LEGISLATIVE PROPOSALS FOR A MORE EFFICIENT FEDERAL FINANCIAL REGULATORY REGIME

HEARING

BEFORE THE

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

OF THE

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U.S. HOUSE OF REPRESENTATIVES

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LEGISLATIVE PROPOSALS FOR A MORE EFFICIENT FEDERAL FINANCIAL REGULATORY REGIME

Thursday, September 7, 2017

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS
AND CONSUMER CREDIT,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2128, Rayburn House Office Building, Hon. Blaine Luetkemeyer [chairman of the subcommittee] presiding.

Members present: Representatives Luetkemeyer, Rothfus, Royce, Lucas, Posey, Pittenger, Barr, Tipton, Williams, Love, Trott, Loudermilk, Kustoff, Tenney; Clay, Maloney, Scott, Velazquez, Green, Ellison, and Crist.

Also present: Representatives Hill and Sinema.

Chairman LUETKEMEYER. The Subcommittee on Financial Institutions and Consumer Credit will come to order.

Without objection, the Chair is authorized to declare a recess of the subcommittee at any time.

Today's hearing is entitled, "Legislative Proposals for a More Efficient Federal Financial Regulatory Regime."

Before we begin today, I would like to thank the witnesses for appearing. We appreciate your participation and look forward to a productive discussion. Some of you have been here before, so we thank you for your return engagement. I guess you didn't get scared off or get intimidated by us, so you are ready to come forward. Thank you.

I now recognize myself for 3 minutes for an opening statement. Today, our subcommittee will continue in its quest to bring about a more reasonable Federal financial regulatory system. We will have the opportunity to examine six bills authored by Representatives Loudermilk, Trott, Royce, Hill, Tenney, and me that will better allow financial companies to serve their customers.

From banks and credit unions to credit reporting agencies and attorneys, we have seen an impeded ability for businesses across the Nation to offer financial services and guidance. Collectively, these bills will streamline regulatory requirements and eliminate inefficiencies that ultimately have the greatest impact on the American consumer.

Included in today's hearing is H.R. 3312, my Systemic Risk Designation Improvement Act. This legislation, introduced with five

Republicans and five Democrats from this committee, aims to improve the manner in which financial institutions are regulated by more closely tying the designation of systemically important financial institutions, or SIFIs, to actual risk in the financial system. My legislation replaces the inflexible, arbitrary $50 billion threshold for designation with a series of well-established standards that more accurately measure systemic importance. Specifically, this legislation requires the Federal Reserve to review an institution's size, interconnectedness, suitability, substitutability, global cross-jurisdictional activity, and complexity.

An inefficient regulatory system based exclusively on arbitrary thresholds can have real economic consequences. The current SIFI standard has led to marketplace disruption and penalized companies for size alone, rather than business activities and other important factors that actually impact risk.

As I said before, it is past time to demand a reasonable regulatory structure that fosters opportunity. The American people deserve economic freedom and the ability to control their own financial future. They shouldn't continue to suffer from Washington, D.C.'s top-down approach and micromanagement.

I want to thank my colleagues for participating in today's hearing and for introducing legislative proposals that will help revitalize the financial system. We have a distinguished panel, and I look forward to your testimony.

The Chair now recognizes another gentleman from Missouri, the ranking member of the subcommittee, Mr. Clay, for 5 minutes for an opening statement.

Mr. CLAY. Thank you, Mr. Chairman, especially for holding this hearing to review legislative proposals intended to improve our Federal financial regulatory regime.

And thank you to each of the witnesses here today for providing insight on these proposals.

While the 2008 financial crisis may seem like a long time ago for many, I was here when it happened, and I will never forgot that we crafted the Dodd-Frank Act to ensure that this country never faces anything like that again. The financial crisis should have taught Congress to proceed very cautiously before rushing to roll back regulations.

While improvements can always be made, an efficient Federal financial regulatory system should not just mean less or no regulation. An efficient system is one that actually works. And by that, I mean laws and regulations should support a strong financial services sector, but they should also protect consumers and promote stable economic growth. Consumers who are harmed by wrongdoers deserve adequate compensation. Consumers making large purchases, like buying a home, deserve to be given accurate, timely, and easy-to-understand disclosures. Consumers should not be duped by misleading materials about future financial obligations or about outstanding debts.

That being said, I am concerned that many of the proposals that will be discussed today would modify or otherwise gut some key existing consumer protections in Federal financial services, laws like the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, and the Truth in Lending Act. So, as we evaluate these proposals, I encourage my colleagues to be mindful that any efficient regulatory regime must minimize harm to consumers, and that any policies that we enact should not come at the expense of the consumers that we serve. The policies should also strengthen, not weaken, financial stability so we don't have another costly financial crisis because, in the end, I believe that strong regulatory enforcement, standards, and consumer protection laws help to maintain the safety and soundness our Nation's financial institutions as well as create economic opportunity for businesses and consumers.

Thank you again to each of today witnesses. And I yield back the balance of my time.

Chairman LUETKEMEYER. The gentleman yields back.

I now recognize the gentleman from California, Mr. Royce, for 1 minute.

Mr. ROYCE. Thank you very much, Mr. Chairman.

One of the bills before us today is my draft legislation, the Credit Services Protection Act, which will improve consumer access to credit monitoring and credit education services. The Credit Repair Organizations Act (CROA) was first enacted in 1996 to combat the predatory practices of credit clinics who promised consumers they could clean up their credit, often with very exorbitant fees attached to that. Preventing fraudulent credit repairs should remain the focus of this important Act. The law, however, outgrew its original Congressional intent. Judicial interpretation brought credit bureaus and others offering monitoring or education services under CROA's strict liability regime additional obstacles that have frustrated consumers, including the mandated 3-business-day waiting period which precedes access to education and credit scores and credit reports.

So the draft bill before us today addresses the unintended consequences of CROA, allowing the provision of credit education and identity protection services in a consumer-friendly manner with close oversight and enforcements by the FTC. We should be promoting financial literacy and financial success, not hindering its delivery.

Thank you, Mr. Chairman.

Chairman LUETKEMEYER. The gentleman's time has expired.

I now recognize the gentleman from Michigan, Mr. Trott.

Mr. TROTT. Thank you, Mr. Chairman, for holding this important hearing on a series of bills, specifically H.R. 1849, the Practice of Law Technical Clarification Act. This limited, targeted, and commonsense bill clarifies that attorneys engaged in litigation should not be subject to interference by Federal agencies.

Americans should be very proud of our independent judiciary. In the United States, attorneys are held accountable by presiding judges, State bars, and opposing counsel. This delicate balance has served our country well for centuries. It ensures that all Americans, no matter who they are, can receive justice. We must protect this system against any attempts to tilt the scales of justice by interference with our independent judiciary.

When the lawyer exclusion was eliminated in 1985, the bill's sponsor, a Democrat, noted the intent was not to regulate lawyers in the courtroom but to do so in the backroom. My legislation clarifies this intent. The American Bar Association has endorsed H.R.

1849, calling it narrowly tailored, and confirms it will only exempt creditors' lawyers engaged in litigation activities. I ask unanimous consent that their letter be made a part of the record.

Chairman LUETKEMEYER. Without objection, it is so ordered.

Mr. TROTT. Thank you, Mr. Chairman.

I look forward to a robust and constructive discussion about this bill and how we can reform the Fair Debt Act to serve its original intent.

I yield back my time.

Chairman LUETKEMEYER. The gentleman's time has expired.

With that, opening statements are finished, and we would like to welcome our guests today: Ms. Anne Fortney, partner emerita, Hudson Cook, LLP; Mr. Charles Tuggle, executive vice president and general counsel, First Horizon National Corporation, on behalf of the American Bankers Association; Mr. Thomas Quaadman, executive vice president, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce; and Ms. Chi Chi Wu, staff attorney for the National Consumer Law Center.

Thank you.

And before we get started here, I would like to recognize the gentleman from Tennessee, Mr. Kustoff, for the purpose of making a brief introduction of one of our distinguished guests today.

Mr. KUSTOFF. Mr. Chairman, thank you.

It is my honor and privilege to introduce Mr. Charles Tuggle, who is joining us here to testify on behalf of the American Bankers Association. Since 2008, Charles Tuggle has served as executive vice president and general counsel of First Horizon National Corporation, which is the parent company of First Tennessee Bank and FTN Financial, which is headquartered in my district in Memphis, Tennessee.

In his current role, Mr. Tuggle is responsible for overseeing all legal matters for the company, which includes compliance with securities, corporate, and banking laws. Mr. Tuggle first joined FTN Financial as chief risk officer in 2003. He has spent his entire career in the Memphis area, beginning for 30 years with the Baker Donelson law firm as a chairman and chief executive officer, one of the most prominent law firms in our region and in the country.

I have to tell you that I've known Mr. Tuggle for many years, and I am pleased to have him join us today to discuss these important matters that he will be testifying about. I can think of no one more qualified as a chief legal officer for the bank than Charles Tuggle and First Tennessee Bank as the largest asset base in the State of Tennessee. It is very important to Memphis and very important to Tennessee.

Mr. Tuggle, thank you so much for being here today. I look forward to your testimony.

Mr. Chairman, I yield back the remainder of my time.

Chairman LUETKEMEYER. The gentleman yields back.

With that, I want to thank each of the witnesses again for being here today. You will each be recognized for 5 minutes to give your oral presentation of your testimony. And without objection, each of your written statements will be made a part of the record.

Just to give you a little tutorial on our lighting system here: green means go; you have 4 minutes to speak at the end of that.

The yellow light means you have 1 minute to sort of wrap up, finish up. And red means I have the gavel, and we may have to stop the proceedings. But hopefully everybody will be within the timeframes and keep it to that, and we will be glad to extend it, if needed.

Ms. Fortney, you are recognized for 5 minutes.

Welcome.

STATEMENT OF ANNE P. FORTNEY, PARTNER EMERITA, HUDSON COOK, LLP

Ms. FORTNEY. Thank you very much. I am very pleased to be here before this subcommittee and have the opportunity to testify on these bills. I have more than 40 years of experience as a lawyer in the consumer financial services field, including 8 years of service with the Federal Trade Commission. I have worked as in-house counsel at a retail creditor and later in counseling clients on compliance with consumer protection laws. My experience includes testifying before this committee on behalf of the Federal Trade Commission on the Fair Debt Collection Practices Act. I have testified in Federal courts and before this committee on the Fair Credit Reporting Act. And I have worked with the FTC and Congressional staff on the scope and operation of the Credit Repair Organizations Act (CROA).

Thus, I have witnessed firsthand the consumer benefits and compliance challenges of each of these laws. I will discuss three bills which relate to my background and experience: the Credit Services Protection Act draft bill; H.R. 1849, the Practice of Law Clarification Act of 2017; and H.R. 2359, the FCRA Liability Harmonization Act. Each of these bills involved laws that were enacted to address industry practices that cause substantial injury to consumers in the consumer financial services field.

Industry representatives supported the enactment of each of these bills. In fact, CROA was enacted at the urging of the consumer credit industry. There is still universal support for these laws and for their essential protections for consumers. By and large, these laws have accomplished the purposes for which they were enacted. So what is the problem?

