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December 9, 2011

The Honorable Jim Sensenbrenner
Chairman
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
2138 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

The Honorable Bobby Scott
Ranking Member
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
2138 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

Re: Hearing on H.R. 1823, the "Criminal Code Modernization and Simplification Act of 2011"

Dear Chairman Sensenbrenner and Ranking Member Scott:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I am writing concerning the hearing, scheduled for Tuesday December 13, 2011, on the "Criminal Code Modernization and Simplification Act of 2011," and to express the views of the criminal defense bar regarding some of the provisions therein. NACDL is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing.

1660 L Street, NW, 12th Floor, Washington, DC 20036 | Phone 202-872-8600 | Fax 202-872-8690 | E-mail assist@nacdl.org

NACDL is pleased that you are shining a spotlight on some of the problems with our federal criminal code and initiating a dialogue on how to address these problems. We certainly see the benefit in eliminating duplicative and overlapping offenses from the code, as well as purging the code of statutes that are not or have not been utilized by prosecutors. This will undoubtedly decrease the size and complexity of the federal criminal code, a goal that NACDL and many other organizations from the right and the left strongly support. As our own reform proposals demonstrate, we share your desire to bring more clarity, uniformity and specificity to our federal criminal code and welcome the opportunity to support the development and enactment of legislation to that effect.

It is from that perspective, and with these goals in mind, that we are writing to share our concerns with some of the provisions in H.R. 1823. As this bill is very technical, and the amendments it makes to the federal code are quite numerous and substantial, we must note that the following commentary and analysis is limited to the specific provisions discussed and in no way represents implicit approval of any portions of the bill that we have not addressed. As you meet to discuss and hear testimony on this bill, we ask you to carefully consider our concerns.

In seeking to shorten, clarify and bring more uniformity to the federal criminal code, H.R. 1823 makes several global changes that impact all offenses codified in Title 18. Of these global changes, NACDL is particularly concerned with the weakening of *mens rea* requirements through the replacement of "willfully" with "knowingly," the penalty increases in the conspiracy statute, the blanket application of "attempt" to all offenses, and the deletion of fines as a possible punishment in nearly all offenses. In addition, NACDL opposes the addition of new criminal offenses to the more than 4,450 already scattered throughout the 50 titles of the federal code.[1] Such additions reflect a disturbing trend that NACDL, along with organizations on the right and the left, have labeled overcriminalization, and certainly undermines the stated principle that this bill be policy-neutral.

I. Weakening of *Mens Rea* Requirements

Many federal criminal offenses are lacking in the clarity that should be required before depriving a citizen of his or her liberty. Weak, inadequately protective *mens rea* requirements permeate the federal criminal code and are increasingly common in offenses outside the realm of traditional criminal law, causing an overall decrease in fair notice. Whereas fair notice of illegality can reasonably be imputed to the average person for crimes like murder and robbery, the same cannot be said for offenses that prohibit conduct that is not inherently evil or necessarily wrongful, such as paperwork and regulatory offenses. It is an obvious injustice to punish an individual for conduct that is not inherently wrongful if he did not know, and had no reasonable prospect of knowing, that his conduct was prohibited by law.

An adequate *mens rea* requirement serves the critical function of compensating for such fair notice deficiencies. Accordingly, for the average, law-abiding citizen, a strong *mens rea* requirement may be

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[1] While NACDL has not yet identified all the new criminal offenses proposed by this bill, we have identified the following new offenses to be added to Title 18: § 171 – Protection of unborn children; § 172 – Partial-birth abortions prohibited; 785 – Fraudulent use of credit card; § 899 – Voting Rights Act violations; § 900 – Prevention of intimidation in fair housing cases; and §951 – Tobacco products as nonmailable.

the only protection he or she has from being criminally prosecuted and punished under a vague statute prohibiting conduct that no reasonable person would know is unlawful. It is therefore essential that the drafting of criminal offenses be done carefully, with a critical eye to the proper *mens rea* requirement for the particular conduct at issue. This is especially so when the conduct is broadly defined and the terms are subject to different interpretations.

It is for all these reasons that this bill's global replacement of the *mens rea* requirement "willfully" with the substantially weaker term "knowingly" is deeply disturbing. Such arbitrary changes will, without question, put innocent individuals at risk of criminal prosecution. Because the term "knowingly" provides no greater clarity than the term "willfully," this replacement will not produce any appreciable benefits, and certainly none that outweigh the costs.

