October 22, 2019

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Kevin McCarthy
House Minority Leader
U.S. House of Representatives
Washington, D.C. 20515

Re: Corporate Transparency Act of 2019, H.R. 2513

Dear Speaker Pelosi and Minority Leader McCarthy:

The National Association of Criminal Defense Lawyers (NACDL) and the American Civil Liberties Union (ACLU) write to oppose the Corporate Transparency Act of 2019, which was considered by the Rules Committee on October 21. We are concerned about the criminal provision discussed below and urge you to vote no unless this provision is removed or appropriately amended.

The bill would impose a criminal penalty of up to three years of imprisonment for conduct that is essentially a paperwork violation—even for a first-time offender. Given the bill's broad reach and vague definitions, the criminal provision could result in the conviction of individuals who have no intent to violate the law, whose greatest offense may simply be not understanding complicated and vague rules, and whose conduct causes no social harm. Such a change is unnecessary, unwise, and unjust.

H.R. 2513 would require any "applicant" who wishes to form a corporation or limited liability company under the laws of any state to file and update with FinCEN information concerning anyone deemed a "beneficial owner" of the company. The act then requires the "applicant" to provide a list of every "beneficial owner" of the business, along with various other information (such as the dates of birth and current addresses of those owners), to FinCEN.

The bill does not provide clarity in the definition of who qualifies as a "beneficial owner," which is particularly concerning given that the bill criminalizes various activities related to failing to comply with the new requirements referenced above. For example, the bill criminalizes the failure to provide complete or merely current beneficial ownership information as well as the provision of incorrect beneficial ownership information, but the definition of who constitutes a "beneficial owner" is both overly broad and vague. As a result, someone could be prosecuted for simply failing to understand what the law requires.

Under the bill's current language, any person who "directly or indirectly" through any "contract, arrangement, understanding, relationship, or otherwise," has "substantial control over," "owns 25 percent or more of the equity interests," or "receives substantial economic benefits from" the corporate entity, is a beneficial owner. (Further, "substantial economic benefits" is circularly defined as "entitlement to . . . the funds or assets" of the company.) This vague definition could encompass numerous persons who have no apparent or official ties to a business, including adult children, spouses or ex-spouses, other relatives, or even friends. We also cannot look to FinCEN's current definition of beneficial owners to provide clarity because the bill's definition does not track the current definition and broadens it to include persons that "receive substantial economic benefits" as that term will be defined by the Treasury Department. And yet, a person submitting the report to FinCEN may be subject to criminal penalties for failure to list these various persons as "beneficial owners."

Even the enumerated exceptions to the definition of "beneficial owner" are unclear. For example, creditors may receive "substantial economic benefits" from borrowers and may exercise "substantial control over" them through loan covenants. Presumably recognizing this, the current bill language lists "creditors" as an exception to the definition of "beneficial owner." Yet the language that does so is circular and renders the exemption illusory. It states that the term "beneficial owner" shall not include "a creditor of a corporation, *unless the creditor also meets the requirements of subsection A*," which is the section defining the term "beneficial owner" (emphasis added). In other words, creditors are exempt unless they are covered, which they may very well be. Clearly, creditors would need no exception unless they were covered by the definition, but the exception language itself provides that they cannot be exempted if they are covered. This "exception" is circular and illusory. It contributes to a lack of clarity regarding who is a beneficial owner, which is particularly dangerous when inaccurate reporting of beneficial owners may carry a prison sentence.

Moreover, the inclusion of a catch-all phrase such as "or otherwise" in a definition renders any previous definitional clauses inconsequential. Unlike other existing definitions of "beneficial owner," the bill's definition does not require that an individual have any agreement bestowing control or entitlement to funds, nor does the bill require someone to actually control, manage, or direct the corporation. Instead, the definitions that serve as the basis of these new legal obligations are frustratingly vague. Fundamental notions of fairness, as well as basic

constitutional principles, require that individuals understand what is required of them under the law before they can be imprisoned for noncompliance.

The concerns that arise over vague definitions for key statutory terms are compounded by the specific application of some of the criminal provisions. For example, the disclosure offense at bill Section 5333(c)(1)(C), which makes it a crime to disclose "the existence of a subpoena, summons, or other request for beneficial ownership information," is troubling because it is not limited in its application to people who would be on notice of the prohibition of such a disclosure. There is nothing inherent in this type of situation that would naturally alert anyone that any request for information should not be disclosed. To criminalize the disclosure of a request for such commonplace information (like the name and address of a business's owner) could turn law-abiding individuals into felons. Similarly, the offense at bill Section(c)(1)(A) punishes the act of knowingly providing "false" beneficial ownership information. Given the broad reach of the definition of the term "beneficial ownership," a person may be accused of providing "false" information based only on a misunderstanding of the law's terms. Thus, a person might face criminal punishment for knowingly providing information which happens to have been incorrect, even if that person intended to comply with the law.

These new disclosure obligations will disproportionately impact small businesses and some non-profits that may be least equipped to understand the complicated set of new requirements. The bill provides a lengthy list of large, exempt business entities, thus leaving the disclosure obligations to fall predominantly on small businesses. The exemptions cover nonprofits organized under 501(c), 527, or 4947(a)(1) of the tax code but only if they have not been denied tax-exempt status and have filed their most recently due information return with the Internal Revenue Service. However, many small non-profits, particularly those run by volunteers, often fail to meet these requirements and find their exemption status "auto-revoked." These small businesses and non-profits are less likely to have sophisticated in-house lawyers or the resources to engage outside attorneys for the purpose of properly understanding and meeting these new disclosure requirements. Thus, many small business owners and non-profit entities will be forced to decide between the risk of possible criminal prosecution and the expense of counsel. For many, however, financial circumstances will dictate the decision. Surprisingly, this legislation would apply retroactively and apply to all existing legal entities (not just those formed after enactment). Thus, with no notice, small businesses and certain non-profit organizations that have been in operation for decades will suddenly be subject to brand new obligations, which, if they do not meet, can trigger investigations and criminal penalties including prison time.

The inclusion of new federal criminal penalties for first-time "paperwork" violations and the creation of new felony criminal offenses is a dramatic step in the wrong direction. Criminal prosecution and punishment constitute the greatest power that a government uses against its own citizens. This law would result in a criminal conviction and up to 3 years' imprisonment for a person's failure to provide the proper paperwork. Additionally, the provision allowing FINCEN to share the information with any federal, state, local, or tribal law enforcement agency without

any restrictions on use of the information or required standard specified for requesting or obtaining information other than that there be an existing investigatory purpose raises serious privacy and due process concerns.

Finally, to the extent that the criminal provisions would merely punish the making of a false statement, such penalties would be entirely redundant with 18 U.S.C. § 1001, which already criminalizes making a false statement to the U.S. Government. Redundant criminal penalties for substantially similar conduct contribute to numerous problems in our criminal justice system, including overcriminalization, excessive prison sentences, and coerced guilty pleas.

No matter how well-intentioned, the Corporate Transparency Act would have a disastrous impact on those bearing no relation to terrorism or money laundering. Instead, it would create new, unnecessary federal criminal laws based on vague and overreaching definitions. For all the reasons listed herein, we urge you to oppose the bill unless these provisions are removed or appropriately amended.

If you have further questions, feel free to contact Nathan Pysno at 202-465-7627 or npysno@nacdl.org or Kathleen Ruane at KRuane@aclu.org.

Respectfully,

National Association of Criminal Defense Lawyers (NACDL)

American Civil Liberties Union (ACLU)