Over the years, some courts have interpreted the laws in a manner that is inconsistent with the Congressional intent and sometimes even with commonsense. Let's take CROA first. It is designed to deal with credit repair. But some courts, especially the Court of Appeals for the Ninth Circuit, have said that credit repair includes any product or service that possibly helps consumers improve their credit or prevent deterioration. This would include services that millions of consumers already use, such as credit monitoring and identity protection. Not surprisingly, such a peculiar definition of credit repair has hurt the development and delivery of new and innovative products even when studies have shown that consumers want and benefit from these services. Congressman Royce's draft would solve this problem by creating a regulatory framework for authorized credit service providers to offer personalized credit education and identity theft protection services under the watch of the Federal Trade Commission. Despite rhetoric to the contrary, the bill leaves intact CROA's protections against credit repair.

Next, we have the courts saying the practice of law by a licensed attorney filing a lawsuit on behalf of a client is debt collection and subject to the Fair Debt Collection Practices Act. No. Debt collection and the practice of law are two different things, and this is especially true when an attorney who is filing a lawsuit on behalf of a client is engaged in litigation.

Preparing documents for litigation and communicating in connection with the litigation are very different activities from sending dunning letters and calling debtors. In addition, attorneys in litigation are subject to standards of conduct overseen by local courts and any State bar, while a debt collector is not. For these reasons, the Fair Debt Collection Practices Act originally exempted attorneys from its coverage. However, a few attorneys abused that exemption in debt collection practices, not in the practice of law.

Testifying on behalf of the FTC in 1985, I urged Congress to clarify the scope of the attorney exemption. Instead, Congress eliminated it.

H.R. 1849 would do what the FTC suggested 32 years ago: create a narrow exemption for attorneys to the extent that they are practicing law and litigating on behalf of a client.

Finally, H.R. 2359 would bring the FCRA in line with other titles of the Federal Consumer Protection Act by placing a cap on class action awards and eliminating punitive damages. The FCRA was amended to provide for statutory damages for violations of the Act. The problem is that some courts, particularly the ninth circuit, have read willful out of the statute and allowed claims to proceed against small and large companies alike for mere technical violations, violations where there are no damages.

Time does not permit me to detail the problems that these three bills would address or the ways in which these bills would bring common sense and fairness into the law. For this reason, I hope your questions will enable me to provide a more complete picture of why I believe Congress should enact each of these bills. Thank you.

[The prepared statement of Ms. Fortney can be found on page 44 of the appendix.]

Chairman LUETKEMEYER. The gentlelady yields back.

With that, we recognize Mr. Tuggle. He has a very high bar to attest to here as a result of that glowing introduction from Mr. Kustoff.

So we look forward to your testimony, Mr. Tuggle.

STATEMENT OF CHARLES T. TUGGLE, JR., EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, FIRST HORIZON NATIONAL CORPORATION, ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION

Mr. TUGGLE. Thank you. Chairman Luetkemeyer, Ranking Member Clay, and members of the subcommittee, I am Charles Tuggle, and I am the executive vice president and general counsel of First Horizon National Corporation. First Horizon is a $30 billion institution, 153 years old, headquartered in Memphis. We have 170 bank branches in 8 States in the southeast, and we offer a full range of banking services. Our fixed income business operates nationwide, serving banks and other financial institutions. Later this year, following receipt of regulatory approvals, we plan to merge with another southeastern bank, increasing our assets to $40 billion and doubling our branches.

I appreciate the opportunity to present the views of the ABA on several important bills. Our industry and its regulators both acknowledge that regulations have overshot their mark, imposing unintended costs on consumers, businesses, and the economy. We support Congressional efforts to make common-sense adjustments without compromising systemic stability.

The three bills I will discuss today will help us meet the needs of our customers. The ABA is very supportive of H.R. 3312. It would eliminate the arbitrary dollar threshold for designation as a SIFI and instead would establish a process for identifying and regulating systemic institutions based on the nature of their business, not simply their size.

Under current law, institutions over $50 billion are subject to much higher levels of regulation, regardless of the real risk they might pose to the financial system. This arbitrary size threshold has needlessly trapped many banks without any risk to the system, handcuffing their abilities to provide needed credit and other services to their communities.

For a bank like mine, soon to have $40 billion in assets, the prospect of crossing the $50 billion threshold is very troubling. It will trigger much greater expense and will be a significant drain on existing resources. The fact that we are growing means that we are successfully meeting the needs of our customers. Good business decisions should not be hijacked by arbitrary cutoffs that bear no relationship with danger to the financial system.

H.R. 3312 takes an important step forward to benefit our economy. It helps tailor and focus supervisory oversight to promote safe and sound banking and to protect against systemic risk. We urge support of this legislation.

ABA also supports the Community Institution Mortgage Relief Act, introduced by Representative Tenney. This bill would provide relief for smaller lenders and servicers with regard to escrow practices. Smaller institutions have an excellent track record providing high-quality mortgage services, even with limited staff and resources. The small scale combined with high compliance cost makes it more expensive for smaller lenders to offer escrow services. Existing regulatory efforts to provide relief from escrow mandates have resulted in a complicated and confusing hodgepodge of requirements, which makes compliance difficult. This legislation seeks to simplify and provide some relief, goals we support.

The bill could be improved to enable regulators to adjust the rules to address changing market conditions through regulation rather than hardwiring limitations and thresholds. The ABA appreciates the efforts by Representative Hill to address the many unanswered questions about liability and compliance under TRID. The complexity of the regulations, the intricacy of the TRID disclosure forms, and the infinite number of scenarios involved in mortgage finance create a situation where inadvertent mistakes in compliance are unavoidable. Without clarity on liability, lenders and investors will avoid exposure, which will reduce product choice and increase costs for borrowers. Ultimately, it is the home buyer who bears the added cost and inconvenience of a cumbersome and confusing process with slower times to closing.

The TRID improvement legislation is an important first step, but there are many more steps needed to provide clarity under the rules. We stand ready to work with the committee in developing further legislation.

In conclusion, the ABA believes that common-sense proposals are desperately needed. It will make our regulatory system more efficient and effective. Doing so would free up scarce resources for banks and help regulators focus on where TRID risks truly lie.

The three bills we will discuss today make significant advances. More can and needs to be done, and ABA stands ready to assist in this process.

[The prepared statement of Mr. Tuggle can be found on page 91 of the appendix.]

Chairman LUETKEMEYER. Thank you.

The gentleman yields back.

Mr. Quaadman, you are now recognized for 5 minutes.

Welcome.

STATEMENT OF THOMAS QUAADMAN, EXECUTIVE VICE PRESIDENT, CENTER FOR CAPITAL MARKETS COMPETITIVENESS, U.S. CHAMBER OF COMMERCE

Mr. QUAADMAN. Thank you, Mr. Chairman, Ranking Member Clay, and members of the subcommittee, and thank you for holding this hearing today.

In order for Main Street businesses to start and thrive, firms need access to a vibrant banking system, including fair and efficient consumer credit markets. Unfortunately, policies have moved away from that time-tested combination. Through an arbitrary threshold, regional banks and large community banks are under an enhanced regulatory scheme even though those banks don't pose a contagion threat or risk or danger to U.S. financial stability.

As a result, midsized and regional banks, which provide direct and indirect services to Main Street businesses, are faced with risk-based capital liquidity requirements, resolution plans, and enhanced stress tests. Rather than loaning money based on merit, decisions are made for regulatory compliance. A recent Harvard Business School study has linked the bank stress test to decreased small business lending.

In trying to resolve global issues, Main Street businesses were hit with the adverse consequences. Small business liquidity has dried up. The cost of capital has risen. And regulatory initiatives have created disincentives to helping the firms that drive growth.

A 2016 U.S. Chamber survey of over 300 corporate financial professionals found that almost four in five were affected by changes in financial markets; 50 percent identified increased capital charges as an obstacle to financing and raising costs; one-third of businesses see the situation worsening over the next 3 years; and compared with a similar 2013 study, businesses have severely contracted the number of banks that they are using.

A survey of 500 small businesses we released earlier this year in conjunction with Morning Consult found that a majority felt that access to capital has not improved over the past year; 50 percent of small businesses believe regulations are inhibiting lending; and 68 percent of businesses with less than 10 employees do not expect to take out another loan or line of credit in the next 4 years.

Studies by the Federal Reserve and the FDIC, and Community Reinvestment Act analysis found that small business lending in demand has not rebounded from the 2008 financial crisis. Loans at the $100,000 level have been particularly hit hard. Outdated laws or overbroad regulations have harmed consumer credit and reduced the effectiveness of consumer protections. This hurts a firm's customers, but also remember that startups use consumer financial products, credit cards, mortgages, and home equity lines of credit as the first means of financing a new business. All of this has added up to depressed business creation and economic growth rates that are persistently 30 percent below the historic norm.

Accordingly, last year, the U.S. Chamber and 120 State and local chambers from over 30 States sent a letter to Congress asking that small, medium, and regional bank reform be a priority. This subcommittee can make that a reality.

The Systemic Risk Designation Improvement Act, introduced by Chairman Luetkemeyer, would regulate regional and large community banks according to their risk profile. This bill uses existing Federal Reserve standards on interconnectedness, substitutability, complexity, and cross-jurisdictional activity. Creditworthiness, rather than compliance cost and stress test model, will determine if a business is eligible for a loan.

Those banks will be regulated, but in a smart and appropriate manner. Regulations will be aligned with a bank's activities and allow regional and large community banks to again deploy capital to Main Street in a responsible manner.

The Facilitating Access to Credit Act, drafted by Representative Royce, will bring CROA into alignment with the needs of a 21st Century consumer. This will allow a consumer to engage in credit monitoring and help them to combat identity theft.

The FCRA Liability Harmonization Act, introduced by Representative Loudermilk, will harmonize liability standards with other statutes such as the Electronic Fund Transfer Act, the Fair Debt Collection Act, the Equal Credit Opportunity Act, and the Truth in Lending Act. This will help ensure that consumers will be compensated for any violations and not enrich class-action lawyers.

The CFPB's TRID rule has caused uncertainty in mortgage markets, creating liability concerns, thus making it harder to issue mortgages to deserving customers. The TRID Improvement Act, introduced by Congressman Hill, will allow minor errors to be corrected and will create a cooling-off period. This will create certainty in the marketplace, making secondary markets and the overall mortgage markets much more efficient.

These three bills will help improve consumer protections and will assist startups to get the capital they need. The bills before us today provide a path forward that balances stability and growth. Access to capital will be restored to Main Street businesses, and protections would be aligned with consumer needs.

Thank you, and I am happy to answer any questions you may have.

[The prepared statement of Mr. Quaadman can be found on page 78 of the appendix.]

Chairman LUETKEMEYER. The gentleman yields back.

With that, we recognize Ms. Wu for 5 minutes.

Welcome.

STATEMENT OF CHI CHI WU, STAFF ATTORNEY, NATIONAL CONSUMER LAW CENTER

Mr. WU. Thank you, Mr. Chairman, Ranking Member Clay, and members of the subcommittee. I appreciate you inviting me to testify today regarding the six bills being considered at this hearing. I am testifying on behalf the low-income clients of the National Consumer Law Center. We oppose each of these bills because they will harm the interests of American consumers.

