

September 30, 2022

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

The Honorable Alex Padilla
United States Senate
112 Hart Senate Office Building
Washington, DC 20510

Re: Opposition to ENABLERS Act Amendment to the FY 2023 National
Defense Authorization Act

Dear Senators Feinstein and Padilla:

We submit these comments on behalf of the California Lawyers Association (CLA). CLA has approximately 72,000 members and is one of the largest statewide voluntary bar associations in the United States. CLA's mission is promoting excellence, diversity, and inclusion in the legal profession and fairness in the administration of justice and the rule of law. For the reasons discussed below, CLA urges opposition to inclusion of the ENABLERS Act either (1) as an amendment to the Senate's version of the FY 2023 National Defense Authorization Act (NDAA), or (2) in any final negotiated package with the House of Representatives.

1. The ENABLERS Act amendment would undermine the attorney-client privilege and the confidentiality of attorney-client communications.

The ENABLERS Act amendment would broaden existing law to add new classes of persons to the definition of a "financial institution" covered by the Bank Secrecy Act (BSA), including lawyers providing a variety of legal services for their clients. The legislation aims to impose anti-money laundering (AML) requirements on so-called "gatekeepers." The version of the ENABLERS Act amendment passed by the House of Representatives would require the Secretary of the Treasury, not later than one year after the date of the enactment, to issue a rule to determine what persons fall within the new class of persons defined as a "financial institution" and to prescribe appropriate AML requirements. The rule would include persons involved in several specified activities, many of which directly involve lawyers and the legal advice they provide to their clients. These persons would then be subject to AML requirements that could include, among other things, filing Suspicious Activity Reports (SARs) concerning their clients' transactions and other activities, thereby disclosing privileged and confidential client information.

The ENABLERS Act amendment would have a nationwide impact, as similar laws exist in other states, but we focus here on California law. California Evidence Code section 954 provides that the client has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by (a) the holder of the privilege, (b) a person who is authorized to claim the privilege by the holder of the privilege, or (c) the person who was the lawyer at the time of the confidential communication. Under California Evidence Code section 953, the client is the holder of the privilege. Under California Evidence Code section 955, the lawyer who received or made a communication subject to the lawyer-client privilege “shall claim the privilege” if they are present when the communication is sought to be disclosed and they are otherwise authorized to claim the privilege. Under California Business and Professions Code section 6068(e)(1), it is the duty of an attorney to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” Rule 1.6 of the California Rules of Professional Conduct provides that a lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) unless the client gives informed consent or the disclosure is permitted by the rule. Permissive disclosure under the rule follows the very narrow exception contained in Business and Professions Code section 6068(e)(2) and Evidence Code section 956.5, providing that a lawyer may, but is not required to, reveal confidential information relating to the representation of a client “to the extent that the lawyer reasonably believes the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.”

Requiring lawyers to file SARs concerning their clients’ financial transactions or other activities, and disclose privileged and confidential client information, is inconsistent with the attorney-client privilege, the lawyer’s duty to preserve the confidentiality of information relating to the representation of the client, and the right to effective assistance of counsel. A lawyer’s duty to preserve the confidentiality of client information involves public policies of paramount importance. As Comment [1] to Rule 1.6 of the California Rules of Professional Conduct states, in part:

Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights

and what is, in the complex of laws and regulations, deemed to be legal and correct.

Robust lawyer-client confidentiality is essential for an effective AML regime. But the ability of lawyers to communicate confidentially with their clients and then counsel them on how to fully comply with AML laws would be severely weakened if lawyers were required to file SARs (without the clients' knowledge or consent, due to the BSA's "no tipping off" rules) and report other privileged and confidential information. Such a measure would be highly counterproductive to fighting money laundering and could discourage clients from engaging in candid discussions and seeking legal advice from their lawyers.

Notably, there are ethical limitations on what lawyers may do when advising their clients. Paragraph (a) of Rule 1.2.1 of the California Rules of Professional Conduct provides that a lawyer "shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal." Under California Evidence Code section 956, there is no privilege if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud. But SARs can be triggered by "suspicious" activity that is not criminal, fraudulent, or the violation of any law. Indeed, financial institutions are not obligated to decline to facilitate "suspicious" transactions, the vast majority of which involve no illegality, yet covered institutions must report such activity to the government. Extending the BSA to lawyers would mean that lawyers would have to file SARs concerning their clients, even though the narrow exception to the duty of confidentiality does not apply and even when a "suspicious" activity would not require the lawyer to decline to counsel the client.

If the ENABLERS Act language is enacted and lawyers are required to file SARs concerning their clients' activities, thereby divulging privileged and confidential client information to the government, fundamental legal principles will be severely undermined.

2. The ENABLERS Act amendment would conflict with and undermine judicial branch regulation and oversight of the legal profession.

Enacting federal legislation that requires lawyers to file SARs concerning their clients' activities would conflict with and undermine longstanding state judicial branch regulation and oversight of the legal profession. For centuries, lawyers have been regulated and disciplined primarily by the highest court of the state in which the lawyer is licensed or authorized to practice.

With respect to California specifically, the State Bar of California is a judicial branch agency and an administrative arm of the California Supreme Court. The State Bar of California's functions include the licensing, regulation, and discipline of attorneys, ultimately subject to the California Supreme Court's primary and inherent regulatory authority over and responsibility for the discipline of attorneys licensed or authorized to practice in California. By imposing special AML-related requirements on lawyers (including filing SARs) that conflict with legal and ethical obligations established by the state, the ENABLERS Act would undermine this regulatory authority.

3. The sweeping changes proposed by the ENABLERS Act require hearings and careful consideration as standalone legislation.

The ENABLERS Act amendment proposes sweeping changes to federal law affecting the legal profession, potentially impacting the vast majority of lawyers in the United States (as well as many other persons who would be covered by the ENABLERS Act). Notwithstanding these changes, and the problems discussed above, this legislation has not yet been the subject of hearings or congressional debate.

At a minimum, the ENABLERS Act amendment (which is not germane to the NDAA) should be fully vetted as standalone legislation. Attachment of the ENABLERS Act amendment to the NDAA could bypass careful consideration of issues surrounding the attorney-client privilege, confidentiality, and the right to effective assistance of counsel without the benefit of hearings and a full debate.

For all of these reasons CLA urges opposition to inclusion of the ENABLERS Act either (1) as an amendment to the Senate's version of the FY 2023 National Defense Authorization Act (NDAA), or (2) in any final negotiated package with the House of Representatives.

We appreciate your consideration of our comments.

Sincerely,



Oyango A. Snell
CEO and Executive Director



Jeremy M. Evans
President