July 17, 2019

The Honorable Lindsey Graham
Chairman
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20515

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20515

Re: Combating Money Laundering, Terrorist Financing, and Counterfeiting Act of 2019, S. 1883

Dear Chairman Graham and Ranking Member Feinstein:

The undersigned organizations write to oppose the Combating Money Laundering, Terrorist Financing, and Counterfeiting Act of 2019. This bill would contribute to the growing overcriminalization in federal criminal law, would criminalize actions that cause no social harm, carries harsh prison sentences that contribute to mass incarceration and coerced guilty pleas, and raises Fourth Amendment concerns by expanding the government's ability to obtain sensitive information without a warrant or judicial process.

To begin, several sections of the bill include unnecessary increases to penalties or would allow prosecutors to tack on additional charges when certain crimes are charged. For example, Section 3 of the bill increases the penalty for bulk cash smuggling, 31 U.S.C. § 5332(b), from 5 years in prison to 10 years. This increase in penalty is not necessary or warranted. Section 11 would make one of the major money laundering statutes, 18 U.S.C. § 1956, apply to tax evasion. Tax evasion, of course, is already a crime of its own, so this provision would allow prosecutors to tack on charges to an existing prosecution for an entirely different crime. These provisions go against the current national movement toward reducing overincarceration in the United States that the vast majority of the U.S. Senate supported when it passed the First Step Act last year.

In general, provisions that increase sentences or allow stacking of charges also contribute to the trial penalty, which is generally manifested by the significant difference in sentence between what a defendant receives via plea bargain and what his or her sentence would be if convicted at trial. This trial penalty has virtually eliminated the constitutional right to a trial in the federal system.[1] It also contributes to the possibility of innocent people pleading guilty, because they fear the long and harsh sentence they would receive if convicted at trial, even if the

[1] National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), http://www.nacdl.org/trialpenalty.

chance of conviction is remote. Many of the bill's provisions, discussed below, would allow prosecutors to add charges and prison years, thereby exacerbating the trial penalty.

Section 4 expands the scope of 18 U.S.C. § 1957, already a harsh and vague statute, by making it easier for the government to satisfy the $10,000 requirement of the offense. It is not clear that this expansion is justified. Section 1957 can be, and often is, added to almost any federal indictment because most federal crimes involve proceeds. This promotes excessive sentencing and charge stacking.

Section 6 amends 18 U.S.C. § 1960. When passed, this statute was intended to reach only unlicensed money transmitting businesses open to the public—that is, businesses used for sending remittances to other countries from the U.S. Under this amendment, however, it would reach lawyers, consultants, investment advisors, accountants, trustees, bankers, and just about anyone who engages in a single transfer of funds for anyone, whether or not for profit. Understandably, most lawyers, accountants, consultants, and others would not think they need to become licensed as a money services business in order to engage in an occasional transfer of funds on behalf of a client. But the statute also says that transmitting money without the required license is criminal, "whether or not the person knows that the operation is required to be licensed or that the operation is so punishable." It is exceedingly harsh for this to be a strict liability crime, particularly considering that the underlying conduct, operating a certain type of business without a license, is not inherently dangerous or harmful. This change is a significant increase in scope to an already punitive and harsh statute.

Section 7 contains two major amendments to Section 1956, the "concealment" money laundering statute. First, it significantly broadens the scope of the statute by substituting the phrase "some form of unlawful activity" in place of the current "specified unlawful activity," which refers to the specific federal felonies enumerated in § 1956(c)(7). This change greatly expands the statute to cover federal misdemeanors as well as all state felonies and misdemeanors. Section 1956 carries a 20-year prison sentence, but, currently, the "specified unlawful activity" covers serious federal felonies, such as murder and kidnapping. With this change, a person could be charged with federal money laundering and face a 20-year prison sentence for allegedly concealing the proceeds of a minor state-level misdemeanor. This is a draconian and unneeded expansion of the statute.