With respect to H.R. 2359, we are opposed because it would drastically reduce accountability for violations of the Fair Credit Reporting Act, a statute that is critical for protecting the financial reputations of ordinary Americans.

To explain our opposition, I want to talk about some of the folks who have had their reputations shredded by false information in their credit reports or background checks and whose legal recoveries would be limited by this bill. People like Angela Williams of Florida who spent 13 years fighting with Equifax to fix her credit report, which contained at least 25 negative accounts that didn't belong to her. She was wrongfully pursued by creditors and debt collectors and repeatedly denied credit due to Equifax's systemic failures to fix the errors in her credit report. Everyday workers like Richard Williams, who was repeatedly falsely labeled a criminal by First Advantage Background Services, costing him two jobs with the result that he was unemployed for most of a year and a half. And innocent Americans, like Sergio Ramirez, who, along with 8,000 other consumers in 49 out of 50 States, were misidentified as terrorists or drug dealers in their credit reports because TransUnion confused them with similarly named individuals from a government watch list.

Can you imagine the horrors that these consumers lived through, falsely accused of a being a criminal, a terrorist, a drug dealer, or a deadbeat? To paraphrase Shakespeare: Who steals my purse steals trash, but he that filches from me my good name makes me poor indeed.

Supporters of this bill have suggested that the FCRA violations are merely technical. There is nothing technical about being wrongfully labeled a criminal, a terrorist, or a deadbeat. That alone causes significant trauma and harm, but the consequences go beyond that. Inaccurate credit report or criminal history information deprives consumers of the ability to get credit, employment, rental housing, and more. H.R. 2359 would deny consumers, such as Angela Williams, Richard Williams, and Sergio Ramirez, the ability to seek full accountability for the outrageous violations of the Fair Credit Reporting Act that affected their lives. It would eliminate the ability to seek punitive damages, which has been a feature of the FCRA since its original enactment in 1970.

In cases such as Sergio Ramirez, where consumers have banded together in a class action to seek relief, H.R. 2359 would limit their recovery for both statutory damages and actual damages to $500,000, no matter how many thousands or millions of consumers were harmed or the extent of the losses created by the illegal conduct.

Eliminating the consequences for wrongdoers under FCRA would enable credit bureaus and background check agencies to blithely disregard protections meant to ensure accurate reporting. And notably the three major credit bureaus, Equifax, Experian, and TransUnion are often among the three top most-complained about companies to the CFPB every month, with the vast majority of complaints involving incorrect information on credit reports.

We also oppose the Credit Services Protection Act of 2017, which would exempt these big three credit bureaus from CROA. The exemption is unnecessary and harmful and would remove consumer protections when credit bureaus sell credit monitoring, identity theft prevention, and other products of questionable value.

Frankly, it is pretty nervy to propose this exemption, given that these products were the subject of enforcement action just this year by the CFPB for deceptive marketing practices, in which Equifax and TransUnion were ordered to pay refunds of $17.6 million, plus fines of $5.5 million. And Experian was ordered to pay a fine of $3 million. Instead of being covered by CROA, the bill substitutes weaker and less enforceable provisions governing authorized credit services providers. Unlike CROA, it doesn't include prohibitions against advanced fees; it also fails to require the full disclosure of the 3-day right to cancel, cannot be privately enforced, preempts State law and State attorney general enforcement, and could limit the CFPB's authority over credit bureaus. It could also allow illegitimate credit repair organizations to escape from CROA because approval is automatic after 60 days if the FTC doesn't act.

Finally, we oppose the four other bills that are the subject of the hearing, for the reasons stated in my written testimony. I thank you for the opportunity to testify and look forward to your questions.

[The prepared statement of Ms. Wu can be found on page 100 of the appendix.]

Mr. LUCUS [presiding]. The gentlelady's time has expired.

Without objection, the gentleman from Arkansas, Mr. Hill, and the gentlelady from Arizona, Ms. Sinema, are permitted to participate in today's subcommittee hearing. While not members of this subcommittee, Mr. Hill and Ms. Sinema are members of the full Financial Services Committee, and we appreciate their interest and participation today.

With that, the Chair now recognizes Mr. Pittenger for 5 minutes.

Mr. PITTENGER. Thank you, Mr. Chairman.

Mr. Quaadman, the CFPB claims that it wants to help lower- and middle-income consumers, yet the Bureau's own study on class-action lawsuit waivers shows that on average, consumers win more in arbitration versus class action lawsuits.

Mr. Quaadman, can you please relay to the committee what the CFPB found when they looked at the average dollar amount that consumers won in arbitration versus class action lawsuits?

Mr. QUAADMAN. Thank you for that question, Mr. Pittenger.

I am probably going to be off on the numbers just slightly, but I believe that the CFPB's own study found that, with individual lawsuits, with individual complaints, consumers were reimbursed to the tune of over $5,000; if it was a class action, it was somewhere around $30. We have actually asked the CFPB in trying to move forward with this arbitration rule that they have recently finalized that that is actually the exact reason why you have a cost-benefit analysis because that shows that arbitration—I am sorry—arbitration, the number is the other way—arbitration, people get $5,000 compensation, and the other way around, $30 with class action. So arbitration is actually a very firm way of making sure the consumer complaints are resolved.

Mr. PITTENGER. Yes, sir.

What other benefits do you see for arbitration over class action lawsuits for consumers? And why will the CFPB's arbitration rule be so harmful?

Mr. QUAADMAN. First, the costs of arbitration are borne by the company. The consumer does not face any of the costs with that. And, second, the time with getting the consumer complaint resolved through arbitration is much quicker than going into court. So it provides the benefit of giving consumers the benefit of getting their situation resolved and quickly. It also provides benefits to the taxpayer without having to clog up the court system.

Mr. PITTENGER. Yes, sir, thank you.

Ms. Fortney, a person's credit score is so critical to their quality of life, as you well know. Even a 20-point boost can mean a cheaper car loan or a mortgage. We should do everything we can, I am sure that you would agree, to protect access to services and products that help people improve their creditworthiness. I would like to say parenthetically that Representative Keith Ellison and I have a bill that will help consumers to reestablish their credit, by utilizing their mortgage payments, car payments, and utility payments to help build their credit score.

But, Ms. Fortney, I would agree with you that the Credit Repair Organization Act protects consumers from the claims of certain bad actors who falsely say that they can fix your credit overnight. With that said, you testified that the Facilitating Access to Credit Act does not jeopardize these protections. How well can consumers benefit from this legislation? What is going to be the impact on folks who need some education on getting their score to a better place?

Ms. FORTNEY. First of all, there is nothing in the draft bill that would interfere with CROA as it stands today. CROA will still remain intact to protect consumers from credit repair organizations and the false and deceptive claims they make. Secondly, contrary to what the NCLC has said, amending CROA in the way we have discussed will not in any way jeopardize the ability of the Consumer Financial Protection Bureau or the Federal Trade Commission to pursue companies that engage in unfair or deceptive acts or practices in the offering of any products or services. The cases that Ms. Wu mentioned were all brought under UDAAP statutes, not under CROA.

What this bill would do is create a new framework, under which companies could offer individualized consumer education services and other types of identity theft protection services to consumers without the fear that a court, particularly in the ninth circuit would say, oh, that is credit repair.

I have to say, I am just astonished that the courts have reached that conclusion. Because to me, there is a real difference between repairing something and helping consumers deal with the credit now and in the future. You take your car into the shop when it is broken, to be fixed, to be repaired. But you take your car to the dealer or to a gas station to be maintained. Those are two different things. One is retroactive; the other is prospective. So the courts have really strained to find that consumer education products and services and credit monitoring are repair, and actually what they are doing is helping consumers maintain and improve their credit.

And the reason we need this is today more than ever there are opportunities for consumers to see their credit scores and to know what is in their credit reports. The problem there though is the consumers say: "Yes, I now know I have a low credit score. How can I fix it? How can I improve it?"

Right now, as interpreted by the courts, CROA prevents these companies from offering this service. What this bill would do is create a framework under the close supervision—

Chairman LUETKEMEYER. The gentlewoman's time has expired.

Mr. PITTENGER. Thank you, Ms. Fortney. I appreciate your great input.

Chairman LUETKEMEYER. The Chair now recognizes the gentleman from Missouri, Mr. Clay, for 5 minutes.

Mr. CLAY. Thank you, Mr. Chairman.

While Ms. Wu's written testimony provides a few examples of innocent consumers harmed by violations of the FCRA who would be adversely impacted if H.R. 2359 were enacted, another consumer advocate shared a troubling story with the committee that I would like to get each of your reactions to. One of the major consumer reporting agencies was alerted at least 8 times over 2 years that it had mixed up a consumer's credit file with a different person who had the same name and a similar Social Security number, but who lived in a different State and had a bad credit record. Despite this, the CRA failed to correct the mistake, causing this person to be rejected for loans. The consumer eventually sued the CRA and a jury awarded her compensatory and punitive damages. The judge in the case said, "For 2 years Ms. Miller was frustrated, overwhelmed, angry, depressed, humiliated, fearful about misuse of her identity, and concerned for her damaged reputation. Equifax engaged in reprehensible conduct that caused real harm to Ms. Miller. Equifax should be punished financially for that wrongful conduct. The punitive damages award should be enough to deter Equifax from repeating this type of conduct in the future."

For each of you—I will start with Ms. Fortney—do you think punitive damages were appropriate in this case and can you please explain why innocent consumers should not be entitled to receive punitive damages from wrongdoers who willfully or recklessly fail to comply with Federal law?

Ms. FORTNEY. I was actually an expert witness on behalf of Equifax in this case. I am intimately familiar with the facts of that case. And I think, as you would see if you actually looked at all the testimony in that case, there were two sides of the story. Obviously, the court and the jury took the side of the plaintiff. There were very, very unusual circumstances in that case. And I agree; this individual was entitled to actual damages, if she could show and to the extent she could show, and she did show actual harm.

What I am concerned about is the attitude that you now need to send a message to a company that is doing everything it can to comply with the law and makes mistakes. We all make mistakes. And the whole question is, if you have the risk of punitive damages hanging over your head, you are not going to be as effective in delivering the products and services—

Mr. CLAY. But the damage was to the consumer.

Ms. FORTNEY. Yes.

Mr. CLAY. It hurt that person, Ms. Fortney, not Equifax because of their inaction.

Let me go on to Mr. Tuggle. Can you respond to this case? Are you familiar with it?

Mr. TUGGLE. I am not familiar with the case, Ranking Member Clay. I will have to tell you that my experience as a lawyer, and I have been doing this for 40 years now, is that you need to know all the facts before you can evaluate a situation.

Mr. CLAY. All right. That is fair enough.

Mr. Quaadman?

Mr. QUAADMAN. Thank you, Mr. Clay.

I am not aware of the facts of the case. However, just a couple of points to note: There are government agencies, such as the IRS, that have also misidentified consumers, and those people cannot, or it is very difficult for them to sue the government. So I think we need to take that into account.

I think you also make a larger point in favor of the bill, which is that it was an individual harm. This bill is looking to harmonize FCRA with all the other different credit reporting and consumer statutes that there are to put caps on liability and class action. So I don't think that—the consumer can still sue. The consumer can still recover damages and be made whole, even under the harmonization bill.

Mr. CLAY. All right.

Ms. Wu, do you have a response?

