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## Cracking Shells: The Panama Papers & Looking to the European Union's Anti-Money Laundering Directive as a Framework for Implementing a Multilateral Agreement to Combat the Harmful Effects of Shell Companies

Nicholas Vail

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## COMMENT

# CRACKING SHELLS: THE PANAMA PAPERS & LOOKING TO THE EUROPEAN UNION'S ANTI-MONEY LAUNDERING DIRECTIVE AS A FRAMEWORK FOR IMPLEMENTING A MULTILATERAL AGREEMENT TO COMBAT THE HARMFUL EFFECTS OF SHELL COMPANIES

by: *Nicholas Vail\**

### ABSTRACT

*In early 2016, the International Consortium of Investigative Journalists released a report detailing thousands of leaked documents demonstrating how a Panamanian law firm had, for years, helped wealthy clients conceal their financial activities through the use of offshore shell companies. The Panama Papers, as the leaked documents came to be known, directed renewed attention at the use of shell companies. Shell companies are used by the world's wealthy and powerful to lower their taxes, but are also used by tax evaders, criminal organizations, and terrorists. While much of the renewed attention has been directed at offshore tax havens such as Panama, the United States is itself considered a tax haven by many, largely due to states such as Delaware, which has long catered to individuals desiring secrecy. In response to the Panama Papers, numerous international jurisdictions have looked to strengthen their laws governing the creation of shell companies and considered the mechanisms used to facilitate exchanges of information. This Article will examine one of those responses—the European Union's Anti-Money Laundering Directive—as an example of the changes the United States should apply to its own domestic laws and as an example of the multilateral framework needed to address a global issue. This Article will argue that the United States should follow the European Union's Anti-Money Laundering Directive's lead in strengthening its laws regarding the disclosure of beneficial ownership information, creating shared registers of beneficial owners, implementing penalties for noncomplying entities, and moving towards creating multilateral, as opposed to bilateral, agreements to combat the misuse of shell companies.*

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## I. INTRODUCTION

In response to the release of the “Panama Papers”—a report detailing some eleven million leaked documents demonstrating how international banks and law firms have sold international secrecy to clients—renewed scrutiny has been directed towards the use of shell companies which, while not illegal, are often used by individuals to launder money, evade taxes, and fund terrorism and criminal organizations.<sup>1</sup> This scrutiny has led to calls globally to implement new laws and regulations that would increase the transparency of shell company ownership and facilitate the exchange of financial information between jurisdictions.<sup>2</sup> Much of the attention and criticism has been directed towards traditional tax havens such as Panama and the Bahamas, where American and European citizens are known to have set up shell companies. However, the United States and European Union member countries have also provided shell companies incorporated within their borders the same secrecy and protection that offshore tax havens have provided their corporate residents. In fact, certain states in the United States, such as Delaware, are home to some of the most corporation-friendly secrecy laws in the world.<sup>3</sup> While the United States has historically refused to implement laws increasing transparency regarding shell company ownership, the European Union has moved to combat the illegal use of shell companies by amending its Anti-Money Laundering Directive (the “Directive”).<sup>4</sup> The Directive requires Member States to strengthen their laws governing the disclosure of beneficial owners of shell companies and

1. Shima Baradaran et al., *Funding Terror*, 162 U. PA. L. REV. 477, 492–93 (2014).

2. Bruce Zagaris, *President Obama Announces Initiatives on Tax and Entity Transparency, Anti-Money Laundering and Anti-Corruption*, 32 INT’L ENFORCEMENT L. REP. 176 (May 2016).

3. Fred F. Murray et al., *Turning the Tables: The United States as a Tax Haven Destination*, 2016 A.B.A. Tax-CLE 0507009.

4. See Jens H. Kunz & Matthias Schirmer, *Key Elements of the 4th EU Anti-Money Laundering Directive*, FINANCIER WORLDWIDE (Sept. 2015), <https://www.financierworldwide.com/key-elements-of-the-4th-eu-anti-money-laundering-directive/#.WLY2bVfnsdU> [<https://perma.cc/57GB-VN6R>].

mandates the creation of shared registers of beneficial owners. This is a strong example of the framework needed to combat the global issue of the misuse of shell companies for illegal purposes. The United States should follow suit by enacting similar laws within its own borders that are aimed at increasing transparency of shell company ownership and by entering into multilateral agreements with foreign jurisdictions to facilitate the exchange of beneficial ownership information.

This Article will discuss the issues surrounding shell companies and examine the European Union's Anti-Money Laundering Directive as an example of the actions necessary to combat the illegal use of shell companies. Section II of this Article generally discusses what shell companies are and examines both the illegal and legal motivations for creating shell companies. Section III provides a discussion of how the United States is as much a tax haven as some offshore jurisdictions, such as Panama. Specifically, the Section examines how Delaware's corporate laws attract and provide secrecy to countless shell companies. Section IV addresses the main changes needed to combat the misuse of shell companies: (1) required disclosure of beneficial owners and (2) the creation of shared registers of beneficial owners. Section V discusses international organizations that have long sought to facilitate changes to increase transparency and also discusses how nations have historically used bilateral agreements to bring about change. Finally, Section VI examines the European Union's Anti-Money Laundering Directive. This Section proposes that the requirements set forth in the European Union's Anti-Money Laundering Directive be adopted by the United States as a means of strengthening domestic laws in states such as Delaware and providing a framework for entering into multilateral agreements with other jurisdictions as a way of combating the issues posed by shell companies.

## II. THE PANAMA PAPERS

In April 2016, the International Consortium of Investigative Journalists ("ICIJ") released a report detailing some eleven million leaked documents exposing how international banks and law firms had sold international secrecy to clients.<sup>5</sup> The Panama Papers, as the leaked documents came to be known, showed how individuals ranging from Russian President Vladimir Putin to international soccer star Lionel Messi had been involved in creating shell companies through a Panamanian law firm, Mossack Fonseca.<sup>6</sup> While many of the individuals named in the report had legitimate reasons for setting up shell compa-

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5. The International Consortium of Investigative Journalists, *Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption*, PAN. PAPERS (Apr. 3, 2016), <https://panamapapers.icij.org/20160403-panama-papers-global-overview.html> [<https://perma.cc/CB8Y-XWU8>] [hereinafter *Investigation*].

6. *Id.*

nies, others set up shell companies to conceal illegal or unethical activities.<sup>7</sup> One hundred twenty-eight politicians were named in the report, including Iceland's Prime Minister Sigmundur David Gunnlaugsson, who was forced to resign after it was discovered that he had ties to an offshore shell company that held bonds in three failed Icelandic banks that his government had negotiated a deal with during the 2008 financial crisis.<sup>8</sup> Similar conflicts of interest involving other heads of states, such as former British Prime Minister David Cameron, lead to up- roars around the world.<sup>9</sup> Other clients named in the report included individuals and companies blacklisted by the United States Government for having ties to terrorist and criminal organizations, such as Mexican drug lord Joaquin "El Chapo" Guzman.<sup>10</sup> While the publica- tion of the Panama Papers was not the first time the issues of shell companies and tax havens had been brought under public scrutiny, the report directed renewed attention towards the lack of transparency in shell company ownership and revived demands for changes in the laws governing the formation of shell companies.

