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The Honorable Charles E. Grassley
Chairman
United States Senate
Committee on the Judiciary
135 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Orrin Hatch
President Pro Tempore
United States Senate
Committee on the Judiciary
104 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Bob Goodlatte
Chairman
U.S. House of Representatives
Committee on the Judiciary
2309 Rayburn House Office Building
Washington, D.C. 20515

The Honorable James Sensenbrenner
U.S. House of Representatives
2449 Rayburn House Office Building
Washington, DC 20515

Re: Mens Rea Reform Act of 2015 (S. 2298), and Criminal Code Improvement Act of 2015 (H.R. 4002)

Dear Senators Grassley and Hatch, and Representatives Goodlatte and Sensenbrenner:

On behalf of the New York City Bar Association (“the City Bar”) we respectfully write to express our concerns regarding the Mens Rea Reform Act of 2015 (S. 2298) and the Criminal Code Improvement Act of 2015 (H.R. 4002). The Mens Rea Reform Act was introduced by Senator Hatch and is pending in the Senate Judiciary Committee. The Criminal Code Improvement Act was introduced by Representative Sensenbrenner, and was approved by the House Judiciary Committee by voice vote on November 18, 2015.

We have two principal concerns that we would like to bring to your attention. First, while some lawmakers have suggested that mens rea reform must accompany any legislation to enact criminal justice reforms, we believe the issue of mens rea reform can and should be addressed separately. In particular, the desire for mens rea reform need not, and should not, hold up enactment of the bipartisan sentencing reform bills, S. 2123 and H.R. 3713, that are now before Congress.

Second, we believe that the current mens rea reform proposals sweep too broadly and, if enacted, would cause great uncertainty and unintended harm to public health and safety. This is particularly true since the current proposals would have retroactive effect, and create a default mens rea standard that would apparently be applicable to many existing offenses, even though the courts in many instances have given careful consideration to the appropriate level of mens rea for the particular offense. A default mens rea standard applicable to future offenses created by Congress may well be appropriate and would not cause the same problems.

Thus, the City Bar believes that mens rea reform should not be considered without careful study and consideration, and then only in a targeted manner. In that connection, Section 109 of the Sentencing Reform and Corrections Act of 2015 (S. 2123), which mandates an inventory and analysis of federal criminal offenses, could provide a necessary and prudent first step for reform.

A. INTRODUCTION AND SUMMARY

The City Bar, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign countries. It includes among its membership lawyers in many areas of law practice, including present or former federal prosecutors as well as lawyers who represent defendants in criminal cases. The Federal Courts Committee is charged with studying and making recommendations regarding substantive and procedural issues relating to the practice of civil and criminal law in the federal courts.

The City Bar recently issued a comprehensive report on the problem of mass incarceration, entitled “Mass Incarceration: Seizing the Moment for Reform.” The report called on Congress and the state legislatures to make reduction of mass incarceration a top priority, including by repealing or reducing mandatory minimum sentences, expanding sentencing alternatives to incarceration and the availability of rehabilitative services during and following incarceration to reduce recidivism and better enable individuals to successfully reenter society, and providing opportunities for individuals with misdemeanor and non-violent felony convictions to seal those records.¹ The sentencing reform bills currently before Congress, if enacted, would make significant progress towards the goals of reducing the current high levels of incarceration and promoting fairness and justice. We have therefore strongly supported passage of these bills, with only minor exceptions or modifications, as reflected in our letter to you dated December 8, 2015.²

Since the sentencing reform bills were reported by the Senate and House Judiciary Committees, bills aimed at mens rea reform have been introduced. Some lawmakers have taken the position that mens rea reform must be addressed alongside sentencing reform as part of a larger package of criminal justice reform. The City Bar believes that mens rea reform should not hold up passage of urgently needed sentencing reform, which is the product of careful consideration and bipartisan compromise.

¹ The City Bar’s Report on Mass Incarceration is available at http://www2.nycbar.org/pdf/report/uploads/Mass_Incarceration_Seizing_the_Moment_for_Reform-20150928.pdf.

² A copy of that letter is available at <http://www2.nycbar.org/pdf/report/uploads/20073012-TheSentencingReformandCorrectionsActof2015FEDCOUR12.8.15.pdf>.

We recognize that there may be legitimate concerns regarding the adequacy of mens rea requirements in some federal criminal laws. However, as discussed below, the City Bar has serious concerns about the proposals to apply a default mens rea requirement retroactively to existing laws. These bills are overbroad, impose a high burden of proof, and could significantly interfere with important government enforcement goals. They also would introduce significant uncertainty as to the scope of existing laws, and could have unintended and harmful consequences to public health and safety.