Mr. WU. Yes. Julie Miller absolutely was entitled to punitive damages. Equifax's errors caused her great trauma. She wasn't able to help her disabled brother get credit. The judge and the jury all agreed. And this bill, H.R. 2359, would snuff out her ability to get punitive damages. She would not have been able to get the recovery she did if this bill were in effect; neither would the other consumers I mentioned.

Mr. CLAY. Thank you. My time has expired.

Chairman LUETKEMEYER. The gentleman's time has expired.

With that, I recognize myself for 5 minutes.

I appreciate the comments so far, and I—it is interesting. I think we have a great group of bills here today that actually address a lot of issues that are of concern. I know the ranking member made a comment about rushing to change the system. And I don't think we are rushing here after 7 years of Dodd-Frank. Any bill that we have out there needs to be fixed, tweaked. Some things go too far;

some things don't go far enough. So I think it is important that we stop, take a look at a lot of these things, and try and fix some problems and inequities in our system.

I appreciate Ms. Fortney's comment a minute ago with regards to rules interpretation and enforcement with regards to inconsistent with the intent and common sense of what has been going on. So hopefully that is where these bills go.

I want to discuss a little bit with regard to my bill, the Systemic Risk Designation Improvement Act.

Mr. Tuggle, you know your bank is one of those banks that is getting ready to, as it grows, hit the threshold within which it is going to cost you a whole lot more money to be able to comply, to stay in business with all the extra restrictions and regulations. Can you address an issue, such as are you going to continue to try and grow and then hit that threshold and comply, or is this a deterrent to your growth and, therefore, a deterrent to continue to address the needs of your community?

Mr. TUGGLE. Thank you, Mr. Chairman. It will be a significant issue for us, considering future growth. We will soon be $40 billion. If our organic growth rates continue as they have been for the last few years, we will be looking at the $50 billion threshold well within 3 years. And if we saw another merger opportunity, it could accelerate from that point.

Here is the challenge: The decision that a bank like ours faces is, is it better for us to be a $49 billion bank or a $51 billion bank? And the answer is pretty clear: It is better to be a $49 billion bank from the perspective of expense regulation and effect on our company from an organizational perspective.

Chairman LUETKEMEYER. Okay. So the question is, when you tip over the threshold, do you become a different bank? Does your business model change? Does your risk model change? The only thing you have done is grow $2 billion more, from $49 billion to $51 billion.

Mr. TUGGLE. Correct

Chairman LUETKEMEYER. The point of my bill is that we take the systemic risk calculation of the Fed and use that to determine where we go with this rather than an arbitrary figure of $50 billion. While a $50 billion bank is a nice sized bank, it is not systemically important. Would you agree then?

Mr. TUGGLE. I totally agree with that. I can tell you that is a fact. The issue—let me say this about our bank, and I think we are representative of many banks across the country. We are $30 billion, soon to be $40 billion, but we are essentially a community bank. A community bank in our mind is a bank that takes deposits and extends credit to people in its marketplace, is its predominant line of business. That is what we do. We are not complex. I would like to think we are sophisticated, but we are not complex.

And we talked about this, Mr. Chairman. I can tell you that, if we were approaching $50 billion but we were only going to go slightly over it, I don't think we would do that. And there are consequences that are adverse to our communities for doing that. If we don't continue to grow organically, in particular based on the fact that customers want to do business with us, then we are not going to be able to extend the levels of credit that our communities—

Chairman LUETKEMEYER. So, basically, when you look at risk, which is what we should be looking at here, if you analyze the five different sets of criteria—and size is one of them—that determine whether you are systemically important and whether the risk that you are taking, your business model that you take—that you have, is something that can bring down the economy, and that is the definition of a systemically important institution.

Mr. Quaadman, before we get too far here, I really appreciate some of the data that you had with some of the surveys: 50 percent of small businesses have difficulty with access to capital. And we saw a dramatic decrease in small business lending as a result of the SIFI situation. Banks—or the midsized regional guys, which I addressed, basically they lend to midsized regional businesses, are having trouble, though those businesses are having trouble getting access to capital. Can you explain that a little bit more, go into more detail?

Mr. QUAADMAN. Sure. So the regional midsized and large community banks provide a lot of the small business lending. And what they also do is they are also liquidity providers to other smaller community banks that also are Main Street lenders as well. So what happens is, as First Horizon or other banks who are going to cross that $50 billion threshold, suddenly all the enhanced regulations and the Federal Reserve regulations that come upon them suddenly make those small business loans unattractive because they are a little riskier according to the regulator or whatever.

What is often forgotten is that that regional bank is going to know that customer, is going to have a much better idea as to who is worthy of getting a loan and who isn't. And, instead, we are seeing that it is more the compliance people, once you go over that $50 billion mark, instead of loan officers, who start deciding who gets loans.

Chairman LUETKEMEYER. So, instead of allowing the bank to decide its own risks, you have the regulators there deciding what risks to take. Is that what you are saying?

Mr. QUAADMAN. That is correct.

Chairman LUETKEMEYER. Thank you very much.

My time has expired. With that, we go to the distinguished gentleman from Georgia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, thank you.

First of all, I want to talk about the frivolous lawsuit situation. And let's be clear of the great value that class action lawsuits provide because there are—every day in the newspapers, we hear stories about abuses by our financial institutions.

But Mr. Loudermilk's bill seeks to strike a delicate balance here. I think, by the same token, our business community suffers from so many frivolous lawsuits that we must do something about that. And I think if there is one way of phrasing what Mr. Loudermilk's bill is doing—it is not taking away anybody's rights to class action—it is trying to come up with a balance that is fair to our financial community and our businesses, to be able to maintain class action but to be able to put a fair balance of a $500,000 cap, which is standard procedure that we have with other agencies in our Federal Government. And so I think that, as we look at this, we need to look at it with a jaundiced eye and make sure that we are doing both things: maintaining that class action right but, at the same token, being fair to those in the business area who have to work with this.

Now, before my time goes out, I do want to comment on Mr. Luetkemeyer's and my bill. I am proud to be a cosponsor of this bill. I have worked with him and my staff has worked with Mr. Luetkemeyer's staff to come up with this—$50 billion threshold in assets, which is something people picked up, and that is not the proper way of being able to determine what is a SIFI. These regional community banks and others should not be fed out of the same spoon as Goldman Sachs, as these other banks.

They should be judged, and this is what we are doing with our bill. We have a five-point criteria: Suitability, the competitiveness. What kind of risky behaviors are you in? Do you deal with derivatives? Do you deal with those complexities? And when you look at what the bank is doing, rather than arbitrarily taking a $50 billion threshold and laying it out there—that is not the right thing to do. And it is our job as the Financial Services Committee to put out laws and legislation that are fair and that are right. And our regional banks should not be put into the same class as Goldman Sachs. Goldman Sachs is a wonderful bank. Bank of America is a wonderful bank. But they deal in cross border. They deal in so many complex issues that they have a global impact. We should not apply that same standard to our regional banks and to those banks.

So I would like to ask two questions: First, if Mr. Loudermilk's bill became law, panelists, how could consumers take action if they allege a violation of the law?

Ms. FORTNEY. I would like to respond to that, please.

Mr. CLAY. Sure.

Ms. FORTNEY. I think they would still be able to take action. Under the Fair Credit Reporting Act, they could sue for actual damages. And as you indicated, they could also participate in class actions.

What would happen, though, is you would not have these ridiculous awards or settlements for statutory damages for highly technical and sometimes really dubiously technical violations of the Fair Credit Reporting Act. The other thing you would not have would be the ability of courts to assess punitive damages when I think the facts do not warrant it.

Ms. Wu mentioned the Ramirez case. Nobody at TransUnion or anyplace else said that any of the individual members of that class were terrorists. What they did was provide a copy of information from the OFAC list, which is produced by the United States Department of the Treasury to deal with terrorists and money launderers. All that list says is your name happens to be the same. It doesn't say you are a terrorist; it just says you as a creditor, including an auto dealer, must inquire further. This is a list—this is information provided by the Federal Government. And TransUnion was providing this as a service to the auto dealer. They weren't saying anything about the character of any of the 8,000 members of this class. There were no actual damages.

Chairman LUETKEMEYER. The gentleman's time has expired.

Mr. SCOTT. Thank you, Ms. Fortney.

Chairman LUETKEMEYER. I now recognize the gentleman from Pennsylvania, Mr. Rothfus, for 5 minutes.

Mr. ROTHFUS. Thank you, Mr. Chairman.

Mr. Tuggle, I want to follow up on a couple of the points that the chairman was making about the $50 billion threshold and taking a look at the proposed legislation. Now your bank, I understand, is approaching the $50 billion threshold or can be very soon.

Mr. TUGGLE. We will be $40 billion by year end.

Mr. ROTHFUS. If the Systemic Risk Designation Improvement Act is not enacted, that will mean that your bank will be a SIFI.

Mr. TUGGLE. Not at $40 billion, but we are on the way.

Mr. ROTHFUS. At $50 billion.

Mr. TUGGLE. At $50 billion, we will.

Mr. ROTHFUS. Does your bank pose a real risk to the stability of the financial system?

Mr. TUGGLE. In no way.

Mr. ROTHFUS. In your testimony, you talked about how, when you cross the $50 billion threshold, there is going to be more expense, a significant drain on resources. Have you tried to quantify that in terms of actual cost or personnel?

Mr. TUGGLE. We have not put specific numbers on that. Quick history, we had been working to grow for a number of years and had been installing systems to accommodate growth. But let me say to you that I have recently seen some work done by RBC Capital—I don't believe this would be our expense level, but RBC Capital says that, based on some peer studies it has done, it estimates that the one-time cost of just crossing from $50 billion to $51 billion are from $60 million to $80 million. And they estimate that the annual additional compliance cost for being a SIFI versus not being a SIFI is $40 million to $60 million. And then something we did look at is, if you are a SIFI, you are subject to the LCR rules. In our case, in looking at just that one additional rule, we believe we would lose $15 million to $20 million a year of net interest income to comply with that rule, which frankly—

Mr. ROTHFUS. Just to comply with all this added burden, rather than being a $50 billion bank, you might need to be a bank with much higher assets than that.

Mr. TUGGLE. Clearly, much higher assets than that.

Mr. ROTHFUS. Which raises the question that we have been seeing going on and rolling through the industry for the last 5, 6, 7, years about the consolidation going on. And that is why banks that are growing are, frankly, incentivized to merge and be acquired by other institutions. And we are losing a community bank or a credit union a day.

If you hit that threshold or got near that threshold, would that increase the likelihood or decrease the likelihood that you would be looking for some kind of transaction to be able to accommodate those expenses?

Mr. TUGGLE. It would mean that we would not look at, frankly, a small acquisition that might make sense for us to add assets and opportunities in markets because, if we were at $49 billion, adding a $2 billion bank debt makes no sense at all. If we had an opportunity to add a merger of equals, then we would be serious about that. But the consequence is, if we are at $49 billion—and as I say, we are a community bank. We are focused on the customers in our markets and business in our markets, and we do a good job of that. That is why we have been around for 153 years. Now, if we can go from $49 billion to $55 billion, then we can do more for our customers. We can extend more credit. We will have more resources available to help them. But if the cost of that is so great that growing means we actually will have less money to spend in the form of credit and investment in technology and investment in new people, then it makes no sense at all.

