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September 13, 2011

The Honorable Joseph Lieberman
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

The Honorable Susan Collins
Ranking Member
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

Re: S. 1483, the Incorporation Transparency and Law Enforcement Assistance Act

Dear Chairman Lieberman and Ranking Member Collins:

The National Association of Criminal Defense Lawyers (NACDL) opposes S. 1483, the Incorporation Transparency and Law Enforcement Assistance Act, and urges you to vote against it. Specifically, this bill imposes a criminal penalty of up to three years of imprisonment for conduct that is, in essence, a paperwork violation. Innocent, law-abiding citizens can be convicted under this offense even where there is no evidence of wrongful intent.

This bill seeks to force states to amend their incorporation laws to require those forming new corporations and LLCs to provide a list of the "beneficial owners" of the business to the state of formation. In addition to the initial filing, businesses must update their filing within 60 days of any change in the beneficial ownership information (or within 10 days if a formation agent is used), and update the filing annually if required by the state. This bill also seeks to amend the United States Code to include individuals who form new corporations and LLCs within the definition of "financial institutions," thereby subjecting these individuals to a variety of recordkeeping and reporting regulations under existing federal laws.

NACDL is concerned with several provisions of S. 1483, as detailed below, but is especially concerned with its inclusion of overly broad criminal offenses, which lack adequate *mens rea* requirements and attach criminal penalties to the failure

to comply with the bill's numerous requirements and the disclosure of certain information.¹ Specifically, the bill creates the following four new federal criminal offenses: (A) knowingly providing false beneficial ownership information, including a false identifying photograph; (B) willfully failing to provide complete or updated beneficial ownership information; (C) knowingly disclosing the existence of a subpoena, summons, or other request for beneficial ownership information (with limited exceptions); and (D) in the case of a formation agent, knowingly failing to obtain or maintain credible, legible, and updated beneficial ownership information. Each of these offenses would be punishable by civil fines up to \$10,000, criminal fines, and imprisonment of up to three years.² Such penalties would be in addition to any civil or criminal penalty that may be imposed by a state.

NACDL opposes the inclusion of these criminal offenses in this bill for a number of reasons. First, this bill criminalizes the failure to provide complete or current beneficial ownership information or the provision of incorrect beneficial ownership information, but the bill's definition of who constitutes a "beneficial owner" is so vague, overbroad, and unknowable that any number of individuals could be prosecuted for simply failing to understand what the law actually requires. Under this definition, a person must have direct or indirect "substantial" control over, interest in, or economic benefit from the corporation, in order to be a beneficial owner. While the inclusion of the term "substantial" is an improvement over past versions of this bill, this new definition is broader in that it no longer requires that an individual's control or entitlement to funds enable him or her to control, manage, or direct the corporation. In addition, the new definition now includes a list of exceptions, but also sets forth a broadly drafted catch-all provision, lacking definition, standards, or a *mens rea* requirement, that seriously undermines the application of the exceptions.³ 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. S. 1483 fails to satisfy these requirements.

Second, NACDL opposes the criminal offenses in this bill because they lack meaningful *mens rea* or criminal intent requirements. As discussed at length in our *Without Intent* report, published jointly with the Heritage Foundation, meaningful *mens rea* requirements are critical to

¹ The criminal offenses are located in Section 3(a) of the bill and, if enacted, would be added to the Homeland Security Act of 2002 (6 U.S.C. 601 *et seq.*) at Section 2009(b)(1).

² Oddly, although all of S. 1483's burdensome requirements would be implemented through state law, any fines levied against noncompliant individuals would be paid to the federal government—an issue that underscores the bill's problematic dismissal of the principles of federalism.

³ Specifically, the bill states that the exceptions "shall not apply if used for the purpose of evading or circumventing" the disclosure provisions of the bill. S. 1483, Sec. 3(a)(1), Sec. 2009(d)(1).

protecting against unjust prosecutions, convictions, and punishments.⁴ With rare exception, the government should not be allowed to wield its power against an individual without having to prove that he or she acted with a wrongful intent. Absent a meaningful *mens rea* requirement, an individual's other legal and constitutional rights cannot protect him or her from unjust punishment for making honest mistakes or engaging in conduct that he or she had every reason to believe was legal. This is particularly true in the case of certain paperwork violations like those set forth in this bill.

Three of the offenses in this bill only require general intent, i.e. "knowing" conduct, which federal courts usually interpret to mean conduct done consciously.⁵ An individual need not have known that he or she was violating the law or acting in a wrongful manner in order to be convicted. In the case of some crimes, general intent is sufficient because the conduct is in itself wrongful. However, when applied to conduct that is not inherently wrongful, such as certain paperwork violations, the "knowingly" *mens rea* requirement allows for punishment without any shred of wrongful intent, culpability, or sometimes even negligence. Despite every intention to follow the law, even the most cautious citizen could be found guilty under such laws. Further, these types of criminal provisions do not effectively deter criminal activity because they do not require the defendant to have any notice of the law or the wrongful nature of his or her conduct.

The problems created by these inadequate *mens rea* requirements are compounded by the breadth of application in the disclosure offense at Sec. 2009(b)(1)(C) and the vague terminology in the formation agent offense at Sec. 2009(b)(1)(D). The disclosure offense is extremely troubling because it is not limited in its application to individuals who would be on notice of the prohibition of disclosure, nor does it require an individual to "know" such disclosure is prohibited before he or she can be prosecuted. Aside from the offense itself, there is nothing that would alert anyone that this type of information is of a nature that should not be disclosed. Criminalizing the disclosure of such commonplace information will thus turn law-abiding individuals into felons. Similarly, the formation agent offense employs vague terms ("credible" and "legible") without any definition or standards. What constitutes a "credible" photograph? Where is the line between legible and illegible information? Absent clear, specific requirements, individuals fall victim to vague laws.

