.org/Advocacy.aspx?id=14904&terms=counter+terrorism+illicit+finance>

requirements].” People who created entities that may have been operating for decades would suddenly face the burden of making the necessary initial disclosures and continuous updates about direct and indirect beneficial owners required by this bill unless they are a bank or other type of large business exempt from coverage. Even if they are exempt, they would still have to be aware of their new obligation to file a document delineating the basis for their exemption or face penalties under S. 1454.

The personal information collected under the bill is not restricted to use by law enforcement for criminal cases, terrorism, or tax evasion, and will be placed in the public domain in the overwhelming majority of States

Under S. 1454, the name and current personal information of all individuals who are beneficial owners of a non-exempt entity would be shared with *any* “local, State, or Federal agency or congressional committee or subcommittee” requesting such information by means of “a civil, criminal, or administrative subpoena or summons” (or their equivalent). While the bill’s proponents focus on the utility of this information to law enforcement, they have rejected calls over the years to limit its use to sworn law enforcement officers pursuing criminal, espionage, and terrorism-related matters.

For years we have expressed concern that so-called beneficial ownership legislation like S. 1454 places no restrictions on what State or federal officials and members of Congress may do with the personally-identifiable information they are authorized to obtain about direct and indirect beneficial owners of a privately held, non-exempt legal entity. We feel strongly that the personally-identifiable information made available to government officials under S. 1454 should be restricted for use in the types of criminal, espionage, and terrorism investigations that the sponsors of S. 1454 cite as the rationale for the legislation. There must also be severe penalties for government officials who make any other use of it or share it with third parties who are not authorized to collect it in the first instance.

Furthermore, to the extent this legislation directs the States to collect beneficial ownership information; it would fundamentally destroy any protections against the public disclosure of all information provided. That is because almost every state has “right to know” laws requiring business filings to be made public. In fact, the National Association of Secretaries of State has publicly declared that “entity information filed with the state business registry is public information, *thus beneficial ownership information filed with the state would be public information.*”⁴ The TITLE Act would effectively create a public database of individuals’ names, driver’s license numbers,

⁴ <http://www.nass.org/initiatives/state-incorporation-collection-company-ownership-info>

and addresses in relation to millions of business enterprises. This not only renders any argument about which types of law enforcement or government officials should have access to the information completely moot, but it also practically guarantees that the personal data of everyone with the requisite direct or indirect interest in a business could be obtained for numerous nefarious reasons that have absolutely nothing to do with fighting terrorists or money launderers. Individuals who are harmed by the public release of this information would have no remedies if their driver's license or home address has been improperly used for non-law enforcement purposes.

Not only is the waiver of privacy protections for American business-owners bad policy, it could also jeopardize early stage investments in many start-up businesses. Venture capital firms and other early investors in innovative start-up enterprises realize value by performing careful analysis and identifying promising ideas and business models before they are widely recognized. S. 1454 would endanger this important vehicle of capital formation for start-up companies in States that choose not to forgo DOJ grant funding and collect and disseminate this information without significant changes to their State public information regimes and business registration systems.

The TITLE Act would result in the federal government collecting information on direct and indirect beneficial owners when companies bid for federal contracts and subcontracts

In addition to making business owners report direct and indirect beneficial ownership information to states, The TITLE Act includes a government contractor provision compelling disclosure of the personally identifiable information of direct and indirect beneficial owners to almost every federal agency. Specifically, the TITLE Act, as introduced, would revise the Federal Acquisition Regulation to require any corporations or LLCs that are not exempt under the bill to provide beneficial ownership information to a federal agency "as part of any bid or proposal for a contract." This is a needless imposition since all existing and new, non-exempt corporations and LLCs, subject to the bill would already be providing beneficial ownership information to a State agency. This redundant disclosure would simply further tilt the federal contractor playing field further against new entrants, especially small and mid-size businesses that do not qualify for an exemption under S. 1454. This mandate also heightens the potential harm if bid documents at federal agencies end up being disclosed to third parties and placed in the public domain. It also makes it easier for bad actors in the government to steer contracts to entities owned or controlled by favored interests or to keep them away from parties they do not like for reasons unrelated to the merits of the bid or proposal.

Looking Ahead

For more than a decade, the Chamber has offered its assistance to work with Congress to advance effective solutions to stop money laundering and criminal activity that threaten our nation. However, the current version of S. 1454 does not include any fundamental changes that mitigate our serious, longstanding concerns over this vast expansion of government authority that would add unnecessary costs and burdens to small and medium-sized businesses. Accordingly, we cannot support and strongly oppose S. 1454. It not only fails to achieve its intended purpose, but it also places new, unprecedented, and unnecessary regulatory burdens on American businesses. It would have far more harmful consequences for the ability of small businesses to provide job creation and economic growth than it would on illicit actors seeking to do us harm.

Notwithstanding our concerns and misgivings about the TITLE Act, the Chamber remains committed—as it has for more than a decade—to finding workable solutions to the misuse of the U.S. financial system by criminals, terrorists, and other bad actors. We stand ready to work with any Member of Congress on this issue, and to do so in a way that does not unnecessarily threaten capital formation, the privacy of business owners' personal information, or the free speech and associational rights of those hard-working men and women who create legal entities.

Thank you again for the opportunity to appear before you today. I would be pleased to answer any questions you may have.