Rather than attempt a single broad-brush fix that could cause significant harm, Congress should target mens rea reforms to laws where there is demonstrable and empirical evidence of a problem, *i.e.*, prosecutions and convictions in circumstances that Congress did not intend or that are unfair to defendants. The City Bar urges Congress to consider mens rea reform only *after* careful consideration of the results of the inventory of all federal criminal laws and regulatory offenses that Section 109 of the Sentencing Reform and Corrections Act would mandate. Going forward, with respect to prospective legislation, Congress should institute policies and practices that ensure that Congress' intentions with respect to the applicable mens rea standard are plainly reflected in criminal statutes and that there is regular and clear oversight by Congress over regulations that impose criminal penalties.

B. THE CURRENT PROPOSALS

1. The Mens Rea Reform Act of 2015 (S. 2298)

The Senate bill would import a default mens rea standard—that the defendant must have acted “willfully”—into all federal laws and regulations that are punishable by imprisonment and/or a criminal fine of \$2,500, whenever the text does not otherwise specify a state of mind for any element of the offense.³ This standard would require that the government prove that a defendant “acted with knowledge that the person’s conduct was unlawful” as to most elements of an offense.⁴ The bill would apply both retroactively to existing criminal offenses as well as prospectively to future laws that impose criminal penalties.⁵

The exceptions authorized by the bill are very limited. First, the bill excludes “any offense that involves conduct which a reasonable person would know inherently poses an imminent and substantial danger to life or limb.”⁶ Second, while recognizing that Congress may authorize strict liability offenses, the bill would apply the default mens rea standard unless the text of a particular statute makes clear that Congress affirmatively intended not to require the Government to prove any state of mind with respect to an element; the bill expressly provides

³ The bill also defines the term “knowingly.” The bill provides that, if the element of the offense involves the nature of the conduct or the attendant circumstances, “knowingly” means that the person is aware that the conduct of the person is of that nature or that such circumstances exist, or, if the element involves a result of the conduct, that the person is aware that it is “practically certain that the conduct will cause such a result.” Section 2(a).

⁴ Elements that go to subject matter jurisdiction and venue are exempted. Section 2(d)(B).

⁵ The bill would not apply retroactively in circumstances where a defendant would be prejudiced, when a jury has been empanelled or a first witness sworn, or where a sentence has been imposed following a guilty plea or plea of *nolo contendere*, in a prosecution commenced before enactment of the bill. Section 2(e)(B).

⁶ The bill also does not apply to laws that govern military justice and military commissions. Section 2(a).

that the mere absence of a mens rea requirement shall not be construed as affirmative congressional intent to authorize a strict liability offense. Third, the bill would generally supersede existing judicial precedent regarding mens rea requirements; the default standard would apply unless it would lessen the degree of mental culpability required to be proved under Supreme Court precedent or any statute.

2. Criminal Code Improvement Act of 2015 (H.R. 4002)

Section 11 of the Criminal Code Improvement Act similarly provides for a default mens rea requirement in federal criminal prosecutions. It provides that where no state of mind is specified by law for a federal criminal offense, the state of mind the government must prove is “knowing.” It also provides for a higher burden of proof of criminal intent “if the offense consists of conduct that a reasonable person would not know, or would not have reason to believe, was unlawful,” in which case the Government must prove that the defendant knew, or had reason to believe, that the conduct was unlawful.

C. THE CITY BAR’S PERSPECTIVE

The City Bar believes the current proposals sweep too broadly across a highly varied landscape of federal criminal statutes and regulatory offenses. Some have estimated that there are almost 4,500 federal statutory crimes and tens (perhaps hundreds) of thousands more federal regulatory offenses for which criminal penalties can be imposed.⁷ The current bills would impose a blanket proof-of-intent requirement retroactively on almost all criminal statutes and regulations that do not expressly state a mens rea requirement for each offense element, without regard to the purpose of these laws, Congress’ intent when it enacted these laws, or judicial precedents under which these laws have been construed for decades. There are many offenses where the courts have appropriately held, after due consideration, that no intent element is required with respect to a particular element of a criminal offense, but the proposed bills would reject these well considered decisions, without careful case-by-case consideration.

The default mens rea standard that is being proposed, moreover, imposes a much higher burden of proof than statutes and courts have historically required for criminal culpability. This is particularly true of the Senate bill, which would mandate proof beyond a reasonable doubt that the defendant acted “willfully”—that is, with the knowledge that his or her conduct was unlawful. The requirement of willfulness imposes a heightened burden of proof, which—depending upon how it would ultimately be interpreted—would risk overturning the basic principle that ignorance of the law is generally no defense to a criminal prosecution. While the default mens rea in the House bill is a lower “knowing” standard, the House bill would still impose a higher standard than currently required for many offenses, or for particular elements of many offenses.