As Chairman Sensenbrenner has previously noted, the federal courts have set forth varied definitions of the *mens rea* terms commonly used in federal offenses.[2] Whereas "willfully" is considered a word of many meanings, so too is the word "knowingly;" its precise definition varies from court to court and, sometimes, from statute to statute. Some courts have defined "knowingly" as conduct done voluntarily and intentionally, not because of mistake or accident. Other courts have stated that "knowingly" requires the defendant to act with knowledge of the facts that constitute the offense. Still others embrace a combination of definitions, requiring an awareness of either one's conduct or the facts constituting the offense. While it can be said that, at a minimum, "knowingly" requires voluntary and intentional conduct, whether and what it requires in addition to that ultimately varies by jurisdiction.[3]

Despite these definitional issues, from the perspective of protecting innocent, law-abiding citizens, NACDL believes that the term "willfully" is better than the term "knowingly." Federal courts have held that, at a minimum, "willfully" requires proof that a person acted with knowledge that his conduct was, in some general sense, unlawful. The use of "willfully" in a statute is a mechanism for separating those who act knowingly *and* with a bad purpose, from those who lack that bad purpose. This mechanism is critical both for protecting innocent actors who make every attempt to comply with the law as well as for punishing those who are truly culpable—individuals who engage in conduct knowing that it is unlawful. When an offense involves broad, vaguely defined conduct or complex rules and regulations, the term "knowingly" is inadequate to protect all innocent, law-abiding actors.[4]

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[2] *See* John McCaslin, *Inside the Beltway, 'Willful Deletion,'* Wash. Times, Mar. 31, 2009, *available at* www.washingtontimes.com/news/2009/mar/31/inside-the-beltway-14883180/ (last visited Nov. 29, 2011).

[3] However, case law allowing "willful blindness" to substitute for knowledge casts doubt on this threshold definition of "knowingly." Willful blindness, also known as conscious avoidance, is a judicially-made doctrine that expands the definition of knowledge to include closing one's eyes to the high probability that a fact exists. *See Global-Tech Appliances, Inc., et al. v. SEB S.A.,* No. 10-6, slip. op. at 10-14 (U.S. May 31, 2011) (affirming the doctrine of willful blindness in both civil and criminal settings and outlining its two basic requirements as "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.").

[4] *See generally* 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.

A blanket replacement of one term for another in the federal criminal code is likely to result in some unintended consequences and is especially dangerous in the context of *mens rea* requirements. Selecting the proper *mens rea* requirement necessitates careful consideration of the relationship between the prohibited conduct and the sufficiently culpable intent. Any change to a *mens rea* requirement should be offense specific, not one-size-fits-all. Whereas "knowingly" may be an appropriate *mens rea* requirement for some offenses, it may be entirely inappropriate for others.

Adding clarity and uniformity to the federal criminal code is an important goal, but it cannot be achieved by simply replacing the term "willfully" with the term "knowingly" everywhere it appears. This change adds no clarity to the code and may fail to protect innocent law-abiding citizens who, lacking any bad purpose or mal-intent, happen to run afoul of the law. Reform of the federal criminal code is possible, but the global replacement of "willfully" with "knowingly" will be a step in the wrong direction.

II. Unwarranted Penalty Increases for Conspiracy

The federal criminal code currently includes a general conspiracy charge at 18 U.S.C. § 371. This statute prohibits conspiring to commit any offense against the United States and conspiring to defraud the United States. Violations of § 371 are punishable by a fine, up to five years imprisonment or both, unless the underlying offense is a misdemeanor and then the punishment shall not exceed the maximum punishment of the misdemeanor. This bill proposes two changes to this conspiracy statute, one a significant improvement and the other an unwarranted alteration of its penalty structure.

The bill seeks to remove the conspiracy statute from § 371 and set forth an amended conspiracy statute at 18 U.S.C. § 5. This amended conspiracy statute is narrowed significantly from existing law; the language prohibiting conspiracy to commit another offense is maintained, but the language prohibiting conspiracy to defraud the United States is deleted. The offense of conspiring to defraud the United States has been subject to much criticism,[5] dating back to 1949 when Justice Jackson declared that "[t]he modern crime of conspiracy [under § 371] is so vague that it almost defies definition," and warned that "loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."[6] As proposed, the charge of conspiracy would be tied to an offense proscribed by statute and not based on some amorphous, undefined conduct. This change would be a notable improvement and would provide much more clarity to federal criminal law and protection to innocent, law-abiding citizens.

