

September 24, 2013

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

The undersigned organizations represent millions of businesses and investors, small and large, from all sectors of the economy and employ tens of millions of Americans. We share the commitment to fight criminals and money launderers who would misuse the U.S. financial system to carry out illicit schemes. However, we oppose S. 1465, the “Incorporation Transparency and Law Enforcement Assistance Act” (ITLEAA), because this bill would not achieve its intended goal of stopping terrorism financing and money laundering.

While the undersigned associations oppose this bill, which traditionally has been considered by the Homeland Security and Governmental Affairs Committee, we recognize this is an issue of first impression for the Judiciary Committee and look forward to discussing our serious concerns regarding barriers the ITLEAA poses for law abiding businesses in the United States.

The ITLEAA would place onerous and complex regulatory burdens upon legitimate American businesses—especially small companies and start-ups—and is at odds with the Jumpstart Our Business Startups Act (JOBS Act) that was designed to remove regulatory burdens that hamper economic growth and job creation. The ITLEAA would also weaken privacy protections for law abiding citizens, may potentially transform unwitting small business owners into federal felons, erode attorney client privileges, and create legal liabilities for those who act as formation agents. Most importantly, the ITLEAA is unnecessary since the information needed to combat money laundering and criminal activities is already collected by the IRS and obtainable by law enforcement.

The ITLEAA would create new regulatory burdens on the 28 million existing businesses in the United States and the two million start-ups that are created each year without achieving its intended purpose.

ITLEAA proponents claim that the bill would only require new businesses to disclose the name of the one person who controls a business. This is not true. As

introduced, the bill would require entrepreneurs starting a business to identify and disclose at the outset—and update on an ongoing basis—the name, address, and driver’s license or passport number of every “natural person” who is a “beneficial owner” of the business. A “beneficial owner” is defined as any individual who “directly or indirectly” “has a substantial interest in or receives substantial economic benefits from” *or* exercises “substantial control” over a business. This broad definition of “beneficial owner” ensnares individuals who have a direct or indirect economic interest in a company through related or affiliated entities, including but not limited to trusts, corporations, partnerships, venture capital firms, lenders, creditors, contractors, and lien holders. This labyrinth of direct and indirect “beneficial owners,” which can change daily, would have to be continuously updated and disclosed as a company’s financing structure and other basic relationships change and evolve.

The ITLEAA would force states to collect information from *all* existing business entities “formed under the laws of [a] State before [the] effective date” of the legislation. Even long-established businesses “exempt” from the bill’s disclosure requirements must have an officer or director file an attestation explaining which of the bill’s exemptions apply to it and why. Most businesses do not fall within these exemptions and would be subject to the ongoing beneficial owner disclosure obligations.

ITLEAA poses serious over-criminalization concerns. Its vague standards combined with its low *mens rea* requirements would federalize and criminalize minor state paperwork violations, potentially making felons of small business owners who mistakenly fail to update their beneficial ownership information 60 days after it has changed. It may also make criminals of owners of small businesses that are unaware the law requires filings of all existing enterprises, even if they are exempt from ITLEAA’s beneficial ownership reporting requirements. Likewise, a company’s formation agent could be prosecuted federally if they unwittingly received incomplete beneficial ownership information on a corporation they helped to establish—even if no violation of state law has occurred. Furthermore, the ITLEAA would erode attorney-client protections and create serious liabilities for attorneys and those who act as formation agents. Specifically, the ITLEAA would regulate lawyers and law firms as financial institutions under the Bank Secrecy Act.

ITLEAA would also fail to provide any privacy protections against the public disclosure of the personal information it would require states to collect since almost 40 states have “right to know” laws requiring business filings to be made public. The lack of privacy protections could harm individuals’ privacy and may 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. They often seek to keep their investments confidential so that others cannot “free-ride” off of the hard work they have invested to identify and nurture promising new companies. The ITLEAA would endanger this important vehicle of capital formation for start-up companies, making the United States a far less attractive place for these investors to risk their capital on new companies and their ideas.

The ITLEAA is unnecessary given changes made to other data collections since this bill was first introduced in 2008. For example, since January 1, 2010, the IRS Form SS-4, which the government receives from every business that obtains an Employer Identification Number (EIN), must include the name of a “responsible party.” The IRS generally defines a “responsible party” as a single individual “who has a level of control over, or entitlement to, the funds or assets that, as a practical matter, enables the individual, directly or indirectly, to control, manage, or direct the entity and the disposition of its funds and assets.” It is the person who has control of an entity. Under 26 U.S.C. §§6103(i)(1), 6103(i)(2), and 6103(i)(7), in terrorism and other criminal investigations, federal law enforcement is already empowered to get and use “all tax information relating to a taxpayer which is contained within the files of the IRS.”¹ The IRS strengthened the SS-4 process on May 6, 2013, with a final rule that now requires any person or entity issued an EIN to regularly provide updated information to the IRS, including updated information regarding the name and taxpayer identification number of the responsible party. Therefore, information already exists that can be accessed by law enforcement without having to create a new regulatory burden on businesses and the network of venture capitalists, lenders, creditors, and others who help entrepreneurs start a company.

American business stands ready to work with Congress to advance effective solutions, such as facilitating the use of existing information already available to law enforcement through the IRS, to stop money laundering and criminal activity that threatens our nation. However, we oppose the ITLEAA because it would not only fail to achieve its intended purpose, but it would also place new, unnecessary regulatory burdens on American businesses that would have harmful consequences for job creation and economic growth.

Sincerely,

American Institute of Certified Public Accountants
Angel Capital Association

¹ United States Attorney’s Manual Criminal Resource Manual 502

Association for Corporate Growth
CCIM Institute
Financial Services Institute, Inc.
Institute of Real Estate Management
International Council of Shopping Centers
National Association of Home Builders
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Black Chamber of Commerce
National Federation of Independent Business
National Venture Capital Association
The Latino Coalition
The Real Estate Roundtable
U.S. Chamber of Commerce