While a strong intent requirement is appropriate (and already in place) for many criminal statutes, a heightened proof-of-intent standard applied across the board is unwarranted and could

⁷ *The Adequacy of Criminal Intent Standards in Federal Prosecutions: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (January 20, 2015) (statement of Stephen Saltzburg on behalf of the American Bar Ass’n), at 1-2.

cause substantial harm. As the Department of Justice has explained, imposing this standard to all offenses in the U.S. Code would severely weaken laws that were enacted for the purpose of protecting public welfare, health and safety, and would frustrate the enforcement of such laws as the Clean Air Act, the Clean Water Act, the Federal Food, Drug, and Cosmetic Act, the Federal Mine Safety and Health Act, and the Occupational Safety and Health Act. These bills also would undermine Congress' determination to impose the burden on companies who profit from activities that have the potential for causing injury, death or damage to public health and safety to conduct their activities strictly in accordance with the law.⁸

Moreover, the current proposals would unnecessarily introduce substantial uncertainty about the scope of existing criminal laws. They would lead to years of litigation, about the precise meaning of “willfully,” about which statutes contain adequately-stated mens rea requirements, and about which statutes prohibit conduct that “a reasonable person would know inherently poses an imminent and substantial danger to life or limb” or that “a reasonable person would not know or would not have reason to believe was unlawful.” These bills could thus have the ironic effect of undercutting one of the very goals of mens rea reform – to provide clarity and fair notice of criminal prohibitions.

We recognize that there are legitimate concerns about the adequacy of criminal intent standards in some federal criminal laws, and does not dispute that the issue is worthy of further study. But mens rea reform should not be a one-size-fits-all proposition that sweeps aside a more nuanced assessment of intent requirements for all existing and prospective federal criminal laws. Rather, mens rea reform should be guided by careful evidence-based consideration of individual statutes—their purpose, conduct prohibition, and penalties, as well as a historical analysis of prosecutions and convictions.

Accordingly, the City Bar urges that if Congress wants to go forward with mens rea reform, it should take a more targeted approach based on the results of the inventory of federal criminal offenses that would be mandated by Section 109 of the Sentencing Reform and Corrections Act currently before Congress. That section would require the Attorney General and the heads of executive agencies to provide an inventory of all criminal statutes and regulatory offenses and their criminal penalties, including analysis over the last 15 years of the number of violations referred to the Department of Justice for prosecution; the number of prosecutions brought; the number of convictions that have resulted; the number of convictions that have resulted in imprisonment; the average length of sentence of imprisonment; the mens rea requirement for the criminal statutory offense; and the number of prosecutions for which the Department of Justice was not required to prove mens rea as a component of the offense. The inventory would provide a treasure trove of data to assist Congress in determining which statutes and regulations may require reform.

In addition, the City Bar believes that Congress can and should take prophylactic steps to avoid inadvertent erosion of mens rea requirements. For example, automatic referral of all criminal legislation to the Judiciary Committees of the House and Senate, according to one study by the Heritage Foundation and the National Association of Criminal Defense Lawyers, could

⁸ See *The Adequacy of Criminal Intent Standards in Federal Prosecutions: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (January 20, 2015) (statement of Leslie Caldwell, Ass't Attorney Gen., Crim. Div.), at 5.

improve the clarity of criminal legislation and provide more consistent consideration of mens rea standards.⁹ Regular review of regulatory criminal offenses by Congress would also help to ensure that criminal regulations, including any mens rea requirements, are consistent with Congress' intent and delegation. We believe, however, that the current efforts to enact mens rea reform should not be permitted to hold back the bipartisan effort underway in the Congress to enact significant and meaningful sentencing reforms. The need for these sentencing reforms is far too urgent to delay them in hopes of enacting broad-based mens rea legislation.

D. CONCLUSION

We urge Congress to pass the bipartisan sentencing reform bills reported by the Senate and House Judiciary Committees and to consider mens rea reform separately *after* a full review of the inventory of federal criminal offenses that would be authorized by that legislation.

Respectfully,



Ira M. Feinberg, Chair
Federal Courts Committee

Cc: U.S. Attorney General Loretta E. Lynch
Vice President Joseph R. Biden
Majority Leader Senator Mitch McConnell
Democratic Leader Senator Harry Reid
Majority Whip Senator John Cornyn
Democratic Whip Senator Richard J. Durbin
Speaker of the House Representative Paul D. Ryan
Majority Leader Representative Kevin McCarthy
Democratic Leader Representative Nancy Pelosi
Majority Whip Representative Steve Scalise
Democratic Whip Representative Steny Hoyer
Ranking Member of the Senate Judiciary Committee Patrick Leahy
Ranking Member of the House Judiciary Committee John Conyers
New York Congressional Delegation

⁹ Brian W. Walsh and Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, at XII, 20 (May 5, 2010).