### III. SHELL COMPANIES

#### A. Definition

A shell company is an entity that has no significant assets or ongo- ing business activities and "has disguised its ownership in order to op- erate without scrutiny from law enforcement or the public."<sup>11</sup> Despite having no assets or significant business activities, shell companies are often used to transfer "large sums of money worldwide."<sup>12</sup> Addition- ally, in many jurisdictions, individuals are able to create shell compa- nies without having to disclose the identity of the beneficial owners of the company.<sup>13</sup> Beneficial owners are those who ultimately control and benefit from a shell company.<sup>14</sup> Furthermore, all that is often needed to set up a shell company is the identity and address of a regis- tered agent.<sup>15</sup> These registered agents often have no meaningful rela-

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*; Christopher Woody, *The World's Most Powerful Drug Lord Has Been Linked to the Panama Papers*, BUS. INSIDER (Apr. 7, 2016, 8:42 AM), <http://www.businessinsider.com/el-chapo-guzman-linked-to-the-panama-papers-2016-4> [<https://perma.cc/MS6B-ZF9G>].

11. *Anonymous Companies*, GLOBAL FIN. INTEGRITY, <http://www.gfintegrity.org/issue/anonymous-companies/> [<https://perma.cc/6H9S-T2TW>] (last visited Sept. 22, 2017).

12. Baradaran et al., *supra* note 1, at 492.

13. Dean Kalant, Comment, *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, 1051 (2009).

14. Max Biedermann, Article, *G8 Principles: Identifying the Anonymous*, 11 BYU INT'L L. & MGMT. REV. 72, 74 (2015).

15. DEL. CODE ANN. tit. 8, § 132 (West 2010).

tionship to the companies they represent; instead, they are simply individuals available for hire.<sup>16</sup> For example, in Delaware, roughly two hundred registered agents represent the state's more than one million corporations.<sup>17</sup> Furthermore, in some jurisdictions, the registered agent may even be another company and not an individual, adding to the layers of secrecy protecting the beneficial owner or owners of shell companies.<sup>18</sup> This lack of beneficial ownership disclosure is what makes shell companies appealing to many individuals, as it is difficult for private individuals and law enforcement to identify the true owners of shell corporations.<sup>19</sup> This protection from disclosure allows the owners of shell companies to carry out financial activities, both legal and illegal, out of sight from the watchful eyes of others.

### B. *Legal Uses of Shell Companies*

While the more nefarious uses of shell companies often grab headlines, there are legitimate, legal reasons for creating a shell company as well. For example, in some countries where kidnappings of wealthy individuals or their family members for ransom are common, wealthy individuals use shell companies to conceal their wealth. Other legitimate reasons for setting up a shell company include using the company to finance foreign operations, to invest in foreign capital markets, and to facilitate purchases or transfers of property or other assets.<sup>20</sup> However, perhaps the most common reason individuals set up shell companies is for tax avoidance. Unlike tax evasion, which refers to engaging in illegal activities to avoid taxes, tax avoidance refers to engaging in legal activities to lower one's taxes.<sup>21</sup> "Tax avoidance practices seek to accomplish one of three things: payment of 'less tax than might be required by a reasonable interpretation of a country's law,' payment of a tax on 'profits declared in a country other than where they were really earned,' or tax payment that occurs

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16. Alana Goodman, *This Delaware Address Is Home to 200,000 Shell Companies—Including Hillary Clinton's*, WASH. FREE BEACON (Apr. 11, 2016, 5:00 AM), <http://freebeacon.com/issues/delaware-address-home-200000-shell-companies-including-hillary-clinton/> [<https://perma.cc/4LC6-68E4>].

17. Suzanne Barlyn, *Special Report: How Delaware Kept America Safe for Corporate Secrecy*, REUTERS (Aug. 24, 2016, 8:50 AM), <http://www.reuters.com/article/us-usa-delaware-bullock-specialreport-idUSKCN10Z1OH> [<https://perma.cc/UH6N-JUNM>].

18. DEL. CODE ANN. tit. 8, § 132 (West 2010).

19. Kalant, *supra* note 13, at 1060.

20. James Rosen, *Is There Ever a Good Reason for Setting Up a Shell Company?*, MIAMI HERALD (Apr. 29, 2016, 2:16 PM), <http://www.miamiherald.com/news/business/biz-monday/article74737252.html> [<https://perma.cc/Y2R3-LZL9>]; see also The Data Team, *The Secretive and Morally Dubious World of Shell Companies*, ECONOMIST (Apr. 7, 2016), <http://www.economist.com/blogs/graphicdetail/2016/04/using-and-abusing-offshore-accounts> [<https://perma.cc/5NTF-KD48>].

21. Jasmine M. Fisher, Note, *Fairer Shores: Tax Havens, Tax Avoidance, and Corporate Social Responsibility*, 94 B.U. L. REV. 337, 339 (2014).

‘somewhat later than [when] the profits were earned.’<sup>22</sup> Numerous multinational companies such as Google, Starbucks, and Amazon have all been linked to shell companies in efforts to lower taxes through legal tax avoidance practices, such as transfer pricing.<sup>23</sup> While some may find tax avoidance practices unethical, they are nonetheless legal and shell companies are instrumental to those engaging in tax avoidance practices.<sup>24</sup>

### C. *Illegal Uses of Shell Companies*

Though legitimate reasons for creating shell companies exist, shell companies are often used for tax evasion.<sup>25</sup> While numerous tax evasion schemes exist, an especially prevalent form of tax evasion is trade misinvoicing. Unlike transfer pricing, which is a legal form of tax avoidance, trade misinvoicing, a similar practice, is not. *Trade misinvoicing* is “a form of trade fraud where someone misrepresents the value or amount of a good they’re importing or exporting. This allows them to evade taxes and gain subsidies, as well as take ‘dirty money’ made in illicit ways and reintegrate it into the formal finance world . . . .”<sup>26</sup> Trade misinvoicing is especially prevalent in developing countries, such as those in Africa, where a recent report from Global Financial Integrity “found that developing countries ‘lost \$7.8 trillion in illicit financial flows from 2004 through 2013’” and estimated that roughly 80% of that loss was the result of trade misinvoicing.<sup>27</sup> It is believed shell companies contribute to this loss as they are “often used to hide money that is illicitly taken out of developing countries.”<sup>28</sup> The use of shell companies is especially concerning since “[d]eveloping countries are particularly vulnerable” to trade misinvoicing schemes since the distinction between legal transfer pricing and illegal trade misinvoicing is not always easily identifiable and the “responsibility to investigate and evaluate transfer pricing strategies largely falls on the shoulders of local governments, which have neither the time nor re-

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22. *Id.* at 340.

