July 20, 2020

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 Amendment to the National Defense Authorization Act

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 Amendment to the National Defense Authorization Act, H.R. 6395, which is scheduled for consideration on the House floor on July 20 or 21. We are concerned about the criminal provision discussed below and urge you to vote no on this amendment unless this provision is removed or appropriately amended. While this bill, H.R. 2513, previously passed the House, it is a financial regulatory bill with criminal provisions that is unrelated to defense spending. It was also opposed by a diverse coalition including both constitutional rights and small business groups and thus should not be included in the defense authorization process.

This provision 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 amendment'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.

The amendment 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. Each "applicant" must 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 amendment contains an unclear and confusing definition of "beneficial owner," which is particularly concerning given that it would criminalize various activities related to failure to comply with the new requirements mentioned above. The amendment defines "beneficial owner" as 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. 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.

Even the enumerated exceptions to the definition of "beneficial owner" are unclear and even illusory. For example, creditors may receive "substantial economic benefits" from borrowers and may exercise "substantial control over" them through loan covenants. Presumably recognizing this, the amendment lists "creditors" as an exception to the definition of "beneficial owner." However, 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.

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 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. 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 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

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 amendment provides a lengthy list of large, exempt business entities, thus leaving the disclosure obligations to fall predominantly on small businesses. 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. 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.

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, this prohibition would be duplicative 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.

This amendment would have a severely negative impact on people and entities that are not involved in criminal activity. It would create new, unnecessary federal criminal laws based on vague and overreaching definitions. For all the foregoing reasons, we urge you to oppose the amendment.

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,

The National Association of Criminal Defense Lawyers (NACDL)

American Civil Liberties Union (ACLU)