Section 7 also waters down the criminal intent requirement for the concealment money laundering statute. Specifically, instead of the criminal intent requirement being "know[ledge] that the transaction is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity," under current law, this bill would supplant a requirement of "know[ledge] that the transaction conceals or disguises, or is intended to conceal or disguise, the nature source, location, ownership, or control of the proceeds of some form of unlawful activity." This would have the effect of abrogating a longstanding Supreme Court precedent, *Cuellar v. United States*, 553 U.S. 550

(2008), a unanimous decision written by Justice Clarence Thomas. This change significantly weakens the criminal intent requirement of this subsection and reduces the level of knowledge required for criminal liability. In practice, the effects of this will almost certainly fall significantly on couriers or other low-level defendants who, in the scope of large investigations, have the least culpability and also often have little knowledge that would provide help to law enforcement.

Section 10 expansion of the Wiretap Act raises a host of privacy concerns. This section expands the Wiretap Act to reach a host of new crimes, including those expanded by the bill like 18 U.S.C. § 1960. This could open the door to additional Wiretap Act orders, including investigations where the criminal intent requirement for the crime being investigated has been weakened by this bill. This is contrary to the intent of the Wiretap Act, which was to restrict this extraordinarily invasive surveillance to only the most serious of crimes.

Section 13's new authorization of administrative subpoenas for structuring poses significant due process concerns. It is a sweeping grant of new federal law enforcement authority, as it would allow the government to go on fishing expeditions rather than obtaining a warrant from a judge based on probable cause or other appropriate judicial order. 18 U.S.C. § 3486, which this section would amend, currently limits this administrative subpoena power to investigations of federal healthcare fraud, sexual exploitation or abuse of children, unregistered sex offenders, or threats against a person under Secret Service protection. Section 13 expands this provision to cover a host of new criminal offenses, circumventing Fourth Amendment protections. In addition, it expands 18 U.S.C. § 3486 to only require that a subpoena "relate" to an investigation of the specified offenses, which could be read by the government to issue subpoenas in investigations that extend beyond the enumerated crimes. Moreover, it expands the grounds to delay notice to individuals targeted by such subpoenas, further undermining critical due process protections. This is a new sweeping grant of authority to federal law enforcement that is unwarranted and comes with insufficient procedural protections. It also moves in the opposite direction of the current movement toward reform of federal forfeiture laws, as it would instigate increased forfeiture by allowing the government to launch investigations of "criminal or civil forfeiture based on an offense enumerated in this subparagraph."

Sections 17 and 18 create brand new criminal offenses for concealing even a single material fact from a financial institution regarding the ownership or control of an account or assets held in an account. There are already thousands upon thousands of federal criminal laws and these new crimes are unnecessary and duplicative. This is already effectively enforced under the civil, criminal, and administrative law regime surrounding the Bank Secrecy Act and its numerous anti-money laundering requirements, including the Know Your Customer Rule. Additionally, numerous criminal laws already exist that criminalize making false statements to a financial institution, including 18 U.S.C. § 1014 and 18 U.S.C. § 1344. The penalties of 10 years in prison and a fine of up to $1 million are also punitive and excessive. Creating new crimes

with overly harsh sentences to cover this conduct will only contribute to charge stacking and overincarceration.

Finally, Sections 13, 14, 17, and 18 provide new avenues for federal law enforcement to pursue civil forfeiture. Federal forfeiture laws are already sweeping and overly broad, often unjustly target innocent property owners, subvert the traditional burden of proof between the government and the accused, and have been widely criticized as unfair and unjust by groups across the political spectrum. They also have been shown to have no positive impact on reducing criminal activity.

While we understand that the Combating Money Laundering, Terrorist Financing, and Counterfeiting Act is well-intentioned, we are concerned that it would create new and unnecessary federal criminal laws, contribute to overly long and harsh sentencing, and weaken due process protections. For the foregoing reasons, we urge you to oppose the bill.

If you have further questions, feel free to contact Nathan Pysno, Director of Economic Crime and Procedural Justice at the National Association of Criminal Defense Lawyers, at 202-465-7627 or npysno@nacdl.org.

Respectfully,

National Association of Criminal Defense Lawyers

American Civil Liberties Union

Drug Policy Alliance

FAMM

FreedomWorks

Human Rights Watch

The Leadership Conference on Civil and Human Rights

National Association of Federal Defenders

The Sentencing Project