⁴ Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, The Heritage Foundation and National Association of Criminal Defense Lawyers (2010), available at www.nacdl.org/withoutintent.

⁵ The fourth criminal offense in this bill, at Sec. 3(a)(1), Sec. 2009(b)(1)(B), now includes the *mens rea* requirement "willfully." While this offense could be improved with a materiality requirement, this strengthened *mens rea* requirement is a significant improvement over the past version of the offense.

Third, NACDL objects to the inclusion of criminal provisions in S. 1483 because there is no justification for turning a “paperwork” violation, particularly a first-time violation, into a criminal offense, let alone a felony federal criminal offense. Criminal prosecution and punishment constitute the greatest power that a government routinely uses against its own citizens. As Harvard Professor Herbert Wechsler famously put it, criminal law “governs the strongest force that we permit official agencies to bring to bear on individuals.”⁶ This bill could result in a criminal conviction and, in some cases a term of imprisonment, for a person’s failure to provide the proper paperwork. This would include a person who is sloppy or lazy, or who happens to make a mistake, even where there is no actual harm resulting from his or her conduct. None of these offenses require a specific intent to violate the law, to enable others to violate the law, or to cause harm to any other individual or the United States. This is, quite simply, a punishment that does not fit the crime. A civil penalty would be more appropriate to address and effectively deter such conduct. In addition, whereas the criminal process is executed at the taxpayer’s expense and often causes innocent employees to lose their jobs, civil enforcement can minimize taxpayer costs and impose civil fines without guaranteeing business failure and job losses.

In addition to our opposition to this bill’s inclusion of criminal provisions with weak *mens rea* requirements, NACDL is troubled by the regulatory criminalization present in S. 1483. Specifically, the bill authorizes unelected government employees to set forth regulations clarifying the bill’s own definitions and specifying how to verify beneficial ownership or other identification information. While this rulemaking could assist in clarifying the bill’s criminal offenses, that responsibility falls squarely on the shoulders of Congress, not unelected government employees. As discussed in the *Without Intent* report, regulatory criminalization raises serious constitutional and separation of powers concerns, and unduly complicates the criminal code.⁷ Here, the regulatory criminalization is particularly disturbing because the bill explicitly circumvents the regular rulemaking process, which includes periods of public comment, and allows government employees to enact regulations by fiat.

NACDL is also concerned with Section 4 of S. 1483, which requires “any person engaged in the business of forming corporations or limited liability companies” to establish an anti-money laundering program.⁸ Whereas the exact meaning of the phrase “engaged in the business of forming” is uncertain, there can be no doubt that it includes members of the legal profession. Specifically, the bill imposes government-mandated reporting obligations on members of the legal profession by requiring them to establish anti-money laundering programs within their own business entity. This requirement may create a conflict between a lawyer’s legal

⁶ Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 (1952).

⁷ See *supra* n. 4 at 9-10, 25-26.

⁸ Section 4 amends the definition of “financial institution” to include this new group of individuals and therefore subjects this group to a plethora of federal recordkeeping and reporting requirements far beyond the anti-money laundering program requirement. This change will undoubtedly increase the burdens on small business, the primary target of this bill.

obligations and a lawyer's ethical obligations to his or her client. The new language excluding attorneys or law firms that use a formation agent to form the corporation is hardly an improvement over past versions of this bill. Employing a formation agent may still not remedy attorney-client privilege and conflict concerns and, more importantly, lawyers should not be forced to choose between outsourcing work, which they are particularly suited to handle, and establishing anti-money laundering programs in-house. NACDL rejects this Hobson's choice and strongly encourages the absolute exclusion of members of the legal profession from the definition of "financial institution" and any of these requirements.

Finally, this bill not only raises serious federalism concerns, but is deeply troubling in the context of a weak economy and the deep financial uncertainty facing our nation. This bill would impose onerous burdens on states, which will undoubtedly be passed onto businesses. As the National Association of Secretaries of State have stated, "this bill . . . would leave states with ill-defined, unfunded mandates while creating unnecessary costs and confusion for businesses."⁹ Whereas the bill now provides a lengthy list of exempt entities, the disclosure obligations fall predominantly on small businesses, who are the least likely to have in-house counsel or the resources to engage outside counsel for the purpose of properly fulfilling these new disclosure requirements. These small business owners will be forced to decide between the risk of criminal prosecution and the expense of counsel; though, for many, their financial circumstances will dictate that decision.

The injury inflicted by a single misguided act of overcriminalization is not limited to an individual defendant and his or her family, but rather it undermines our entire criminal justice system and public confidence therein. For all the reasons listed herein, NACDL opposes S. 1483 and urges you to do the same.

Respectfully,



Lisa Monet Wayne

President, National Association of Criminal Defense Lawyers

⁹ Press Release, National Association of Secretaries of State (NASS), NASS Statement on Federal Approaches to Collecting Business Entity Ownership Information at No Additional Cost to U.S. Taxpayers (Aug. 30, 2011), available at http://www.nass.org/index.php?option=com_content&view=article&id=281%3Anews-statement-corp-formation-ownership&catid=964&Itemid=434.