23. See Michael Winter, *Google Dodged \$2 Billion in Taxes Using a Shell Company in Bermuda*, USA TODAY (Dec. 11, 2012, 7:53 AM), <https://www.usatoday.com/story/tech/2012/12/10/google-bermuda-shell-company-2-billion-tax-dodge/1759833/> [https://perma.cc/7EAS-D86U]; see also Michele Fletcher, *The Transfer Pricing Labyrinth*, GLOBAL FIN. INTEGRITY (June 26, 2014), <http://www.gfintegrity.org/transfer-pricing-labyrinth/> [https://perma.cc/C2SQ-4HJN].

24. See Winter, *supra* note 23.

25. See generally David Spencer, *International Tax Evasion: Enablers and Shell Corporations (Part 1)*, 18 J. INT’L TAX’N 44 (2007).

26. Drake Baer, *Shell Companies Hide About \$1 Trillion Taken from Poor Countries Every Year*, BUS. INSIDER (Apr. 4, 2016, 2:40 PM), <http://www.businessinsider.com/shell-companies-hide-developing-world-money-2016-4> [https://perma.cc/6JJE-UEKJ].

27. *Id.*

28. *Id.*

sources” to effectively assess and monitor the activity.<sup>29</sup> While trade misinvoicing is only one example of a tax evasion scheme that shell companies help protect, the secrecy shell companies provide likely enables others tax evasion methods as well.<sup>30</sup>

While tax evasion might be considered a less-than-significant white collar crime, a much greater criticism of shell companies is that they are often used by criminals and terrorist organizations to finance their operations.<sup>31</sup> Cases in which criminals or terrorists have used shell companies to manage their funds are well documented, such as with Russian arms dealer Viktor Bout.<sup>32</sup> Bout, a Russian arms dealer who was recently sentenced to twenty-five years in federal prison for conspiring to kill Americans, was found to have used at least twelve shell companies in Delaware to operate his business of selling weapons to terrorists and criminal organizations around the world.<sup>33</sup> Numerous other criminals, such as Mexican drug lord Joaquin “El Chapo” Guzman, have been connected to shell companies; likewise, it is widely believed that terrorist groups such as ISIS and Al Qaeda use shell companies to conceal their global financial activities.<sup>34</sup> Historically, the banks and law firms that help individuals create shell companies have been the ones responsible for screening potential clients and identifying individuals who pose a high risk for either engaging in illegal activity or having connections to blacklisted individuals and organizations.<sup>35</sup> However, studies show that firms have been unlikely to adhere to screening and reporting standards when approached by clients posing a high risk of being engaged in, or related to, terrorist activities and organizations.<sup>36</sup> Instead, a recent study found that firms in many jurisdictions, including some in the United States, were found to exhibit little hesitation in offering to help individuals create shell

29. Fletcher, *supra* note 23.

30. See Baer, *supra* note 26.

31. See Biedermann, *supra* note 14, at 72–73.

32. *Id.* at 73; Karl Baker, *Delaware Seeks Compromise in Anti-Money Laundering Fight*, DEL. ONLINE (Sept. 20, 2016, 2:09 PM), <http://www.delawareonline.com/story/news/2016/09/16/delaware-seeks-compromise-anti-money-laundering-fight/90412966/> [<https://perma.cc/Z7W7-TELW>].

33. Lynnley Browning, *Delaware Laws, Helpful to Arms Trafficker, to Be Scrutinized*, N.Y. TIMES (Nov. 4, 2009), <http://www.nytimes.com/2009/11/05/business/05tax.html> [<https://perma.cc/J8CN-KZRB>]; Benjamin Weiser, *Departing Judge Offers Blunt Defense of Ruling in Stop-and-Frisk Case*, N.Y. TIMES (May 2, 2016), [http://www.nytimes.com/2016/05/02/nyregion/departing-judge-offers-blunt-defense-of-ruling-that-ended-stop-and-frisk.html?\\_r=2](http://www.nytimes.com/2016/05/02/nyregion/departing-judge-offers-blunt-defense-of-ruling-that-ended-stop-and-frisk.html?_r=2) [<https://perma.cc/G6YE-6E73>]; Stefanie Ostfeld, *Shell Game: Hidden Owners and Motives*, CNN (Sept. 11, 2012, 2:32 PM), <http://www.cnn.com/2011/10/26/opinion/ostfeld-shell-companies/> [<https://perma.cc/3AL2-SWGW>].

34. Anne L. Clunan, *The Fight Against Terrorist Financing*, 121 POL. SCI. Q. 569, 570 (2006); Melanie Hicken & Blake Ellis, *These U.S. Companies Hide Drug Dealers, Mobsters and Terrorists*, CNN (Dec. 9, 2015, 4:36 AM), <http://money.cnn.com/2015/12/09/news/shell-companies-crime/> [<https://perma.cc/A3AW-WQS4>].

35. Baradaran et al., *supra* note 1, at 522–23.

36. *Id.* at 514.



companies “regardless of the risks involved and the information provided.”<sup>37</sup> One explanation for this trend is that, in some jurisdictions, firms involved in facilitating the formation of shell companies face few repercussions for failing to properly screen potential clients. Thus, some believe that to curb the illegal use of shell companies, stricter screening requirements and penalties for noncomplying firms are necessary.<sup>38</sup>

#### D. *The United States as a Tax Haven*

While shell companies are often associated with offshore tax havens, such as the Bahamas, Panama, and the Cayman Islands, tax havens include nations of all sizes and locations. In fact, one of the world’s largest tax havens is the United States.<sup>39</sup> Despite the Panama Papers being the largest leak of financial documents in history, relatively few Americans were named in the report.<sup>40</sup> One explanation for this is that Americans do not need to look to offshore jurisdictions to hide their financial activities behind shell corporations.<sup>41</sup> Instead, Americans need only look to states such as Delaware and Nevada which are home to some of the most business-friendly secrecy laws in the world.<sup>42</sup> In fact, the United States was ranked third—ahead of the Cayman Islands and Panama—in the 2015 Financial Secrecy Index, a report published by the Tax Justice Network which “ranks jurisdictions according to their secrecy and the scale of their offshore financial activities . . . .”<sup>43</sup> While the United States has directed criticism toward offshore tax havens for providing American citizens with the means of concealing their financial activities from the eyes of United States’ law enforcement and tax authorities, many foreign countries have directed similar criticism at the United States for allowing foreign citizens to conduct financial activities in the United States that are beyond the reach and vision of their home countries.<sup>44</sup>

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37. *Id.* at 514–15.