Unfortunately the proposed conspiracy statute also makes unwarranted changes to the penalty structure for punishing conspiracy. Whereas conspiracy is currently punished by fines, up to five years imprisonment or both, the new provision would make conspiracy to commit any federal offense subject

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[5] In his famous article on the subject, Professor Goldstein explained that "'conspiracy' and 'defraud' have assumed such broad and imprecise proportions as to trench [on] constitutional prohibitions against vagueness and double jeopardy." Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L. J. 405, 408 (1959). Further, he concluded that until the scope of that offense was limited, "'conspiracy to defraud the United States' will remain on the books as a Kafkaesque crime, unknown and unknowable except in terms of the facts of each case—and even then, not until the verdict has been handed down." *Id.* at 463.

[6] *Krulewitch v. United States*, 336 U.S. 440, 455-59 (1949) (Jackson, J. concurring).

to the same penalty as the completed offense. This proposal is at odds with the sound policy of most states to impose reduced liability for uncompleted offenses and the provision in the U.S. Sentencing Guidelines distinguishing between conspiracy and completed offenses.[7] Further, no evidence has been offered to justify this spectacular, wholesale increase in punishment that will undoubtedly produce many unintended consequences.

NACDL recognizes that some offenses in the federal criminal code explicitly provide the same punishment for conspiracy as the completed offense, but in each instance Congress has made a conscious decision to specify that penalty structure for that particular offense. We further recognize that conspiracies to commit federal drug offenses are uniformly subject to the same penalties as the completed offenses, but that policy—particularly respecting mandatory minimum penalties—has been the subject of extensive criticism. Extending this policy to mandatory minimums contained elsewhere in the U.S. Code will exacerbate the unwarranted sentencing uniformity that plagues these statutes and undermines the Sentencing Guidelines. And, rather than making the decision for each individual offense, this proposal inappropriately subjects all offenses to the unwarranted and troubling policy decision that conspiracy should, in all instances, be subject to the same penalties as the completed offense.

III. Arbitrary Application of "Attempt"

NACDL objects to the application of attempt to all federal criminal offenses and making attempt to commit any federal offenses subject to the same penalties as the completed offenses.[8] This dramatic, across-the-board expansion of federal criminal liability and punishment is not only arbitrary, but it will undoubtedly produce many unintended consequences. Moreover, there is no evidence that such a blanket provision is even needed or that federal prosecutors are hamstrung by the current law. Even if attempt is not specified in the statute, many uncompleted federal crimes will be subject to the conspiracy laws and some crimes (e.g., federal mail fraud or wire fraud) do not require completion of the underlying scheme.

Currently, the federal criminal code does not include a general statute proscribing attempts to commit federal criminal offenses. Rather, where Congress wishes to criminalize attempt, it writes it into that particular statute. Omission of attempt from a particular statute therefore reflects a conscious legislative decision that attempt prosecutions are not warranted. Blanket application of attempt to all federal criminal offenses bypasses this critical offense-by-offense decision-making process that should

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[7] *See* U.S. Sentencing Guidelines Manual § 2X1.1(b)(1)-(2) (providing a three level decrease for attempt or conspiracy unless the defendant or co-conspirator completed all the acts necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant or conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control). Acknowledging that some instances of attempt or conspiracy are distinct from the completed offense, the background commentary to § 2X1.1 states: "Sometimes, however, the arrest occurs well before the defendant or any co-conspirator has completed the acts necessary for the substantive offense. Under such circumstances, a reduction of three levels is provided under §2 X1.1(b)(1) or (2)." U.S. Sentencing Guidelines Manual § 2X1.1 cmt. background.

[8] As proposed, "attempt" would be codified at 18 U.S.C. § 6.

take place before any conduct is criminalized. Finally, these concerns are further heightened when it comes to penalties. Whereas "attempt" is not an appropriate charge for some offenses, punishing attempt in the same manner as the completed offenses is completely unjustified.