Mr. ROTHFUS. And it doesn't let your customers and clients grow with their businesses.

Mr. TUGGLE. It does not.

Mr. ROTHFUS. If I could switch to Mr. Quaadman, you spoke favorably in your testimony about H.R. 2359, the Fair Credit Reporting Liability Harmonization Act. Can you explain why you feel that there is a need to bring the FCRA in line with other financial consumer protection statutes?

Mr. QUAADMAN. Thank you very much, Mr. Rothfus. If we take a look at it, we have a collection of consumer credit bills there or legislation and the FCRA is the one outlier. So this is going to make sure that the liability regime for all of these is going to be the same. I think it is also important to note as well that, when the FCRA was passed in 1970, the class action borrower was not the problem that it was later on and that Congress consciously decided to put in these liability caps moving forward. So I think, as we have heard here, it is creating a balance where the consumer can be made whole if there is a violation or if there is a problem and that there can also be ways that businesses can have some certainty as well. So we believe it makes logical sense to pass the bill.

Mr. ROTHFUS. I thank the chairman, and I yield back.

Chairman LUETKEMEYER. The gentleman's time has expired.

The gentlelady from New York, Mrs. Maloney, is recognized for 5 minutes.

Mrs. MALONEY. Thank you. First of all, I want to thank the chairman and the ranking member for this hearing, and thank all of the panelists. And I just want to put this in perspective. The reason we passed Dodd-Frank was that we had a financial crisis that resulted in the loss of $15 trillion in wealth for families—people lost their jobs, their homes, their pensions—and that the root of this crisis was abuse of consumers. The Bureau of Labor Statistics and other economists came out and said this was the first financial crisis that was totally caused by mismanagement.

Yet, since we passed Dodd-Frank, under the Obama Administration and continuing now under the Trump Administration, this country's economy has created more than 16 million private sector jobs. That is absolutely great news. And business lending has increased 75 percent since Dodd-Frank was enacted into law. And our banks, both large and small, are continuing to post record profits and are—at least in my district, my credit unions are expanding their membership.

So this is good news about the American economy. We bounced back. And I question any attempts to reduce protections for consumers. And I would say that—and, if I may quote Chair Yellen, whom I hope President Trump will reappoint, "Although many small banks failed because of the weak regulatory system, Dodd-Frank was designed to combat the problems that triggered the financial crisis, and methodically implemented in a tiered and tailored manner so that only the largest financial firms have to comply with the bulk of new regulations. As such, the law has helped to level the playing field for smaller sized firms, including consumer banks and regional banks, while better protecting consumers and the broader economy."

So I did want to mention that since—that the economy has bounced back, and our banks are doing well, thank God, employing people and getting loans out.

But I have a series of questions. And I would like, first, to ask Ms. Wu. You said in your testimony that the Credit Services Protection Act would eliminate some of the CFPB's authority over credit bureaus. I would like you to elaborate on this. And, specifically, it was my understanding that the CFPB doesn't currently enforce the Credit Repair Organizations Act. Does this bill change this in any way?

Ms. WU. Thank you for the question, Congresswoman Maloney. What the bill says is that the FTC is the only entity that can enforce CROA with respect to authorized credit service providers, including credit bureaus. And so it could be interpreted to limit the CFPB's authority, even under its UDAAP authority, when it goes after the credit bureaus for products that are covered under the authorized credit services designation. It also says the authorized credit services provisions are only enforceable by the FTC, not by the consumer, not by the CFPB.

Also, just really quickly on the systemic risk bill, I am in complete agreement with what you said. And we would just like to point out that this legislation not only reverses Dodd-Frank; it goes further by putting unprecedented constraints on the Federal Reserve and that some of the banks that this legislation would have affected were similar to the ones that caused the financial crisis, such as Countrywide, Washington Mutual, Wachovia, and IndyMac.

Mrs. MALONEY. Okay. Also—my time is running out—but you said in your testimony that security freezes mandated by State law for identity theft are actually more effective than identity theft prevention products sold by credit bureaus. Why is this? And are security freezes all that we need to prevent identity from being stolen from our constituents and our residents?

Ms. WU. Thank you, Congresswoman Maloney, for the question. Absolutely. Security freezes are the best identity theft prevention measure. It locks down the report so the thief can't apply for new credit using the consumer's credit report. Credit monitoring closes the barn door after the horse has left. It detects the fraud after it happens. And so we have always said the best thing to prevent identity theft should be freezes and that these subscription credit monitoring products are not a great value.

Mrs. MALONEY. My time has expired. I have other questions that I will submit for the record.

Thank you, again, all of you, for your service.

And I would particularly like to hear from Ms. Fortney, but my time is up, as to whether or not you agree with Ms. Wu on the interpretation of the Credit Services Protection Act?

Ms. FORTNEY. I do not, but our time is up.

Mrs. MALONEY. Okay.

Chairman LUETKEMEYER. The gentlelady's time has expired.

With that, we go to the gentleman from California, Mr. Royce. You are recognized for 5 minutes.

Mr. ROYCE. Thank you, Mr. Chairman.

I think Congresswoman Maloney made a point there. Perhaps I could ask on my time.

Ms. Fortney, would you respond to the Congresswoman's question?

Ms. FORTNEY. I would be glad to. The Consumer Financial Protection Bureau has brought actions under its authority to deal with unfair or deceptive acts or practices. There is nothing in the Royce bill that addresses that at all, that would interfere with that in any way.

What the bill would do is simply let the FTC and consumers pursue the rights of consumers' protections for consumers, under the Credit Repair Organizations Act. It does not in any way interfere with the ability of the CFPB to enforce the law.

Mrs. MALONEY. Thank you.

And thank you, Mr. Chairman.

Mr. ROYCE. Thank you.

And I will continue with another point here. CROA is a law that protects consumers from the predatory practices of credit repair organizations. It does this by requiring written contracts, statutory disclosures, a cooling-off period, and a prohibition on prepayment. Under what we are doing here with the Credit Services Protection Act, what we propose is leaving CROA in place for credit repair while changing the regulatory regime for what? For credit education. That is the point. We have tried to strike the right balance, on one hand, offering a clear path to better financial literacy for consumers while maintaining the strong consumer protection by the FTC, by the CFPB, and by the State attorneys general.

So how would consumers continue to be protected under this provision? Can the bad actors that offer predatory forms of credit repair simply use this law to escape CROA liability? No. But I will ask Ms. Fortney if she wanted to—

Ms. FORTNEY. I would be glad to.

Mr. ROYCE. —opine.

Ms. FORTNEY. Because that is one of the misconceptions about this bill, that somehow companies that actually engage in credit repair could use this framework, this regulatory framework within the Federal Trade Commission to evade compliance with CROA. Actually, in order to be certified—registered as an authorized credit services provider, there has to be a determination by the Federal Trade Commission that you don't engage in credit repair.

And I can say that there is no agency or entity in America that is better qualified to determine whether somebody is engaging in credit repair or not. The FTC has successfully and vigorously enforced CROA for the last 20 years.

What this bill does is create a separate regime, a separate framework, under the supervision of the Federal Trade Commission. And one of the objections was that somehow credit repair organizations would apply en masse. I think it would take the FTC 5 minutes to determine if somebody is, in fact, a credit repair organization or if somebody is an entity that actually wants to provide individualized consumer education products and services and identity theft protection services. The FTC would very carefully review the qualifications and the business of each of these entities. It would be require a 3-day cancellation period. It would require a notice. And I think there is concern also about whether this notice would be clear and conspicuous.

The FTC has developed the standards for what is clear and conspicuous. They are going to know if the notice is clear and conspicuous. These companies that want to be authorized service providers would, in fact, subject themselves to very close scrutiny by the FTC. I think this would enhance the protections for consumers with respect to credit education and identity theft protection products.

Mr. ROYCE. And I will throw another point out here for Mr. Quaadman because your members provide credit to millions of Americans who want to buy a house or a car or finance education and so forth. So, in previous testimony, we heard from the Economic Research Council that personalized credit education materially benefits consumers, and 23 percent of consumers improved and moved up score bands, such as from subprime to near prime or to prime, after receiving personalized credit education from a national credit bureau. What, then, does access to credit education mean for consumers from your standpoint here?

Mr. QUAADMAN. Mr. Royce, I think you are exactly along the right lines that consumers are much more savvy and understand that they need to stay on top of their credit scores and be much more aware of what is impacting their financial situation.

So, to the extent that we can help educate consumers to be better informed and to better use tools to protect their credit scores, they are going to be not only better consumers, they are going to be better entrants into the financial—

Mr. ROYCE. Thank you, Mr. Chairman.

Mr. Chairman, if I could ask unanimous consent to submit for the record nine letters of support for my draft legislation, including from the Coalition to Improve Credit Education, the National Black Caucus of State Legislators, the National Bankers Association, the Policy and Economic Research Council, the U.S. Chamber of Commerce, and the U.S. Hispanic Chamber of Commerce.

Chairman LUETKEMEYER. Without objection, it is so ordered.

Mr. ROYCE. Thank you.

Chairman LUETKEMEYER. The gentleman's time has expired.

The Chair now recognizes the gentlelady from New York, Ms. Velazquez, for 5 minutes.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Mr. Tuggle, the Systemic Risk Designation Improvement Act removes Dodd-Frank's $50 billion asset threshold to designate a firm a SIFI and replaces it with an indicator-based approach. There are a number of important factors to consider before making such a critical change. But, as you know, regional banks are the primary lenders to small and medium-sized businesses.

And as the ranking member on the House Small Business Committee, I am always concerned about access to capital for small businesses. You claim—or your argument in support of this change is that the cost of compliance hinders the ability of your banks to lend and to increase access to capital for small businesses and consumers. So I would like to know what specific, tangible steps will you be taking to increase access to capital? You just stated in one of your answers that it cost your bank between $40 million to $60 million to be designated a SIFI. I see here that, in 2014, you made 2,337 loans to small and medium-sized businesses in the amount of $5 million. If we make this change, how will that amount change?

Mr. TUGGLE. Thank you.

One point of clarification, Congresswoman. What I said was that RBC Capital had done a study, and that is what they thought the numbers would be.

Ms. VELAZQUEZ. Okay.

Mr. TUGGLE. That is not the number that we have identified. Let me say—

Ms. VELAZQUEZ. But when you cited the story, it is to basically back up your argument of the cost of compliance.

Mr. TUGGLE. That is correct.

Ms. VELAZQUEZ. Yes.

Mr. TUGGLE. Yes. So we do lend to small businesses. I am not familiar with the number that you just talked about. I can tell you that—

Ms. VELAZQUEZ. I got it from your website.

Mr. TUGGLE. That is fine. I am not questioning it. I am just not familiar with it.

I will say that we received our CRA lending rating from the Fed for the years 2010 to 2013 recently. And we were rated high satisfactory on our lending component. So I think we really do work hard to identify opportunities and make loans.

Let me say that we have significantly expanded our focus on CRA lending, which often includes small businesses. And we have submitted plans to show that we are going to lend more, that we are going to invest more in our communities. So I am very comfortable with our real commitment to small businesses and the communities where we bank.