38. *Id.* at 528 (discussing the importance of working with the private sector to curb terrorism financing).

39. Jesse Drucker, *The World’s Favorite New Tax Haven Is the United States*, BLOOMBERG (Jan. 26, 2016, 11:01 PM), <https://www.bloomberg.com/news/articles/2016-01-27/the-world-s-favorite-new-tax-haven-is-the-united-states> [<https://perma.cc/8RXB-YJF4>].

40. *Panama Papers: Where Are the Americans?*, BBC (Apr. 6, 2016), <http://www.bbc.com/news/world-us-canada-35966612> [<https://perma.cc/LDR3-4BU8>].

41. *Id.*

42. *See Delaware: The US Corporate Secrecy Haven*, TRANSPARENCY INT’L (Jan. 12, 2016), [https://www.transparency.org/news/feature/delaware\\_the\\_us\\_corporate\\_secrecy\\_haven](https://www.transparency.org/news/feature/delaware_the_us_corporate_secrecy_haven) [<https://perma.cc/3H7T-N3GG>].

43. *Financial Secrecy Index*, TAX JUST. NETWORK (Nov. 2, 2015), <http://www.financialsecrecyindex.com> [<https://perma.cc/69GM-6BD7>].

44. Ana Swanson, *How the U.S. Became One of the World’s Biggest Tax Havens*, WASH. POST (Apr. 5, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/04/05/how-the-u-s-became-one-of-the-worlds-biggest-tax-havens/> [<https://perma.cc/LK8J-A2JK>].

The United States' ranking in the Financial Secrecy Index as a tax haven was largely due to the state of Delaware, whose secrecy laws have attracted more than one million businesses to incorporate in the state—a number greater than Delaware's population.<sup>45</sup> In addition to the thousands of American shell companies formed in Delaware, Delaware also attracts a large number of foreign companies and clients seeking to set up shell companies.<sup>46</sup> What makes Delaware attractive to individuals is not only the State's secrecy laws, but the ease with which a shell company can be created. By many accounts, a Delaware shell company can be set up in as little as one hour by any of the numerous incorporation services located in the state.<sup>47</sup> All that is needed to set up a company is the name and address of a registered agent located in the State.<sup>48</sup> The registered agent may be the company itself, another domestic or foreign business, or any individual resident of Delaware.<sup>49</sup> Since any resident of Delaware may act as the registered agent of a company, many companies hire lawyers or bankers with no significant relationship to the company to act as their registered agent. In fact, individuals often act as registered agents for multiple corporations.<sup>50</sup> Additionally, since the given address does not need to be a corporation's place of business, numerous corporations often share the same registered address, such as one notorious address that is home to over 285,000 companies.<sup>51</sup> Thus, Delaware's incorporation laws allow the true owners or beneficiaries of shell companies to create corporations without disclosing any identifying information. While Delaware's secrecy laws have attracted scores of legitimate businesses to the State, the laws have also attracted criminals such as Viktor Bout and Jack Abramoff. Abramoff, a former lobbyist, defrauded and laundered millions of dollars through a shell company set up in Delaware that was run "by a lifeguard out of a beach house."<sup>52</sup>

Despite receiving criticism from other jurisdictions, Delaware depends on its secrecy laws to draw business to the State. In 2011, for example, roughly a quarter of Delaware's budget was derived from

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45. ST. DEL., <https://corp.delaware.gov> (last visited Oct. 8, 2016) (claiming Delaware is home to more than one million companies) [<https://perma.cc/E9AD-GGCO>]; U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/10> (last visited Oct. 8, 2016) (listing Delaware's population at 952,065) [<https://perma.cc/JQ6W-9YTP>].

46. Swanson, *supra* note 44.

47. Leslie Wayne, *How Delaware Thrives as a Corporate Tax Haven*, N.Y. TIMES (June 30, 2012), <http://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html> [<https://perma.cc/7VK9-DC4Q>].

48. DEL. CODE ANN. tit. 8, §§ 131–132 (West 2010).

49. *Id.* § 132.

50. See Barlyn, *supra* note 17.

51. Wayne, *supra* note 47.

52. Suzanne Barlyn, *Special Report: How Delaware Kept America Safe for Corporate Secrecy*, REUTERS (Aug. 24, 2016, 8:50 AM), <http://www.reuters.com/article/us-usa-delaware-bullock-specialreport-idUSKCN10Z1OH> [<https://perma.cc/UH6N-JUNM>].

taxes and fees collected from its absentee corporate residents.<sup>53</sup> This reliance on corporate residents is the reason Delaware has long been one of the staunchest resisters of increased transparency in shell company ownership.<sup>54</sup> Prior to his retirement, former Senator Carl Levin tried for years to bring greater transparency to corporations in the United States through the Incorporation Transparency and Law Enforcement Assistance Act (“ITLEAA”).<sup>55</sup> The bill sought to increase transparency by requiring the disclosure of beneficial owners of corporations. Specifically, the bill would require corporations and limited liability companies to: (1) use an incorporation system to provide and update lists of their beneficial owners; (2) maintain beneficial ownership information for five years after the corporation terminates; and (3) provide such information pursuant to certain criminal, civil, or administrative requests.<sup>56</sup> However, the bill was met with strong opposition from states such as Delaware and has yet to pass despite repeated attempts in the Senate.<sup>57</sup> While the United States may direct criticism at foreign jurisdictions for facilitating tax evasion and other crimes through shell companies, the United States must first address secrecy laws in states such as Delaware, which is as much a tax haven as are foreign jurisdictions such as Panama.

#### IV. NECESSARY CHANGES

In addition to implementing stricter screening requirements and noncompliance penalties for the firms and banks that help individuals form shell companies, advocates for increased transparency often stress the need for (1) requiring the disclosure of beneficial owners when creating shell companies and (2) creating shared registers of beneficial owners.<sup>58</sup>

##### A. *Disclosure of Beneficial Owners*

The Securities and Exchange Act of 1934 defines *beneficial owner* as any “person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares: (1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or, (2) Investment power which includes

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53. Wayne, *supra* note 47.

54. Libby Watson, *Why Are There So Many Anonymous Companies in Delaware?*, SUNLIGHT FOUND. (Apr. 6, 2016, 12:59 PM), <https://sunlightfoundation.com/blog/2016/04/06/why-are-there-so-many-anonymous-corporations-in-delaware/> [<https://perma.cc/KUH8-3RMX>].