NACDL does not believe the need for this provision has been adequately demonstrated, nor the dangers it poses adequately considered. The scope of the federal criminal law—covering everything from murder to making mistakes while filling out regulatory forms—provides a strong argument for determining the appropriateness of attempt liability on an offense-by-offense basis. In addition, the dangers described in the previous section discussing conspiracy apply with equal force here; punishing attempt in the same manner as the completed offense is arbitrary and, especially with regard to mandatory minimums, will increase the unwarranted sentencing uniformity that plagues the federal criminal code and undermines the Sentencing Guidelines.

IV. Unnecessarily Limiting and Confusing Sentencing Options

In organizing and re-stating the federal criminal offenses contained in Title 18, this bill deletes fines as a possible punishment in nearly all offenses. This change is not only deeply troubling in the context of the Sentencing Reform Act of 1984[9] and in light of our pressing need to reduce imprisonment due to overcrowding and stressed resources, but it has the potential to cause great confusion when read in conjunction with Chapter 227 of Title 18, governing sentences. For these reasons, NACDL opposes the global deletion of criminal fines as a possible penalty from nearly all the re-stated offenses in this bill.[10]

When Congress enacted the SRA, it considered fines to be a real standalone punishment and sought to provide judges with the discretion to use fines, as well as community service and probation, more often. In discussing this point, the Senate Report accompanying the SRA explained:

> Current law is not particularly flexible in providing the sentencing judge with a range of options from which to fashion an appropriate sentence. The result is that a term of imprisonment may be imposed in some cases in which it would not be imposed if better alternatives were available. In other cases, a judge might impose a longer term than would ordinarily be appropriate simply because there were no available alternatives that served the purposes he sought to achieve with a long sentence.

S. Rep. 98-225, at 37 (1983). Further, the SRA created fines as a standalone sentence in the statutes relevant to sentencing, 18 U.S.C. §§ 3571-74, and the statute outlining the duties of the U.S. Sentencing Commission, 28 U.S.C. § 994(a)(1)(A)-(B). As Congress itself recognized when enacting the SRA, criminal fines are an important sentencing tool. Global deletion of criminal fines as a possible punishment is not only contrary to the SRA, but it will unnecessarily limit critical sentencing options.

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[9] The Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) [hereinafter "SRA"].

[10] To the extent the intent of this global deletion was not to remove fines as a possible punishment, but instead to simply the language of the offenses, we would recommend amending Chapter 227 of Title 18 to explicitly provide for the application of fines as a possible penalty, as a standalone punishment or in addition to probation or a term of imprisonment, despite the omission of this as a possible penalty in the language of the offense.

Our federal prisons are overcrowded and the resources supporting them are stressed. Given our national economic climate and current debt levels, increased costs related to incarceration are extremely troubling. Now is not the time to remove fines as a tool for judges to use in appropriate cases, nor is it the time to hamstring judges into sentencing individuals to prison when fines are the better, more efficient alternative. The global deletion of criminal fines as a possible penalty will prevent judges from fashioning effective sentences and will significantly increase the burden on the taxpayer by ballooning the already rising costs of incarceration in the United States.

Finally, this bill fails to reconcile this global deletion of fines with the provisions of Chapter 227 of Title 18, governing sentences. Absent changes to these sentencing statutes, this bill will create unnecessary confusion over the types of sentences available. As currently drafted, the bill is unclear on the proper treatment of fines. One could read the bill to treat fines in the same manner as probation—a penalty that can be imposed instead of prison and regardless of whether the statute of conviction only lists imprisonment as the punishment. However, this bill appears to make a distinction between offenses—expressly leaving fines as a possible punishment for some, while deleting fines from most. This calls into question whether fines can or should be treated in the same manner as probation.

NACDL opposes the global deletion of fines as a possible punishment because it is contrary to the SRA, unnecessarily limits judicial discretion and sentencing options, and will undoubtedly result in more individuals being incarcerated for an even longer time. Further, the deletion of fines in the large majority of offenses, as compared to the inclusion of fines in a small number of offenses, establishes a distinction without any discernable justification. This distinction combined with the failure to amend Chapter 27 will cause further confusion. In order to meet the goals of clarifying and providing more uniformity to the federal criminal code, NACDL recommends that the bill expressly state that fines are a possible punishment either alone or in addition to other sentencing options.

<u>Conclusion</u>

Thank you for considering our views. We stand ready to assist you and your staff in improving the clarity, uniformity and specificity of the federal criminal code.

Respectfully,

Lisa Wayne
President

Cc: Members of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security