Ms. VELAZQUEZ. For the bank that is—you have in assets $40 billion?

Mr. TUGGLE. Thirty today.

Ms. VELAZQUEZ. Yes. And $5 million to small businesses, that is just—I just would like to know how that figure will change dramatically if such a change will happen.

Mr. TUGGLE. I can't give you a number today. Again, I can tell you that we have really focused in the last 2 years on CRA. And CRA does expect significant lending to low- to moderate-income people and small businesses. And we have made a significant increase—

Ms. VELAZQUEZ. I hear you about CRA. But I also hear small and medium-sized banks or regional banks making the argument that you are the one to lend to small businesses, right?

Mr. TUGGLE. Yes.

Ms. VELAZQUEZ. So I just want to make sure that if such a change happens, how would you specifically take the kind of steps that would increase access to worthy small businesses? And then we may—we heard Carolyn Maloney stating the fact that lending to small businesses has increased by 75 percent.

Ms. Fortney, regarding the discussion draft of the Credit Services Protection Act, I am concerned that consumers may be subject to abusive marketing and business practices by providers of these services. How can we be assured that the FTC will have full authority to protect these consumers?

Ms. FORTNEY. Thank you. They will have full—the FTC does have authority to protect consumers from unfair or deceptive acts or practices. And, as I said, I think what is really significant here is the companies that would subject themselves to this framework, this regulatory framework, and continued oversight by the Federal Trade Commission are companies that recognize that the FTC will be watching what they do in terms of advertising and, if they happen to engage in any practices that the FTC finds to be in violation of the registration or unfair or deceptive acts or practices, the FTC can and will enforce them, enforce the law.

Chairman LUETKEMEYER. The gentlelady's time has expired.

With that, we go to the gentleman from Colorado, Mr. Tipton, who is recognized for 5 minutes.

Mr. TIPTON. Thank you, Mr. Chairman.

And I would like to thank the panel for taking the time to be here and for your testimony. I would like to note that I appreciated Mr. Scott's comments in regards to H.R. 2359 when he did note the frivolous lawsuits and the need to be able to seek fair balance, and I certainly appreciate the work of our colleague, Mr. Loudermilk, in regards to this legislation.

Ms. Fortney and Mr. Quaadman, I would like you to expand on maybe a little broader sense in regards to FCRA. A criticism that we have heard of this bill is that it would reduce accountability for credit bureaus and labeling innocent consumers wrongfully. However, large class action lawsuits have also been targeting not just the credit reporting agencies but have also expanded to a number of other businesses as well. If you could expand on, perhaps, for, how does the broad range of businesses that are subject to FCRA, including medical record agencies, check verification companies, as an example, broaden the statutes, governance, just beyond credit bureaus, and what the impacts are?

Ms. FORTNEY. Thank you. I think we first need to understand two things about the Fair Credit Reporting Act. First, the scope. As you indicated, it applies not just to credit bureaus but to other companies that are consumer reporting agencies. It also applies to users of consumer reports, creditors, retailers, employers. And so it is a statute that is very broad in its scope.

It is also a very, very detailed and complex statute. I worked with that statute for 40 years. And I can tell you it is what the United States Supreme Court characterized it to be, which is less than pellucid. This is a situation where reasonable people can disagree as to the interpretation of the statute. And then we have the situation now where there are these class actions based on hyper technical violations of the Act where the company, let's say an employer, actually provides the notice that is required to a consumer, to an applicant or an employee, that they are going to obtain a credit report. They provide it to them on a piece of paper. Unfortunately, the courts have said, well, that piece of paper had something else on it. Not that that piece of paper, or what was on the piece of paper, detracted in any way from the notice. So, again, a very, very technical violation of the Act, no actual damages. And that is the problem: so many of these lawsuits involve no actual damages. And they are brought in order to obtain these unlimited statutory damages in class actions. And the range of this Act, the complexity of the Act, is the reason why we need relief in this area.

Mr. QUAADMAN. Mr. Tipton, thank you for the question. As you noted, employers do use consumer reports in doing background checks in the hiring process. So, if there is a violation there, it is—generally it is a very technical violation, and it is an individual issue. However, what we have seen is FCRA class actions filed against businesses ranging from fast food restaurants, grocers, retailers, universities, and transportation companies. So, if we were looking at highly technical individual problems, they could still be addressed under the harmonization bill. But what we are talking about here is not a class, but an individual problem. And this bill addresses that.

Mr. TIPTON. I think it is important to note: Everyone wants to make sure that consumers do have access to recourse if they have actually been harmed. But I think what is going to be important for us in this piece of legislation is whether this is going to impair the ability of consumers to be able to protect themselves from false or inaccurate information. Are they going to be impaired? Do they have access?

Ms. FORTNEY. I do not believe they will be impaired in any way. The Act already provides for a lot of mechanisms that consumers have to protect themselves. They can see information in their credit reports. They can have that information verified. They can have the information removed if it can't be verified or it is inaccurate. And they can do all that for free. The Act has many, many protections for consumers. So I don't think that will be—that the protections of the Act will be impaired.

As you note, there will continue to be the right of consumers to sue for violations of the Act. What there will not be will be the risk of draconian civil penalties—I'm sorry—statutory penalties for technical violations of the act or for violations of the act that were not willful where the court decides: Well, I disagreed with the interpretation; therefore, it is willful. That is reading willful out of the statute. But, unfortunately, courts, and particularly the ninth circuit, have done that.

Mr. TIPTON. Thank you, Mr. Chairman. My time has expired.

I appreciate it, panel.

Chairman LUETKEMEYER. The gentleman's time has expired.

The gentleman from Texas, Mr. Williams, is recognized for 5 minutes.

Mr. WILLIAMS. Thank you, Mr. Chairman, and to all of the witnesses for your important testimony this morning.

As a small business owner—and, in full disclosure, a car dealer—for 47 years in Texas, I understand the importance of credit and the impact it can have on everyday life. And I am still in the business. In fact, some of the most important milestones in one's life can be dictated by their credit. Whether it is buying the first family home or finally purchasing the car they want, individual credit is a key difference maker. And it is for all the supply chain.

Now, Dodd-Frank is a disaster. And for this reason, amongst many others, I am concerned that unnecessary regulations threaten to harm the endeavors of hard-working Americans on their path to fulfilling their dreams. And this idea of hiring more compliance officers and loan officers, we need to probably stop that. I am encouraged by this committee's continuous work to improve the financial health of consumers across the country through deregulation and relief from unnecessary government encroachment. So last Congress I was proud to cosponsor the Facilitating Fair Access to Credit Act that would exempt certain credit reporting agencies (CRAs) from the requirements of the Credit Repair Organizations Act (CROA). One of the largest barriers under CROA is the 3-business-day waiting period for consumers to utilize credit education services.

So, Mr. Quaadman, can you speak on the importance of credit education services—you have done that earlier—and how lifting the 3-day waiting period could assist consumers in making better informed decisions?

Mr. QUAADMAN. I thank you, Mr. Williams, for that question. And, also, to reiterate on the point that Mr. Royce was making earlier, that the CROA protections are going to remain in place against predatory organizations. The reason why the 3-day—I think we have to look at it in this way, when CROA was passed in 1996, we didn't have iPhones. So it is much easier and quicker for consumers to access information and to stay on top of their credit history, et cetera. So I think the 3-day cooling-off period actually inhibits communications that can be beneficial to consumers in terms of receiving education and other communications that can help them. So I think we need to adjust the legislation to reflect the realities of the consumer needs as well as the delivery of devices that currently exist.

Mr. WILLIAMS. Thank you.

Ms. Fortney, regarding the Credit Services Protection Act, I was a cosponsor in the last Congress of the earlier iteration because I think it is important that consumers are able to obtain individualized credit education from responsible entities. Is there evidence consumers would benefit from innovative credit education products?

Ms. FORTNEY. Yes, there is. There are studies that are cited and linked to in my written testimony which show that consumers want and benefit from these services, that they are, in fact, able to improve their credit. They are able to understand much better what is in their credit score, how to improve their credit score, how to deal with their credit histories. So, actually, what these companies want to do is offer services that help consumers improve their credit. The problem is the interpretation of CROA prevents them from doing that. So what we have here is a framework, under the supervision of the FTC, that would enable consumers to get what they want. And the studies show this is what they want and need.

Mr. WILLIAMS. Thank you.

Mr. Tuggle, any relation to the Tuggle in Killeen, Texas, who is a banker?

Mr. TUGGLE. Not that I know of.

Mr. WILLIAMS. Okay. In the closing of your testimony, you stated ABA believes that common-sense proposals are desperately needed that will make our regulatory system more efficient and effective. I wholeheartedly agree with this assessment. Plain and simple, is the Federal Government, to include the CFPB, acting in a common-sense way? And what specifically do you believe requires immediate action?

Mr. TUGGLE. This may surprise you a little bit, but we are regulated by the OCC and the Fed, primarily. We have only had the CFPB in one time, in our bank. And that was uneventful. So that is not something with which we have real experience.

I would say that, candidly, I think the regulators—and this is my opinion, just my opinion—have been under a lot of pressure to be pretty tough. And I am not sure that in all occasions the approach was consistent with what the topic and issue was. And so I will also say that I have seen, literally have seen, what we believe is a healthier relationship with our regulators recently. And that is important. Our regulators assure safety and soundness. But we need to be able to do business. So I am not—I don't want to really go too far here about the regulators. But I will say that—that when I look at what candidly the law requires of us post-Dodd-Frank, there are places where it makes no sense at all. And the question is, is that overreaching? It clearly is.

Mr. WILLIAMS. Thank you for your testimony.

I yield back.

Chairman LUETKEMEYER. The gentleman's time has expired.

The gentleman from Minnesota, Mr. Ellison, is recognized for 5 minutes.

Mr. ELLISON. Thank you, Mr. Chairman, and Ranking Member Clay.

Ms. Wu, allow me to ask you about a bill called the TRID Improvement Act. Are you familiar with it?

Ms. WU. Yes. It is one of the bills before the committee on this hearing.

Mr. ELLISON. Do you know of examples of home buyers paying strange and unexpected fees as part of their closing costs?

Ms. WU. Absolutely. We have even seen examples of a fee to email documents.

Mr. ELLISON. And do you know of examples of home buyers being referred by a retailer to a title agent, a lender, a home warranty service, et cetera, that provides a kickback and affiliation or some kind of financial benefit for the referral?

Ms. WU. Kickbacks are certainly an issue. And I don't have case citations, but I believe the CFPB—and before that, HUD—had taken action against settlement service providers for kickbacks.

Mr. ELLISON. How likely is it that a home buyer will find out about these overcharges, referral fees, kickbacks?

Ms. WU. It is probably very hard for the ordinary home buyer to figure that out.

Mr. ELLISON. So it is pretty rare?

Ms. WU. Rare, yes.

Mr. ELLISON. Hard to discover and then rare to be discovered?

Ms. WU. Yes.

Mr. ELLISON. So let's say someone gets a mortgage and finds out later that the lender also charged them for property insurance or life insurance or opened up a bank account or credit card in their name without their permission. What would happen under current law?

Ms. WU. It depends on the type of charge. In some cases, they might be entitled to a refund, and in some cases, actual damages. In other cases, statutory damages. And in other cases, no remedies.