55. Incorporation Transparency and Law Enforcement Assistance Act, S. 1465, 113th Cong. (2013).

56. *Id.*

57. Watson, *supra* note 54.

58. Biedermann, *supra* note 14, at 83–84.

the power to dispose, or to direct the disposition of, such security.”<sup>59</sup> Other definitions of *beneficial owner* include any “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].” More simply put, *beneficial owners* are “persons who exercise ultimate effective control over . . . [an] arrangement.”<sup>60</sup> Regardless of the definition, *beneficial owners* are the true owners of a shell company. Since shell companies are often criticized for allowing individuals to engage in illegal financial activities, many argue that in order to effectively combat financial crimes—it is imperative that information regarding beneficial owners is collected upon creation.<sup>61</sup> However, those opposed to mandating the disclosure of beneficial owners argue that disclosure is unnecessary because “beneficial ownership transparency has not posed a significant problem” and law enforcement in countries such as the United States already possesses a wide “range of investigatory powers to compel the disclosure of beneficial ownership information” if necessary.<sup>62</sup> This argument is unconvincing however, since, as the Panama Papers have once again shown, shell companies are often misused by individuals, many of whom never face any repercussions for their illegal or unethical activities due to the inability of law enforcement to identify them.<sup>63</sup>

### B. Shared Registers of Beneficial Owners

The second major change often called for is the creation of shared registers of beneficial owners. Proponents of shared registers argue that registers would allow government and law enforcement agencies to easily share information to identify the true owners of shell companies.<sup>64</sup> This sharing of information would enable law enforcement and tax authorities to better track funds being moved across jurisdictional lines to combat tax evasion and other crimes. While many countries and states already have beneficial owner registers, many registers are not shared between jurisdictions and differ in the quality and scope of information collected.<sup>65</sup> For example, in the Bahamas, while the names of directors are required to be disclosed for the national regis-

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59. Securities Exchange Act of 1934, 17 C.F.R. § 240.13d-3(a) (2010); Avnita Lakhani, *Imposing Company Ownership Transparency Requirements: Opportunities for Effective Governance of Equity Capital Markets or Constraints on Corporate Performance*, 16 CHI.-KENT J. INT’L & COMP. L. 122, 131 (2016).

60. Incorporation Transparency and Law Enforcement Assistance Act, S. 569, 111th Cong. §3(a)(1) (2009) (noting the amendment to (a)(1) and addition of (e)(1)); Kalant, *supra* note 13, at 1051; Biedermann, *supra* note 14, at 74.

61. Biedermann, *supra* note 14, at 74.

62. Kalant, *supra* note 13, at 1063.

63. *Investigation*, *supra* note 5.

64. Biedermann, *supra* note 14, at 86.

65. *Id.*

ter when forming a company, much of the information entered in the register is incomplete.<sup>66</sup> Additionally, to obtain a Bahamian company's information, a fee is required to search the register.<sup>67</sup> Finally, foreign investigators who are granted permission to search the register are hampered by the complication that "directors' names cannot be searched individually or without preexisting knowledge of the Bahamian company's name."<sup>68</sup> Another issue regarding current registers is that while jurisdictions can request beneficial ownership information from other states or countries, jurisdictions may not comply with requests in a timely or complete fashion.<sup>69</sup> To remedy this issue, the Organisation for Economic Co-operation and Development ("OECD") has created a model treaty to mandate the automatic exchange of information between foreign jurisdictions which multiple countries voiced their support for at a recent G8 Summit.<sup>70</sup> If implemented, the treaty would allow law enforcement to quickly and easily obtain beneficial owner information from foreign jurisdictions. However, while countries often voice their support for measures, widespread implementation is often hard to accomplish.

## V. HOW TO ACCOMPLISH CHANGE

### A. *International Organizations*

One organization that has, for years, suggested and helped create numerous policies and agreements aimed at increasing global corporate transparency is the OECD.<sup>71</sup> The OECD is an organization comprised of thirty-nine member countries that account for nearly 80% of the world's trade and investment.<sup>72</sup> The OECD has helped implement plans and standards to increase transparency in an effort to curb the illicit flow and use of currency through shell companies. Recent standards include the Standard for Automatic Exchange of Financial Account Information in Tax Matters and the Base Erosion and Profit

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66. See Will Fitzgibbon & Emilia Díaz-Struck, *Former EU Official Among Politicians Named in New Leak of Offshore Files from the Bahamas*, ICIJ (Sept. 21, 2016, 2:00 PM), <https://www.icij.org/offshore/former-eu-official-among-politicians-named-new-leak-offshore-files-bahamas> [<https://perma.cc/5EG9-WA7F>].

67. *Id.*

68. *Id.*

69. See Hedda Leikvang, Note, *Piercing the Veil of Secrecy: Securing Effective Exchange of Information to Remedy the Harmful Effects of Tax Havens*, 45 VAND. J. TRANSNAT'L L. 293, 316–17 (2012) (discussing issues with information exchange).

70. Biedermann, *supra* note 14, at 83; see also Itai Greenberg, *The Battle over Taxing Offshore Accounts*, 60 UCLA L. Rev. 304, 331 (2012).

71. *The Organisation for Economic Co-operation and Development (OECD)*, OECD, <http://www.oecd.org/about/> [<https://perma.cc/TYS5-DNE4>].

72. *History*, OECD, <http://www.oecd.org/about/history/> [<https://perma.cc/2FVS-SEWS>].

Shifting Project.<sup>73</sup> The Standard for Automatic Exchange of Financial Account Information in Tax Matters created “a new single standard for automatic exchange of information, including the technical modalities, to better fight tax evasion and ensure tax compliance” and “calls on jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis.”<sup>74</sup> The Base Erosion and Profit Shifting Project is an action plan developed “to address base erosion and profit shifting” which “identifies a series of domestic and international actions to address the problem.”<sup>75</sup> While these actions show a desire to cultivate change, member countries have often failed to fully comply with or implement the suggested or agreed-upon changes. For example, in 2000, the OECD placed the Bahamas on a blacklist of countries that aid tax evasion and only later removed it after the country had implemented new laws in line with recommended standards to address some of the tax evasion concerns.<sup>76</sup> However, the Bahamas was placed on the OECD’s gray list in 2009; thus signifying that although its noncompliance with international standards did not warrant placement on the blacklist, its noncompliance was still a serious concern.<sup>77</sup> “Although the OECD now considers the Bahamas compliant, in June 2015, the European Union listed the Bahamas” as a tax haven.<sup>78</sup> The Bahamas is not the only country that has refused to conform to international standards over the years. Numerous countries, including the United States, have been criticized for failing to meet OECD standards. Similar international standards set by other international organizations such as the Financial Action Task Force (“FATF”), “an inter-governmental body established . . . [to] promote effective implementation of legal, regulatory[,] and operational measures for combating money laundering, terrorist financing[,] and other related threats to the integrity of the international financial system,” have also struggled to achieve widespread implementation of standards and agreements.<sup>79</sup> While the standards set by the OECD and FATF could

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73. *Panama Joins International Efforts Against Tax Evasion and Avoidance*, OECD (Oct. 27, 2016), <http://www.oecd.org/tax/panama-joins-international-efforts-against-tax-evasion-and-avoidance.htm> [<https://perma.cc/389T-BL4R>].

74. OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN TAX MATTERS 311 (July 21, 2014), [http://www.oecd-ilibrary.org/taxation/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters\\_9789264216525-en](http://www.oecd-ilibrary.org/taxation/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters_9789264216525-en) [<https://perma.cc/B2XH-DPVN>].

75. *Action Plan on Base Erosion and Profit Shifting*, OECD (July 19, 2013), <http://www.oecd.org/tax/beps/action-plan-on-base-erosion-and-profit-shifting-9789264202719-en.htm> [<https://perma.cc/RN2V-VYWD>].

76. Fitzgibbon & Diaz-Struck, *supra* note 66.

77. *Id.*

78. *Id.*

79. *Who We Are*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/about/> [<https://perma.cc/2GDF-A8BZ>].

help increase transparency if adopted, without effective enforcement mechanisms, widespread compliance is unlikely.<sup>80</sup>

### B. *Bilateral and Multilateral Treaties*

While international organizations such as the OECD have been helpful in facilitating some change, the more common and effective way jurisdictions have facilitated the exchange of financial information with other jurisdictions is through the use of bilateral agreements, which are treaties between two nations.<sup>81</sup> Although bilateral agreements can be helpful in facilitating the exchange of information, they nonetheless have many shortcomings. A major issue with bilateral agreements in combating the illegal use of shell companies is the limited scope of the agreements.<sup>82</sup> Since bilateral agreements only involve two countries, they do little to tackle global problems, such as the widespread use and creation of shell companies. Even where bilateral agreements successfully facilitate the exchange of information between countries, including those that are tax havens, tax evaders and criminals can simply move to another foreign jurisdiction that does not have a bilateral agreement with their home jurisdiction.<sup>83</sup> The nature of bilateral agreements also tends to favor more-developed countries that possess superior bargaining positions and leverage.<sup>84</sup> This dichotomy of bargaining power often leaves less-developed countries reluctant to enter into bilateral agreements with countries such as the United States.<sup>85</sup> Bilateral agreements also typically “impose a ‘dual criminality’ requirement, meaning that the activity related to the information sought must constitute crimes” in both the requesting and receiving country.<sup>86</sup> Thus, as a result of the lenient tax laws in many tax haven jurisdictions, tax-related offenses are often not considered crimes. Therefore, many requests for information do not meet the dual criminality requirement needed for an exchange of information.<sup>87</sup> Instead, for many jurisdictions to obtain financial information regarding an individual, the “individual must be suspected of a crime other than tax evasion before authorities can request information about the individual.”<sup>88</sup> A related issue is that bilateral agreements “usually only require information exchange upon specific requests relating to particular individuals, requiring the IRS [and similar foreign tax authorities] to identify the potential tax evaders in advance.”<sup>89</sup> Lastly, some juris-

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80. Fisher, *supra* note 21, at 358.

81. Leikvang, *supra* note 69, at 314.

82. *Id.* at 316.

83. *Id.* at 318.

84. *Id.*

85. *Id.*

86. *Id.* at 316.

87. *Id.*

88. *Id.*

89. *Id.* at 316–17.

dictions have local laws requiring that suspects be notified that their financial information has been requested prior to exchanging the information with the requesting jurisdiction.<sup>90</sup> This allows the suspects an opportunity to move assets or take other preemptive measures to further protect their identities or activities.<sup>91</sup>

While bilateral agreements can be helpful in targeting specific tax havens, they do little to remedy the larger issues surrounding shell companies formed in tax havens across the globe. A more far-reaching agreement is a multilateral agreement. Unlike bilateral agreements, which are between two countries, multilateral agreements are between three or more countries. While multilateral agreements are, no doubt, more difficult to create, the wide nets they cast are a far more effective means of tackling wide-spread issues, such as the global use of shell companies.

## VI. EUROPEAN UNION ANTI-MONEY LAUNDERING DIRECTIVE

A promising multilateral agreement addressing the issues surrounding shell companies and other financial arrangements is the European Union's Anti-Money Laundering Directive ("AMLD"). Amended in 2016, the AMLD was enacted in response to the realization that, while all European Union Member States criminalize money laundering, "existing differences in the definition, scope and sanctions of money laundering offences affect cross-border police and judicial cooperation between national authorities as well as the exchange of information" and that "[t]hese differences in legal frameworks can also be exploited by criminals and terrorists, who could carry out financial transactions where they perceive anti-money laundering measures to be weakest."<sup>92</sup> To remedy these weaknesses, the AMLD requires all members of the European Union to improve their anti-money laundering and counter-terrorism financing rules by strengthening national laws governing disclosure of beneficial owners and by creating shared registers of beneficial owners.<sup>93</sup>

The European Union's AMLD defines a beneficial owner as "the natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity . . . ."<sup>94</sup>

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90. *Id.*

91. *Id.*

92. *Security Union: Proposal for a Directive on Countering Money Laundering by Criminal Law – Questions & Answers*, EUROPEAN COMM'N (Dec. 21, 2016), [http://europa.eu/rapid/press-release\\_MEMO-16-4452\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-4452_en.htm) [<https://perma.cc/MZ4H-VNV3>].

93. Kunz & Schirmer, *supra* note 4; *The Fourth EU Anti Money Laundering Directive*, DELOITTE 2 (2015), [https://www2.deloitte.com/content/dam/Deloitte/ie/Documents/FinancialServices/investmentmanagement/ie\\_2015\\_The\\_Fourth\\_EU\\_Anti\\_Money\\_Laundering\\_Directive\\_Deloitte\\_Ireland.pdf](https://www2.deloitte.com/content/dam/Deloitte/ie/Documents/FinancialServices/investmentmanagement/ie_2015_The_Fourth_EU_Anti_Money_Laundering_Directive_Deloitte_Ireland.pdf) [<https://perma.cc/27A7-LCGU>].

