ABA Opposes Anti-Money Laundering Legislation that Imposes Burdensome Regulations on Small Businesses and their Attorneys and Undermines the Attorney-Client Privilege

The American Bar Association supports reasonable and necessary domestic and international measures to combat money laundering but opposes legislation that would impose burdensome and intrusive regulations on small businesses, their attorneys, or the states or that would undermine the attorney-client privilege. Thus, the ABA opposes key provisions in the Corporate Transparency Act (H.R. 2513, sponsored by Rep. Carolyn Maloney (D-NY); and S. 1978, Sen. Ron Wyden (D-OR)); the ILLICIT CASH Act (S. 2563, Sen. Mark Warner (D-VA)); and the TITLE Act (S. 1889, Sen. Sheldon Whitehouse (D-RI)) that would require small businesses or their attorneys to submit detailed information about the businesses’ beneficial owners to the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) or to the states and require FinCEN or states to disclose the data to government agencies and financial institutions on request. The ABA also opposes provisions in S. 1889 that would regulate many attorneys as “formation agents” under the Bank Secrecy Act.

The ABA opposes H.R. 2513/S. 1978, key provisions in S. 2563, and S. 1889 because:

- **The legislation would impose burdensome, costly, and unworkable beneficial ownership reporting requirements on small businesses and their attorneys, and raises serious privacy concerns.** Millions of small businesses would be required to disclose detailed beneficial ownership information to FinCEN or the states and then continuously update that information, with harsh civil and criminal penalties for noncompliance. Many attorneys and law firms that help clients to form companies would be deemed to be applicants or formation agents under the bills and would also be subject to these requirements. FinCEN or the states would then be required to maintain this information in a database and disclose it to other government agencies and financial institutions on request. This new federal regulatory regime, combined with the broad and confusing definition of “beneficial ownership,” would be costly, impose onerous burdens on legitimate businesses, and would be almost impossible to comply with. Sharing the data with other government agencies and financial institutions also increases the potential for cybersecurity breaches, misuse, and unauthorized disclosure.

- **S. 1889 would also undermine the attorney-client privilege, client confidentiality, and state court regulation of the legal profession.** Under the bill, attorneys that help small business clients to form new companies would be considered “formation agents” (and hence a new category of “financial institution”) under the Bank Secrecy Act and would be subject to the strict anti-money laundering (AML) and suspicious activity reporting (SAR) requirements of the Act. These SAR requirements could compel attorneys to disclose confidential client information to government officials, a result plainly inconsistent with their ethical duties and obligations established by the state supreme courts that license, regulate and discipline attorneys. Requiring attorneys to report such information to the government—under penalty of harsh civil and criminal sanctions—would also seriously undermine the attorney-client privilege, the confidential attorney-client relationship, and the right to effective counsel by discouraging full and candid communications between clients and their attorneys.

- **The burdensome reporting requirements in the legislation are unnecessary and duplicative because the federal government already has other, more effective tools.** FinCEN’s new Customer Due Diligence Rule and other FinCEN regulations already require banks to collect beneficial ownership data about most business entities opening new accounts as well as existing account holders with an elevated risk profile. The IRS also requires every business with at least one employee to designate a “responsible party” who controls the business on the entity’s SS-4 Form. Together, these FinCEN and IRS rules provide the federal government with access to useful beneficial ownership information on almost every business entity in the United States.

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