Mr. ELLISON. And what would happen if there was an accounting mistake in the closing disclosure form?

Ms. WU. Right now, the situation is that, once the error is discovered by the creditor or the regulator, they have 60 days to fix it. And if they fix it in 60 days, there is actually no liability.

Mr. ELLISON. Okay. And under current law, how would the error get discovered? By the buyer or the regulator? Through a lawsuit?

Ms. WU. It could be any of those.

Mr. ELLISON. Most likely avenue?

Ms. WU. Just any of them.

Mr. ELLISON. It could vary?

Ms. WU. Yes.

Mr. ELLISON. And if a lender found an error, what penalties would they pay? Out-of-pocket costs to the buyer or a fine? What would be their hit?

Ms. WU. If they fix it within 60 days, there is none of that. After the 60 days, then, yes, there could be refunds or penalties.

Mr. ELLISON. Right. So, under the proposed TRID Improvement Act before us today, the error correction timeframe is expanded from 60 days from discovery, 2 months, to 210 days, 7 months. Am I reading the bill right?

Ms. WU. Yes. That is our reading of the bill, too, and it is a significant extension of that time period.

Mr. ELLISON. So, if a lender makes a mistake or an error, under the bill before us today, lenders will have 7 months to correct it without any liability. Is that right?

Ms. WU. Seven months. Yes.

Mr. ELLISON. In my read of the text of the bill, the language is designed to prevent any administrative action by the Consumer Financial Protection Bureau. This bill gives the creditor the ability to simply say, "Oops," after being caught or not having any penalty for making that mistake.

Is that right?

Ms. WU. Yes.

Mr. ELLISON. And am I right that, under this bill, any penalty assessed for errors is limited to out-of-pocket costs for the borrower?

Ms. WU. Yes.

Mr. ELLISON. And so, in other words, if you get caught fleecing a consumer, you could get away with it, essentially?

Ms. WU. It certainly gives less incentive for the lender to fix things and to fix it quickly.

Mr. ELLISON. So let me ask you how this 7-month review time interacts with a 1-year oversight period for the Real Estate Resettlement Procedures Act, or RESPA. Does giving the creditors or assignees 210 days instead of 60 days to run out the clock on the 365-days to pursue RESPA violations?

Ms. WU. I am assuming you are talking about the statute of limitations. And yes. What would happen is, there would be 7 months for the lender to fix the error and then a much shorter time period of 5 months between the end of that and the running of the statute of limitations after when you couldn't file a lawsuit.

Mr. ELLISON. Right. So, in light of what you shared about overcharges, kickbacks, and things like that, should we keep the pressure on lenders to regularly review their work for errors?

Ms. WU. Oh, absolutely.

Mr. ELLISON. Should we reduce the pressure on them to be excellent and honest in the work that they do?

Ms. WU. No. Incentives, as we have learned from being a consumer advocate for 15 years, are very important. And that is why things like the penalties, statutory and actual damages, are important both in RESPA as well as the Fair Credit Reporting Act. You reduce punitive damages, you reduce statutory damages, you increase these periods for cure, and you reduce incentives to get it right.

Mr. ELLISON. I am not in favor of the bill because I think it is bad for consumers. And I think the power and authority and the reason to know how to get it right is really on the lender. So I plan to oppose it.

Thank you for your testimony. I think I am over my time.

Ms. WU. Thank you.

Chairman LUETKEMEYER. The gentleman yields back.

The gentleman from Michigan, Mr. Trott, is now recognized for 5 minutes.

Mr. TROTT. Thank you, Mr. Chairman.

I want to thank the panel for being here today.

Ms. Fortney, I want to talk about H.R. 1849. Ms. Wu, in her written testimony, said that H.R. 1849 would eradicate essential protections against abusive and deceptive debt collection practices by collection attorneys. So let's use a hypothetical to try and illustrate what 1849 does and doesn't do. And I want to start with two assumptions. Let's assume 1849 is signed into law. And let's assume Visa has hired you to collect on a $1,000 unsecured debt. So you start by sending some demand letters and calling the debtor, Mrs. Smith. Would you be subject to the Fair Debt Act?

Ms. FORTNEY. Absolutely. I would be engaging in collecting a debt on behalf of the creditor.

Mr. TROTT. Let's say you started contacting Mrs. Smith before you sent out the 1692(g) letter. Would you be subject to liability under Fair Debt?

Ms. FORTNEY. Yes, I would.

Mr. TROTT. Let's assume that your 1692(g) letter didn't contain the mini Miranda warning. Would you be subject to liability?

Ms. FORTNEY. Yes, I could be.

Mr. TROTT. Let's assume when you sent out the 1692(g) letter, Ms. Smith called up and contested the debt, but you continued to call her. Would you be subject to liability under Fair Debt even if 1849 was enacted?

Ms. FORTNEY. Yes.

Mr. TROTT. Let's assume you are one of those bad collection attorneys, and you call up Mrs. Smith at 2 in the morning and you say, "I have Toto, your dog, and you are never going to see him again unless you pay Visa the money you owe them." Would you be subject to a lawsuit under the Fair Debt Collection Practices Act?

Ms. FORTNEY. Yes, and you should be.

Mr. TROTT. You could be sued?

Ms. FORTNEY. Yes.

Mr. TROTT. Let's assume that Mrs. Smith never responds, never pays; you file a complaint and summons. And you file the complaint, and Mrs. Smith contests the debt by filing an answer saying it is not correct. And let's say the judge or the client says to you: We don't want to try this case as a now contested matter; contact Mrs. Smith and say we will take 300 bucks to settle this. Could you do that with certainty, knowing that, without 1849, that you wouldn't be sued under Fair Debt?

Ms. FORTNEY. That is the problem. The problem is you would not know with certainty you would not be sued. And the reason is you would be communicating with the consumer to collect a debt. However, you would be doing so in the context of litigation.

Mr. TROTT. And isn't that why Justice Kennedy, in the *Jerman* case, said that that interpretation of the Fair Debt Act distorts the legal process, basically subjecting the lawyer to—putting them in a position where their own personal financial interests and their bar license undermines the attorney-client relationship? Isn't that the problem we are trying to address here with a technical correction?

Ms. FORTNEY. That is exactly the problem. And it is a technical correction that is very, very narrowly tailored to deal with the practice of law and only the practice of law in litigation.

Mr. TROTT. Let's assume your complaint misstated the debt. Without 1849, couldn't you be sued under Fair Debt for filing a complaint that misstated the debt, maybe misstated the late charges, because an argument can be made that that is misleading to the least sophisticated consumer?

Ms. FORTNEY. And that is a problem, yes.

Mr. TROTT. And that has created a cottage industry for plaintiff's lawyers, hasn't it?

Ms. FORTNEY. Unfortunately, it has.

Mr. TROTT. What would happen if you are that same bad lawyer, and you are in court now, and you called up and said, "We have Toto, the dog." What would the judge do? What would the State grievance commission do? What would opposing counsel do?

Ms. FORTNEY. I think all three of them would take action to be sure that you would be sanctioned in some way for such an egregious act.

Mr. TROTT. You could be disbarred, couldn't you?

Ms. FORTNEY. Yes, you could be.

Mr. TROTT. So, Ms. Wu, in her testimony, says that 1849 will hurt consumers, especially people who have recently lost jobs, had a death in the family, or suffered another type of devastating personal loss. And to support this conclusion, she argues that, prior to 1986, that lawyers could circumvent the Fair Debt Act by hiding behind their bar licenses, and to enact 1849, this would turn back the clock on these important protections. Isn't that a total misunderstanding of what this bill does?

Ms. FORTNEY. It is a complete misunderstanding, and it also mischaracterizes what the Federal Trade Commission was saying in the testimony I delivered on behalf of the Commission in 1985.

Mr. TROTT. Thank you.

I yield back my time.

Chairman LUETKEMEYER. The gentleman yields back.

The gentleman from Georgia, Mr. Loudermilk, is recognized for 5 minutes.

Mr. LOUDERMILK. Thank you, Mr. Chairman. I appreciate you having this hearing, and especially your leadership on the subcommittee and bringing forward bills that I believe are common sense and actually seek to open up and pave the path of prosperity for all Americans, not just a selected class of Americans. And that is what we have—my staff has been working on since I have been here, is what are the things that we can do that fairly benefit everybody?

I especially want to address my bill. And I appreciate my friend and colleague from Georgia, Mr. Scott, in his comments. Because what the Fair Credit Reporting Act Liability Harmonization Act seeks to do is strike a fair balance that is just like every other financial services consumer protection act that we already have on the books. And so I think it is important that we parse out facts from fiction because we have heard a lot of stories in here and a lot of heart-tweaking testimony, but we need to parse out what is fact and what is fiction.

And I appreciate Ms. Wu's testimony, especially; you can tell she is very passionate in there.

But, Mr. Chairman, the instances that she brought up in here, there is absolutely no way that this bill, if it would pass, would have restricted any of those from receiving damages. It would not restrict any of those from receiving actual damages because they were individual lawsuits. And my bill does not address individual lawsuits whatsoever. It addresses the class action lawsuit. And they would have had the ability to receive full compensation for damages and the legal expenses that were involved. So we need to make sure that that is understood. And it also, if they would have been purposely violated, they would have been able to receive all of the damages that they received.

Let's also look at some other issues. The CFPB complaints. Yes, the CFPB complaints against the credit bureaus are larger. Why? Because the pure volume of people that the credit bureaus work for. It is basically every American. That is why you are going to see a higher volume, simply because of the number of people that they support. It has also been presented that this is a credit bureau protection act. And this is false.

Mr. Chairman, I have three letters here I would like to present for the record, one from the National Association of Professional Background Screeners, one from the Credit Union National Association, and one from the U.S. Chamber of Commerce, which is also supported by the American Financial Services Association, the Community Bankers Association, the Consumer Data Industry Association, the Electronic Transactions Association, the National Association of Professional Background Screeners, the Retail Industry Leaders Association, the Society for Human Resource Management, the Software and Information Industry Association, the U.S. Chamber Institute for Legal Reforms, and the U.S. Chamber of Commerce.

Chairman LUETKEMEYER. Let's take a breath. Without objection, it is so ordered.

Mr. LOUDERMILK. This is to illustrate the vast support that this has. The other thing is that this is a draconian measure. This only aligns it with other acts that are already in place. And the final thing is we have—trying to build this that we have to protect the consumer against the evil corporation out there that seeks to build its profit on the backs of the consumer.

Let me tell two quick stories here. One is we have a business in my district that I met with last week. And they also have an operation in Corpus Christi, Texas. They are writing a $100,000 check to every employee to rebuild their homes. I have another business in my district called Home Depot. I have worked in search and recovery for years. We have a devastating hurricane coming up toward Georgia right now. Home Depot is the go-to organization that provides tarps and emergency supplies for free to help people who are damaged.

Now, how does this hurt? Let's talk about a real instance. Home Depot was sued in a class action lawsuit because of a technical violation of the Fair Credit Reporting Act. Now, they settled out of court for $3 million. And even the plaintiff said, had this gone to court, they would have had a very difficult time even proving that there were damages because there weren't any damages. The consumers, who didn't even know that there was a violation, received about $15 apiece. But guess who got a million dollars out of it? The trial attorneys who filed the class action lawsuit.