94. Council Directive 2015/849 art. 3(6)(a)(i), 2015 O.J. (L 141) 73, 86 (EU).



While the Directive allows Member States to designate a lower percentage as an indication of ownership or control, the Directive sets a “shareholding of 25%” or more as the standard indication of ownership.<sup>95</sup> The Directive requires that “Member States shall ensure that corporate and other legal entities incorporated within their territory are required to obtain and hold adequate, accurate[,] and current information on their beneficial ownership, including the details of the beneficial interests held.”<sup>96</sup> The Directive further requires that the beneficial owner information obtained “is held in a central register in each Member State”<sup>97</sup> and that the register information is accessible to all “competent authorities and [Financial Intelligence Units],” “obliged entities” for purposes of customer due diligence, and to “any person or organisation that can demonstrate a legitimate interest” in the information.<sup>98</sup> Opponents of increased transparency often point to the need for secrecy for wealthy individuals who are targets for crimes such as kidnapping and blackmail.<sup>99</sup> However, the AMLD provides for an exception whereby “Member States may provide for an exemption to the access . . . to all or part of the information on the beneficial ownership on a case-by-case basis in exceptional circumstances, where such access would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence[,] or intimidation, or where the beneficial owner is a minor or otherwise incapable.”<sup>100</sup>

In addition to addressing transparency issues by requiring the disclosure of beneficial owners and creating shared registers, the Directive also addresses enforcement issues. Whereas in some countries the custom is to alert individuals when a foreign jurisdiction has requested information on them, the AMLD stipulates that “[o]bliged entities and their directors and employees shall not disclose to the customer concerned or to other third persons the fact that information is being, will be[,] or has been transmitted in accordance with Article 33 or 34 or that a money laundering or terrorist financing analysis is being, or may be, carried out.”<sup>101</sup> The Directive also addresses information sharing issues between jurisdictions. While some jurisdictions have, in the past, refused to disclose information adequately and promptly, the Directive requires that Member State Financial Intelligence Units

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95. *Id.*

96. *Id.* art. 30(1), at 96.

97. *Id.* art. 30(3), at 97.

98. *Id.* art. 30(5)(a)–(c), at 97.

99. See Gregory Crawford, *Shell Companies' Secrecy Provides Personal Security*, NY TIMES (Apr. 7, 2016, 3:22 AM), <https://www.nytimes.com/roomfordebate/2016/04/07/cracking-shell-company-secrecy/shell-companies-secrecy-provides-personal-security> [<https://perma.cc/YKW5-FU83>].

100. Council Directive 2015/849 art. 30(9), at 97.

101. *Id.* art. 39(1), at 100.

provide prompt and complete information to requesting parties who comply with procedures.<sup>102</sup>

The AMLD places responsibility on entities that are instrumental in the formation of shell companies, such as law firms and banks, to conduct due diligence when taking on a new client and to practice ongoing monitoring of the business in order to determine beneficial owner information as well as any indications of illegal activity. This due diligence includes:

- (a) identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;
- (b) identifying the beneficial owner and taking reasonable measures to verify that person's identity so that the obliged entity is satisfied that it knows who the beneficial owner is, including, as regards legal persons, trusts, companies, foundations and similar legal arrangements, taking reasonable measures to understand the ownership and control structure of the customer;
- (c) assessing and, as appropriate, obtaining information on the purpose and intended nature of the business relationship;
- (d) conducting ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the obliged entity's knowledge of the customer, the business and risk profile, including where necessary the source of funds and ensuring that the documents, data or information held are kept up-to-date.<sup>103</sup>

Additionally, the Directive also calls for enhanced due diligence when dealing with persons or entities from third-party countries identified as high-risk third-party countries.<sup>104</sup> However, what is arguably the most important aspect of the AMLD is its allowance for the use of sanctions against obliged entities that breach the terms of the Directive. The Directive sets forth that "Member States shall ensure that obliged entities can be held liable for breaches of national provisions transposing this Directive in accordance with this Article and . . . [that any] resulting sanction or measure shall be effective, proportionate and dissuasive."<sup>105</sup> Specifically, the Directive provides that:

Member States shall ensure that in the cases referred to in paragraph 1 [regarding obliged entities], the administrative sanctions and measures that can be applied include at least the following:

- (a) a public statement which identifies the natural or legal person and the nature of the breach;
- (b) an order requiring the natural or legal person to cease the conduct and to desist from repetition of that conduct;

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102. *See id.* art. 53, at 106.

103. *Id.* art. 13(1), at 92.

104. *Id.* art. 18, at 94.

105. *Id.* art. 58(1), at 107.

- (c) where an obliged entity is subject to an authorisation, withdrawal or suspension of the authorisation;
- (d) a temporary ban against any person discharging managerial responsibilities in an obliged entity, or any other natural person, held responsible for the breach, from exercising managerial functions in obliged entities;
- (e) maximum administrative pecuniary sanctions of at least twice the amount of the benefit derived from the breach where that benefit can be determined, or at least EUR 1[, ]000[, ]000.<sup>106</sup>

This use of sanctions against obliged entities who fail to conduct reasonable due diligence serves as a strong deterrent for those firms and individuals who previously would have turned a blind eye to high-risk clients likely to engage in illegal activities.

The European Union's AMLD is a strong example of the framework needed to combat the negative effects associated with financial secrecy provided by shell companies. The Directive addresses the underlying issue of transparency by requiring disclosure of beneficial owners when creating shell companies and by placing a responsibility of due diligence on the private sector individuals and entities who help set up shell companies. The Directive addresses enforcement concerns by granting "greater power to tax authorities to investigate crime"<sup>107</sup> through the creation of shared registers of beneficial owners and by creating a mechanism for imposing "severe financial penalties for non-compliance" on noncomplying entities.<sup>108</sup> In addition to addressing these major concerns, the Directive also addresses smaller issues by requiring "[a]dditional due diligence checks . . . on money flowing from a list of non-EU countries with deficiencies in their anti-money laundering prevention regimes" and by creating reasonable exceptions such as restricting access to information regarding individuals at a risk of kidnapping.<sup>109</sup>

An example of the AMLD in action can be seen in recent actions taken by the United Kingdom.<sup>110</sup> Prior to the leak of the Panama Papers, the United Kingdom became the first government to create a "fully public beneficial ownership" register of companies in the United Kingdom.<sup>111</sup> The United Kingdom's PSC Register requires

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106. *Id.* art. 59(2), at 108.

107. Mark Taylor, *EU Nears Agreement on Delayed Anti-Money Laundering Laws*, LAW360 (Dec. 20, 2016, 3:47 PM), <https://www.law360.com/articles/874797/eu-nears-agreement-on-delayed-anti-money-laundering-laws> [<https://perma.cc/A4CY-R87R>].

108. *Id.*

109. *Id.*

110. Katharine Murphy, *Australia to Follow UK in Creating Public Register of Shell Companies*, GUARDIAN (Apr. 22, 2016, 12:15 AM), <https://www.theguardian.com/world/2016/apr/22/australia-to-follow-uk-in-creating-public-register-of-shell-companies> [<https://perma.cc/S3JZ-J2XV>].

