



# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

October 30, 2009

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: Hearing on S. 569, 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. 569, 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 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 also update their filing annually, in those states requiring annual filings, or anytime there is a change in the beneficial ownership information in those states that do not require annual filings. 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 especially concerned with Section 3(b), which would establish criminal penalties for failure to comply with the bill's numerous requirements. Specifically, providing incorrect beneficial ownership information, attempting to provide incorrect beneficial ownership information, or intentionally failing to provide updated ownership information would each be

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punishable by civil fines up to \$10,000, criminal fines, and imprisonment of up to three years.<sup>1</sup> Such penalties would be in addition to any civil or criminal penalty that may be imposed by a state.

NACDL opposes the inclusion of a criminal provision in this bill for a number of reasons. First, this bill criminalizes the failure to provide beneficial ownership information or providing 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.<sup>2</sup> 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.

Second, NACDL opposes Section 3(b) of this bill because the criminal offenses it would create lack meaningful culpable state-of-mind (or *mens rea*) requirements, which would inevitably lead to unjust prosecutions, convictions, and punishments. 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.

This bill only requires general intent, i.e. "knowing" conduct,<sup>3</sup> which federal courts usually interpret to mean conduct done consciously. 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

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<sup>1</sup> Oddly, although all of S. 569'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.

<sup>2</sup> Other organizations have noted the vagueness of the bill's definition of "beneficial owner." See Hans A. von Spakovsky and Andrew M. Grossman, *Another Sarbanes-Oxley: Threatening Small Businesses with the "Beneficial" Ownership Bill*, Legal Memorandum, No. 48, October 6, 2009, p. 5 available at <http://www.heritage.org/Research/legalissues/lm0048.cfm> (detailing numerous questions about what the phrase "beneficial ownership" could mean).

<sup>3</sup> The *mens rea* term "intentionally," which is used in two of the offenses created in this section, also fails to provide adequate protection for would-be defendants as that term has also been held by courts to not require a specific intent to violate the law. *E.g., Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217, 1224 (7<sup>th</sup> Cir. 1981).

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.

Third, NACDL objects to the inclusion of a criminal provision in S. 569 because there is no justification for why a “paperwork” violation, particularly a first-time violation, requires a criminal penalty. 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.”<sup>4</sup> 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 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 those costs and produce financial benefits without guaranteeing business failure and job losses.

In addition to our opposition to the inclusion of a criminal provision with weak *mens rea* protection in S. 569, NACDL is also troubled by provisions of S. 569 that would impose government-mandated reporting obligations on members of the legal profession. Moreover, we strongly oppose any obligation that would erode the attorney-client privilege or that would create a conflict between a lawyer’s legal obligations and a lawyer’s ethical obligations to his or her client. On these issues, we adopt the ABA’s comments as set forth in their June 30, 2009 letter.

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 these reasons, NACDL opposes S. 569 and urges you to do the same.

Respectfully,

Cynthia Hujar Orr  
President, National Association of Criminal Defense Lawyers

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<sup>4</sup> Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 (1952).