

July 24, 2002

American Civil Liberties Union
National Association of Criminal Defense Lawyers
Families Against Mandatory Minimums

Re: Oppose Creating a General Attempt Crime in Financial Responsibility Bills

Dear Conferees on the Corporate Responsibility Legislation (S. 2673, H.R. 3763 and H.R. 5118):

We, the undersigned organizations, are writing to urge that you oppose Section 7 of H.R. 5118, which is now being considered in conference negotiations with Senate Bill S. 2673 the “Public Company Accounting Reform and Investor Protection Act of 2002” and H.R. 3763 the Public Company Accounting Reform and Investor Protection Act of 2002.” This ill-considered provision would make “attempt” and “conspiracy” to commit **any** federal offense **subject to the same penalties as the completed offense**. This dramatic, wholesale expansion of federal criminal liability and punishment will undoubtedly produce many unintended consequences and should be the subject of thorough committee review and debate.

Federal criminal law **does not** include a general statute proscribing attempts to commit all of the substantive crimes in the Federal Criminal Code. If Congress wishes to criminalize an attempt, it writes the statute to proscribe both the attempt and the completed offense. Thus, the fact that attempt is not included in a particular statute has to date reflected a considered legislative decision that attempt prosecutions are not warranted.

Federal criminal law covers crimes ranging from minor regulatory offenses to murder. Federal criminal law also includes firearms offenses and gambling offenses. Authorizing attempt liability for the entire U.S. Code may present due process concerns because a person could be held criminally liable for conduct that they would not be on notice was criminal. For example, if a person from Maryland attempts to purchase a handgun from a Virginia firearms dealer, and the dealer informs him of the law prohibiting the transaction, has that person committed the crime of attempted purchase of a handgun by a non-resident?

There is no evidence that federal prosecutors are unable to adequately prosecute crimes under 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. We do not believe the need for this legislation has been adequately demonstrated, nor the dangers adequately considered.

This proposal is at odds with the sound policy of most states to impose reduced liability for uncompleted offenses. See Paul Robinson, *The Role of Harm and Evil In Criminal Law*, 1994 J. Contempt. Legal Issues 299, 320 (1994). The U.S. Sentencing Guidelines likewise distinguish between completed and attempted offenses (see USSG §2X1.1).

While we recognize that the same penalties that apply to completed federal drug offenses also apply to attempts and conspiracies to commit federal drug offenses, that policy has been the subject of extensive criticism, especially in regards to mandatory sentencing policy. 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. We oppose extending this policy to other crimes that have mandatory penalties, such as firearms offenses. It is unfair for someone convicted of attempted firearms possession, attempted gambling or attempted tax evasion to automatically receive the same sentence as if they had committed the underlying offense.

We urge you to strike this provision from the bill. Congress should not be rushing to make such a wholesale change to the law so quickly. For more information, please contact Rachel King at (202) 675-2314.

Thank you for your attention.

Sincerely,

Laura Murphy, Director
Washington Office of the American Civil Liberties Union

Irwin Schwartz, President
National Association of Criminal Defense Lawyers

Julie Stewart, President
Families Against Mandatory Minimum