111. *Beneficial Ownership*, FIN. TRANSPARENCY COAL., <https://financialtransparency.org/issues/beneficial-ownership/> [<https://perma.cc/CX28-CMJ5>].

that the officer of a company identify the people with significant control (“PSCs”) over the company, record the PSC’s information in the company’s own register, report the same information to the shared national register, and keep the registers updated.<sup>112</sup> An individual is considered a PSC if they meet one of the following five criteria: (1) “an individual who holds more than 25% of shares in the company”; (2) “an individual who holds more than 25% of voting rights in the company”; (3) “an individual who holds the right to appoint or remove the majority of the board of directors of the company”; (4) “an individual who has the right to exercise, or actually exercises, significant influence or control over the company”; or (5) “where a trust or firm would satisfy one of the first four conditions if it were an individual . . . , any individual holding the right to exercise, or actually exercising, significant influence or control over the activities of that trust or firm.”<sup>113</sup> Information including each PSC’s name, service address, residential address, date of becoming a PSC, and criteria for qualifying as a PSC is required to be disclosed.<sup>114</sup> The law also permits fines and prison sentences for individuals who fail to accurately provide the required information<sup>115</sup> in addition to allowing anyone to request to see PSC information.<sup>116</sup> Numerous other European Union member countries such as Germany, Hungary, and Sweden have either already passed or are expected to pass bills creating registers similar to the United Kingdom’s PSC Register to conform with the AMLD’s requirements.<sup>117</sup>

The United States should follow the European Union’s lead in enacting similar laws consistent with those set forth in the AMLD. The United States first needs to address issues with laws governing the creation of shell companies within the United States by requiring the disclosure of beneficial owners, creating shared registers, and imposing penalties for noncomplying entities who fail to conduct reasonable due diligence when helping clients create shell companies. The United States should then look to enter into multilateral or regional agreements with other tax havens in the Caribbean and elsewhere to facilitate the effective exchange of information. While states and offshore jurisdictions that benefit from the proceeds of shell companies such as

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112. *Summary Guide for Companies – Register of People with Significant Control*, GOV.UK 1, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/555657/PSC\\_register\\_summary\\_guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/555657/PSC_register_summary_guidance.pdf) [<https://perma.cc/M9CQ-ZWAP>].

113. *Id.* at 2.

114. *Id.* at 3–4.

115. *Id.* at 5.

116. *Beneficial Ownership Register Opens on 6 April 2016*, BDO U.K. (Feb. 15, 2016), <https://www.bdo.co.uk/en-gb/insights/business-edge/business-edge-2016/beneficial-ownership-register-opens-on-6-april-201> [<https://perma.cc/P45Y-T5MQ>].

117. *Implementation Overview: 4th Anti-Money Laundering Directive (AMLD4) Regarding the UBO-register*, NAUTADUTILH (Jan. 2, 2017), <https://www.nautadutilh.com/siteassets/documents/overview-implementation-amld-4-eu.pdf> [<https://perma.cc/V9S9-KLED>].

Delaware and Panama are likely to continue to object to any attempts at increasing transparency, the harm and risk that financial secrecy and shell companies pose to countries outweigh the benefits that secrecy provides to individual users of shell companies.

## VII. CONCLUSION

The Panama Papers have directed renewed attention at the use of shell companies to engage in illegal activities. While shell companies can be used for legitimate, legal purposes, the instances where they are used to conceal criminal or terrorist activities are far too common. Shell companies have been used by individuals such as international arms dealer Viktor Bout, Mexican drug lord Joaquin “El Chapo” Guzman, and lobbyist-turned-criminal Jack Abramoff.<sup>118</sup> Even where shell companies are not used to conceal illegal activities, the secrecy they provide to their beneficial owners is controversial. Numerous politicians such as Argentine President Mauricio Macri, former Icelandic Prime Minister Sigmundur David Gunnlaugsson, former British Prime Minister David Cameron, Russian President Vladimir Putin, and Chinese President Xi Jinping have all faced intense criticism and, in some cases, been forced to resign from office for using shell companies to hide conflicts of interests.<sup>119</sup> Countless countries including the United States, Argentina, Australia, Canada, Denmark, France, India, Indonesia, Mexico, Pakistan, Afghanistan, Nigeria, Kenya, and the United Kingdom have either conducted investigations into shell companies or announced policy changes regarding regulations of shell companies or both.<sup>120</sup> While the issues surrounding shell companies have been discussed and argued for years, significant actions have, for the most part, not been taken.

While much attention since the release of the Panama Papers has been directed at tax havens such as Panama and the Bahamas, the United States is as much of a tax haven as many offshore jurisdictions.<sup>121</sup> States such as Delaware reap enormous profits off the secrecy their laws provide to individuals and businesses looking to keep their financial activities hidden, and it is these jurisdictions that have defeated past efforts to enact changes designed to increase transparency.<sup>122</sup> However, the Panama Papers have once again shown that the need to prevent illegal uses of shell companies outweighs the benefits shell companies provide. To prevent misuse, it is necessary to re-

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118. Browning, *supra* note 33; Woody, *supra* note 10; Barlyn, *supra* note 17.

119. Jeremy Maltby & Grant Damon-Feng, *The Panama Papers: The Story So Far, and What Comes Next*, LAW360 (Dec. 16, 2016, 5:09 PM), <https://www.law360.com/articles/874074/the-panama-papers-the-story-so-far-and-what-comes-next> [https://perma.cc/G6ER-B9E4].

120. *Id.*

121. Swanson, *supra* note 44.

122. Watson, *supra* note 54.

quire the disclosure of beneficial owners when creating shell companies and to create shared registers of beneficial owners to effectively police and investigate misuse of shell companies. Since the illegal use of shell companies is a global issue, a global response is required to effectively police the issue. While the use of bilateral agreements may be effective in eliminating certain jurisdictions as tax havens, individuals will simply continue moving to jurisdictions that do not enter into bilateral agreements with other nations.<sup>123</sup> Instead, what is needed are multilateral agreements that encompass numerous jurisdictions. The European Union's AMLD is a good example of the multilateral framework necessary to accomplish this goal. The AMLD requires disclosure of beneficial owners, mandates the creation of shared registers, provides for penalties to be imposed on noncomplying entities, and addresses other smaller issues and exceptions.<sup>124</sup> The United States would be well-advised to follow the European Union's lead in addressing transparency issues regarding shell companies. The United States should first look to address transparency issues in states such as Delaware that cater to those seeking secrecy by implementing laws similar to those set forth in the European Union's AMLD. The United States should then look to enter into multilateral agreements, as opposed to bilateral agreements, with foreign jurisdictions to facilitate the exchange of information to crack the shells of secrecy that shell companies provide to those attempting to evade taxes, fund terrorist and criminal organizations, or otherwise conceal illegal and unethical activities.

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123. Leikvang, *supra* note 69, at 318.

124. Kunz & Schirmer, *supra* note 4; *The Fourth EU Anti Money Laundering Directive*, *supra* note 92.

