ABA Opposes Anti-Money Laundering Legislation that Erodes the Attorney-Client Privilege and Imposes Burdensome Regulations on Small Businesses, their Lawyers, and States

The American Bar Association supports reasonable and necessary domestic and international measures to combat money laundering but opposes legislation that would undermine the attorney-client privilege or impose burdensome and intrusive regulations on small businesses, their lawyers, or the states. Therefore, the ABA opposes key provisions in the TITLE Act (S. 1454, introduced by Sen. Sheldon Whitehouse (D-RI)) and the Corporate Transparency Act (S. 1717, Sen. Ron Wyden (D-OR), and H.R. 3089, Rep. Carolyn Maloney (D-NY)) that would subject many lawyers and law firms to the anti-money laundering (AML) and suspicious activity reporting (SAR) requirements of the Bank Secrecy Act when they help clients to establish companies. The ABA also opposes provisions in these bills—and in the draft Counter Terrorism and Illicit Finance Act sponsored by Rep. Steve Pearce (R-NM) and Rep. Maloney—that would require companies to submit their beneficial ownership information to the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) or the states and that would require FinCEN or the states to disclose the information to government agencies and financial institutions upon request.

The ABA opposes S. 1454, S. 1717, H.R. 3089, and the draft Pearce/Maloney bill because:

- **S. 1454, S. 1717, and H.R. 3089 would undermine the attorney-client privilege, the confidential lawyer-client relationship, and traditional state court regulation of the legal profession.** Under these bills, lawyers and law firms 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 AML and SAR requirements of the Act. These SAR requirements could compel lawyers 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 lawyers. Requiring lawyers 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 lawyer-client relationship, and the right to effective counsel by discouraging full and candid communications between clients and their lawyers.

- **All four bills would also impose burdensome, costly, and unworkable beneficial ownership reporting requirements on small businesses, their lawyers, and states.** Millions of small businesses would be required to disclose detailed beneficial ownership information to FinCEN or state authorities and then continuously update that information, subject to harsh civil and criminal penalties for noncompliance. FinCEN or the states would then be required to maintain this information in a massive database and disclose it to federal, state, and foreign government agencies and financial institutions upon request. Many lawyers and law firms that help clients to form companies would be deemed to be formation agents or applicants under the bills and would also be subject to these requirements. This new federal regulatory regime would be very costly, and the bills’ vague and unworkable definition of “beneficial ownership” would sow confusion into the company formation process. The bills also would not be effective in fighting money laundering and terrorist financing.

- **The burdensome and intrusive new reporting requirements in the legislation are unnecessary because the federal government, financial institutions, and the legal profession have developed other more effective tools.** The IRS and financial institutions already collect useful entity-related information needed to fight money laundering and terrorist financing—through IRS Form SS-4 and FinCEN’s recent Customer Due Diligence Rule, respectively—and that information is available to law enforcement authorities. The ABA also developed and is actively promoting voluntary good practices guidance that is designed to help lawyers fight these problems by taking prudent, proportional, risk-based steps tailored to the individual situation rather than the burdensome and costly rules-based approach of the proposed legislation.

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