BANK POLICY INSTITUTE

American Bar Association Opposes Anti-Money Laundering Efforts. Objection!

By Greg Baer

Last week, the American Bar Association released a letter opposing H.R. 2513, the Corporate Transparency Act (Maloney D-NY), a bipartisan proposal that would end the creation of anonymous shell companies, which are routinely used to facilitate money laundering, terrorist financing and other criminal activities. The bill is simple and straightforward and would require newly incorporated businesses to provide basic information about their largest owners to the Treasury Department. H.R. 2513 is strongly supported by a wide and diverse variety of groups, including the Fraternal Order of Police, the FACT Coalition, the National District Attorneys Association, Delaware Secretary of State Jeffrey W. Bullock, and the Main Street Alliance (a small business advocacy group), to name a few. These supporters recognize that the bill would impose minimal requirements on businesses yet provide law enforcement and national security officials an important and much-needed tool to track criminals and their activities.

The ABA's opposition letter contains several factual inaccuracies and misleading statements – the top seven are listed below.

1. BURDENSOME REPORTING REQUIREMENTS

- **ABA Letter:** "Section 3 of the bill would require small businesses with twenty or fewer employees and gross receipts or sales of $5 million or less to disclose detailed information about their beneficial owners—including their names, dates of birth, addresses, and passport or driver's license numbers—to FinCEN and then update that information continuously during the lifespan of those businesses."

- **Response:** The letter misleadingly suggests that there is a large volume of additional "detailed" information that must be disclosed, but the listed items – name, date of birth, address, and a unique identifying number (e.g. passport or driver's license number) – are the sum total of requirements for owners of covered businesses. It is simply inaccurate to suggest that this information is overly detailed or "would impose burdensome and costly" requirements; consumers and businesses provide such information every day to perform a range of mundane tasks (e.g., purchase an airline ticket, open a deposit account).

  It is also false to state that the information must be updated "continuously"; rather, the bill states that this information is to be submitted to FinCEN at incorporation and annually thereafter.

2. INEFFECTIVENESS OF THE BILL IN FIGHTING MONEY LAUNDERING, TERRORIST FINANCING AND OTHER CRIMES

- **ABA Letter:** "In addition, the legislation would not be effective in fighting money laundering, terrorist financing, or other crimes."

- **Response:** The government agencies responsible for fighting money laundering, terrorist financing and other crimes have expressed support for beneficial ownership legislation. This statement is unsupported by any analysis or explanation, and runs exactly counter to the views of the Treasury Department, Federal Bureau of Investigation, Fraternal Order of Police, National District Attorneys Association, and over 60 national security experts, as well as organizations that fight human trafficking and protect human rights around the world.

3. CREATES A MASSIVE GOVERNMENT DATABASE

- **ABA Letter:** "The bill would require FinCEN to maintain this sensitive personal information in a massive government database and to disclose it upon request to any federal, state, tribal or local governmental agency or to any foreign law enforcement agency if certain conditions are met."

- **Response:** This is hyperbole; the database would only include basic identifying information for significant owners. Moreover, it would be substantially smaller than the suspicious activity report (SAR) database already administered by FinCEN, where a new SAR, containing much more detailed information than is contemplated by the bill, is filed every few seconds.

4. POTENTIAL FOR MISUSE

- **ABA Letter:** "FinCEN would also be required to disclose the information to any financial institution with 'customer consent.' But because financial institutions will likely require all customers to provide such consent when opening new accounts, the beneficial owners' identities and other personal information will be freely shared not just with the financial institutions, but also with any other affiliates or third parties that the institutions decide to reference in their customer agreements. As this personal information is shared with more and more entities, the potential for misuse will grow exponentially."

- **Response:** Financial institutions are already required to gather all this information, and then some, to comply with the Bank Secrecy Act. H.R. 2513 would simply mean that multiple financial institutions would not have to gather the same information for the same customer. Access would be limited to law enforcement and to financial institutions only to verify ownership and would not be shared with "third parties."

5. THE FEDERAL GOVERNMENT ALREADY COLLECTS BENEFICIAL OWNERSHIP INFORMATION

- **ABA Letter:** Together, both FinCEN's new CDD rule and the IRS' SS-4 Form provide the federal government with extensive beneficial ownership information on almost every business entity in the United States (i.e., almost all entities with a bank account or at least one employee.)

- **Response:** This statement is entirely false. FinCEN's CDD rule generally requires banks and other financial institutions to identify and verify the beneficial owners of corporate customers that directly or indirectly own 25% or more of the company and at least one individual with "significant responsibility to control" the company, but this information is *not* reported to the government.

  In addition, as noted by the ABA, the IRS's SS-4 Form only requires the designation of a "responsible party" within a business. This contact could be a secretary or a receptionist, which is far weaker than the CDD rule's beneficial owner reporting requirement. As a result, it does little to combat the illicit use of shell corporations, as there is not a requirement to identify *beneficial owners*, who "can provide law enforcement with key details about suspected criminals who use legal structures to conceal their illicit activity and assets."[1]

6. IMPOSING INDIRECT OBLIGATIONS ON LAWYERS AS "APPLICANT[S]"

- **ABA Letter:** "Many lawyers and law firms that help clients to form companies could also be subject to these burdensome disclosure and recordkeeping requirements and to the bill's severe penalties for non-compliance because many of the bill's requirements apply to any "applicant" who files an application to form a corporation or LLC under state law, a broad term that would include many lawyers involved in the entity formation process."

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1 *See* 81 Fed. Reg. 29400.

- **Response:** This point assumes that if an applicant for incorporation employs a lawyer, then the lawyer is an applicant as well, and would have to comply with all the obligations imposed on the client. But that is patently false. For example, under the ABA's reading, a lawyer filing taxes for a company would also be responsible for the payment of the tax. The legislative history also disproves this interpretation, as previous iterations of the bill imposed obligations on "formation agents" – a term that might include lawyers – that have since been removed and are not found in H.R. 2513.

7. IMPOSING NEW OBLIGATIONS ON LAWYERS

- **ABA Letter:** "The ABA opposes key provisions in the [bill] that would require small corporations and limited liability companies (LLCs) and many of their lawyers to submit information about the businesses' 'beneficial owners'…"

- **Response: The bill imposes no such direct obligation on lawyers**. Lawyers are nowhere mentioned in the bill. Rather, it requires a newly incorporated business to list its largest owners, which can easily be done without consulting a lawyer. If the lawyer is otherwise handling the incorporation, that lawyer may assist in filling out this information as well, just as lawyers assist clients with a wide range of other reporting obligations imposed by law. In all such work, lawyers are subject to liability if they knowingly assist in a fraud; this area would be no different.