May 6, 2019

The Honorable Maxine Waters
Chairwoman
Committee on Financial Services
U.S. House of Representatives
Washington, D.C.  20515

The Honorable Patrick McHenry
Ranking Member
Committee on Financial Services
U.S. House of Representatives
Washington, D.C.  20515

Re: Concerns Regarding the Amendment in the Nature of a Substitute to H.R. 2513, the “Corporate Transparency Act of 2019”

Dear Chairwoman Waters and Ranking Member McHenry:

On behalf of the American Bar Association (ABA), I write to express our concerns regarding the Amendment in the Nature of a Substitute to H.R. 2513, the “Corporate Transparency Act of 2019,” which would impose burdensome and intrusive regulations on millions of small businesses and their lawyers. The ABA opposes key provisions in the substitute bill that would require small corporations and limited liability companies (LLCs) and many of their lawyers to submit information about the businesses’ “beneficial owners” to the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) and require FinCEN to disclose that information to governmental agencies and financial institutions upon request. We urge you and your Committee colleagues to oppose this bill during the upcoming markup scheduled for May 8.

The ABA supports reasonable and necessary domestic and international measures to combat money laundering and terrorist financing. We commend the sponsors of the substitute bill for their efforts in this regard and would welcome the opportunity to meet and discuss workable options for addressing these problems. However, the ABA opposes the proposed regulatory approach set forth in the bill and believes that other recently adopted reforms will be more effective in addressing these problems without the many downsides of the proposed legislation for the following important reasons.

**First, the ABA opposes the substitute bill because it would impose burdensome, costly, and unworkable new regulatory burdens on millions of small businesses and their lawyers.**

Section 3 of the bill would require small businesses with twenty or fewer employees and gross receipts or sales of $5 million or less to disclose detailed information about their beneficial owners—including their names, dates of birth, addresses, and passport or driver’s license numbers—to FinCEN and then update that information continuously during the lifespan of those businesses. Failure to timely submit this information or to update it annually and after any changes regarding the businesses’ beneficial ownership could subject the businesses to harsh civil and criminal penalties, including stiff fines and prison sentences, for essentially paperwork violations.

Many lawyers and law firms that help clients to form companies could also be subject to these burdensome disclosure and recordkeeping requirements and to the bill’s severe penalties for non-
compliance because many of the bill’s requirements apply to any “applicant” who files an application to form a corporation or LLC under state law, a broad term that would include many lawyers involved in the entity formation process.

In Delaware and most other states, a corporation or an LLC is created by filing the articles of incorporation (for a corporation) or a certificate of formation (for an LLC) with the secretary of state. For a new corporation, the filing is signed by an incorporator, and when an LLC is formed, the filing is signed by a person usually called the organizer, or in Delaware, an “authorized person.” Oftentimes the incorporator, the organizer, or the authorized person is a lawyer or a paralegal working under a lawyer’s direction. Therefore, the bill’s broad definition of applicant, covering “any natural person who files an application to form a corporation or limited liability company under the laws of a State or Indian Tribe,” would include many lawyers who help clients to form these new entities.

Unlike the definition of “beneficial owner” under FinCEN’s Customer Due Diligence (CDD) rule (as discussed below), the bill’s definition of “beneficial owner” is vague, overly broad, and unworkable. The bill’s definition includes every natural person who directly or indirectly exercises “substantial control” over the company, owns 25 percent or more of its equity interests, or receives “substantial economic benefits” from its assets, subject to several exceptions. The bill also defines a recipient of “substantial economic benefits” to mean a natural person who “has an entitlement to more than a specified percentage of the funds or assets” of the entity and “exercise[s] a dominant influence” over the entity, all to be established by a future Treasury Department rule. Because the beneficial owner definition is so expansive and unclear and would cover many individuals whose personal information is not even within the businesses’ knowledge or control, it would be almost impossible for many small businesses to comply with the bill’s disclosure requirements.

The new federal regulatory regime created by the bill, combined with the broad and confusing definition of beneficial owner, would be costly, impose onerous burdens on legitimate businesses and their lawyers, and subject them to harsh civil and criminal penalties if they fail to comply. In addition, the legislation would not be effective in fighting money laundering, terrorist financing, or other crimes.

Second, the substitute bill raises serious privacy concerns for small businesses and the many individuals who would be designated as beneficial owners.

The bill would require FinCEN to maintain this sensitive personal information in a massive government database and to disclose it upon request to any federal, state, tribal or local governmental agency or to any foreign law enforcement agency if certain conditions are met. While previous versions of the bill would have required an agency to secure a criminal or civil subpoena or summons before obtaining the information, the current substitute bill would require FinCEN to disclose the information in response to a simple agency request.

FinCEN would also be required to disclose the information to any financial institution with “customer consent.” But because financial institutions will likely require all customers to provide such consent when opening new accounts, the beneficial owners’ identities and other personal information will be freely shared not just with the financial institutions, but also with any other affiliates or third parties that the institutions decide to reference in their customer agreements. As this personal information is shared with more and more entities, the potential for misuse will grow exponentially.
Third, the burdensome beneficial ownership reporting requirements in the substitute bill are unnecessary and duplicative because the federal government already has other, more effective tools to fight money laundering and terrorist financing.

In 2016, FinCEN issued its sweeping new CDD rule that requires banks and other covered financial institutions to collect certain specific beneficial ownership information regarding entities that establish new accounts, and the rule became fully effective in May 2018. But unlike the substitute bill, the CDD rule includes a specific, understandable, sensible definition of “beneficial owner” consisting of each individual who owns 25 percent or more of the entity and a single individual with significant responsibility for managing the entity. Now that the CDD rule has taken effect, it will provide FinCEN with information about key individuals who own or control virtually every company and other entity with a bank account and will assist the agency in combatting money laundering and terrorist financing.

In addition to the new CDD rule, the Internal Revenue Service (IRS) collects entity-related information needed to fight money laundering and terrorist financing, and that information is currently available to law enforcement authorities. Since 2010, the IRS has required every business that obtains an Employer Identification Number to submit IRS Form SS-4, which includes the name of a “responsible party” within the business, i.e., an individual who is able to “control, manage, or direct the entity and the disposition of its funds and assets.”

Together, both FinCEN’s new CDD rule and the IRS’ SS-4 Form provide the federal government with extensive beneficial ownership information on almost every business entity in the United States (i.e., almost all entities with a bank account or at least one employee). Therefore, because federal law enforcement authorities are already able to access the information they need to fight money laundering and terrorist financing, it is unnecessary to create a duplicative new regulatory regime that would impose unfair burdens, excessive costs, and the risk of severe civil and criminal liability on millions of small businesses and their lawyers.

For all these reasons, the ABA urges you to oppose the substitute legislation. Thank you for considering our views on these important issues, and if you have any questions or would like to meet to discuss other possible measures to combat money laundering and terrorist financing, please contact ABA Associate Governmental Affairs Director Larson Frisby at (202) 662-1098 or larson.frisby@americanbar.org.

Sincerely,

Robert M. Carlson

cc: Members of the House Financial Services Committee

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