Who does that hurt? That is $3 million that Home Depot does not have now to send tarps and plywood and emergency supplies to those who are devastated by natural disasters or help their employees or keep prices to their consumers low.

Mr. Chairman, I know I have used up my time here. But I thank you for bringing this bill forward. This is to protect consumers and all Americans. Thank you.

And I yield back the balance of my time.

Chairman LUETKEMEYER. We thank the gentleman for his passion. And he yields back his time.

With that, we recognize the ranking member for a unanimous consent request.

Mr. CLAY. Thank you, Mr. Chairman. I ask unanimous consent that statements we have from AFR, Better Markets, NCLC, NACA, U.S. PIRG, and other organizations providing valuable comments on the bills we are discussing today be made a part of the hearing record.

Chairman LUETKEMEYER. Without objection, it is so ordered.

Mr. CLAY. Thank you.

Chairman LUETKEMEYER. I now recognize the gentleman from Tennessee, Mr. Kustoff, for 5 minutes.

Mr. KUSTOFF. Thank you, Mr. Chairman.

And we do appreciate the witnesses appearing this morning.

Mr. Quaadman, in your testimony, and in your written statement, you cite statistics for the lack of loan growth going back to the time of the start of the end of the financial crisis, 2008 to 2015, or ending in 2015. Some of the statistics are really troublesome, the loan growth, or the lack of loan growth, from that period for loans of all sizes. Is that because the economy is growing or not growing? And what are some of the reasons that you would cite for the decline in loan growth for those types of loans?

Mr. QUAADMAN. Let me take the second part first. Part of the reason why you don't see the loan growth—and this is why I actually cited the $100,000 number, because we not only have seen that with some of the studies, but in all the travel I have done around the country and talking with bankers and talking with small businesses, what you hear consistently is that the regulatory cost in burdens for writing a $100,000 loan are the same as a million dollar loan. So, if you are a small bank, you are going to write a million dollar loan and not that smaller loan. So then, when you start to drill down and you look at those firms with 10 employees and less, they are the ones who are saying: We know we are not getting a loan.

So, while there might be demand there, they know they are not going to get it because of these regulatory problems. So they are not even going to ask for the loan.

The reason why—now to get to your first point, it is a little bit of a "chicken-or-egg" thing. Those smaller businesses are the ones that drive growth, because if you are the startup in the garage, you are that firm with less than 10 employees, and you are sort of looking at how you can get money. So, if we are going to shut down—right, if you can't—with some of the issues with TRID, you can't get a mortgage or whatever, you can't get started, or you can't get that bank loan, you are not going to start that firm. And when you take a look at the Census Bureau statistics and some of the other studies we cited, business creation is at historic lows, and we have not seen the ratio pop back in the way that it was where you have business creation and business destruction. And that has an add-on effect because that creates a drag on economic growth.

Mr. KUSTOFF. And as far as the financial institution's ability to make those loans?

Mr. QUAADMAN. Correct. Right. And the problem that, when you hit that SIFI threshold, you have all the enhanced requirements. We are seeing that—business lending, track stress tests. We have heard that from companies, not only from that Harvard Business School study that I mentioned. And you also have situations, too, when you see that banks are getting close to that $50 billion number, they start making decisions that they are not growing anymore, that they are going to be lending less. I heard what Mrs. Maloney said. But New York Community Bank in New York wasn't able to make a merger. So they are trying to stay below that $50 billion number. And then, if you do get over that number with LCR, as Mr. Tuggle raised, suddenly business cash deposits, which are why banking started in the Western world in the Renaissance, they are now counted against your LCR. So businesses—banks are disincentivized from even wanting to take business cash deposits.

Mr. KUSTOFF. Thank you, very much, Mr. Quaadman.

Mr. Tuggle, in relation to the questions that Chairman Luetkemeyer asked of you about the SIFI proposed legislation, and I mentioned in my remarks when I introduced you that you are the largest bank in Tennessee by asset size and certainly in my district. If you look at Tennessee, you have a number of metropolitan areas. But you have a lot of rural areas across the State and certainly the western part of Tennessee where First Tennessee is based. As First Tennessee or First Horizon now seeks to expand with your merger and go from $30 billion to $40 billion, and, hopefully, through growth, you would like to get to $50 billion or more, can you describe, from the bank's standpoint, the impact that that SIFI designation, if you hit it, would affect those consumers in more rural areas of Tennessee that the bank serves?

Mr. TUGGLE. Sure. It is pretty straightforward, Congressman. It is simply a matter of, with the levels of increased expense that we will incur, there is simply going to be less available credit for us. With the increased levels of expense we incur, there will be less investment in products and services and technology that allow us to deliver credit and other services to people wherever they are located.

Technology is an absolutely critical, critical issue for banks like ours. And we need to invest in technology to remain competitive.

It is my understanding that JPMorgan has an annual budget of $9 billion to invest in technology. We obviously can't fund those sorts of things. But we have to fund a level of technology that allows us to be competitive. And that does go to our ability to deliver services outside the metropolitan areas.

Mr. KUSTOFF. Thank you, Mr. Tuggle.

I yield back my time.

Chairman LUETKEMEYER. The gentleman's time has expired.

The gentlelady from Utah, Mrs. Love, is recognized for 5 minutes.

Mrs. LOVE. Thank you, Mr. Chairman.

And I thank everyone for being here.

I very much appreciate the opportunity to talk about the chairman's bill, H.R. 3312, regarding the appropriate circumstances for systemic risk designation, which, of course, is an important issue that we have been trying to address for some time.

Salt Lake City, Utah, is home to one of the smallest institutions that has fallen into the SIFI designation, Zions Bancorporation, a $65 billion bank holding company. Zions Bancorporation operates banks primarily throughout 11 Western States and is focused on traditional banking models, taking deposits, making loans, providing a high level of customer service. Zions Bank's CEO, Harris Simmons, has testified before this committee and the Senate committee about the costs and the challenges that have been imposed on this institution as a result of the SIFI designation. According to Mr. Simmons, as a result of the enhanced prudential standards requirements of Dodd-Frank, Zions has had to divert resources to add nearly 500 additional full-time-equivalent staff who deal with just compliance, internal audit, credit administration, and enterprise risk management. Mr. Simmons went on to testify that Zions had to move resources away from lending and consumer services because of those regulations.

So I just want to make a quick comment about what we are talking about when we remove these services. We are talking about people not being able to have access to the services that they need. We are talking about people who live in Sanpete or Juab County that are trying to run their farms and can't get the equipment that they need to be able to do that. They can't get the loan or the services because all of those funds and the resources have been diverted to something else. Let's be clear about what we are talking about. When we add costs, those costs are always given to the consumer. When it costs more for a turkey farmer to raise their turkeys, to be able to provide the food, the food that they provide costs more. That means a family has to pay more out of their pocket in order for them to eat. This is absolute reality.

And all of this because of one issue: SIFI designations are based on size, not on actual evaluation of the institution's activities or level of systemic risk that might be posed by its complexity and interconnectedness.

So my question for you, Mr. Tuggle, regarding the Luetkemeyer bill, is you find your bank perhaps going down that similar path. You describe in your testimony a little bit about your bank's operations and your soon-to-be $40 billion bank. Could you tell us a little bit more about what you do? For example, do you have an international presence? Do you engage in complex trading? Tell me about what your services—what you focus on.

Mr. TUGGLE. We do not have an international business. As you described, we are a bread-and-butter lender. We take deposits from our customers, and we turn around and we deploy those deposits back into our communities, the communities where we live, work, and operate, in the form of loans and credit and various services.

In terms of risk, we are ultimately really not different than a $10 billion bank or a $5 billion bank in the sense of the products and the services and the approach that we take. It seems to me, to make the point very clearly, that having a $50 billion threshold says that a bank that is $49 billion, 900 million is not systemically important, but a bank that is $50 billion and a dollar is systemically important, without any difference in what the $49-plus-billion bank does and the $50 billion bank does. It is an irrational way to think about risks to our system, and it is impeding the growth of really fine banks like ours. And it has hurt very fine banking—

Mrs. LOVE. So it sounds like you primarily are a bank that offers traditional banking products, retail, commercial lending. Is it correct to say that the products and the services that you offer carry risks that are well understood by your regulators?

Mr. TUGGLE. It is absolutely the case. It is the same risks they have been regulating forever.

Mrs. LOVE. I have run out of time. But, again, I just want to reiterate that this is not about trying to save banks. This is trying to give people access to the products that they deserve. We talk about when people are harmed when they don't receive—when a banking institution or lending institutions harm, but we don't talk about the opposite side of that. We don't talk about the people who do not receive opportunities because they do not receive—the services that were available to them are no longer available to them.

Thank you.

Chairman LUETKEMEYER. The gentlelady's time has expired.

The gentlelady from New York, Ms. Tenney, is recognized for 5 minutes.

Ms. TENNEY. Thank you, Mr. Chairman.

And I just want to thank the excellent panel for being here today. This is very helpful and very enlightening.

I just want to highlight a few things. Over the last 10 years, the community financial institution industry has undergone dramatic transformation, as you have heard. Since 2006, more than 1,500 banks have failed, been acquired, or merged due to economic factors and the overwhelming expensive regulation brought forth by the passage of Dodd-Frank. During that same period, there has been a drought in de novo banks or new banks. In fact, only 5 new bank charters and 16 new credit union charters have been granted.

Today, for the first time in over 125 years, there are fewer than 6,000 banks and roughly 6,000 credit unions serving the consumers in the United States. This is proof that a community financial institution needs smart, common-sense regulatory relief so they can properly serve local communities by assisting with small business startup and consumer credit.

I am working on a bill called the Community Institution Mortgage Relief Act that would offer real relief for small institutions that are barely staying alive in this regulatory environment we currently have. This bill would exempt small community institutions from mandatory escrow requirements and would provide relief from new regulations that has approximately doubled over the cost of servicing with a direct impact on the consumer cost of mortgage credit.

I know that certain institutions wish to provide escrow services to their customers, and they are welcome to do so under this act. This is about autonomy and the choice for smaller institutions. However, for the smaller institutions like the ones in my district, they rely on relationship banking, something that has seemed to have disappeared in this day and age, and this could help them greatly.

I first wanted to address this with Mr. Tuggle since he so kindly addressed positively my proposed regulation or my proposed bill to minimize regulations. You referenced in your testimony that you supported the bill but that you would have some suggestions in regulatory changes of how we could make this bill more effective or better. And if you could highlight those, I would appreciate that.

Mr. TUGGLE. Thank you. It is fairly simple. I think that what you want to do is—if I understand the bill; I believe I do—one of the exemptions is tied back to the $50 billion number.

Ms. TENNEY. Okay.

Mr. TUGGLE. And I just have a problem with that. It is an arbitrary number that doesn't reflect reality. Let me say, our company, worth $30 billion, we had a large mortgage business we sold it in 2008 and basically got out of the business. At $30 billion, we don't provide escrow services today. And it is, in part, because of the expense of it relative to the fairly lower number of mortgage loans that we make. So I don't know that $50 billion is necessarily—

Ms. TENNEY. Let me ask, what would you use as a determining factor? If not an arbitrary number like $50 billion, what would you say in looking at it in a regulatory framework? How would I change the law to amend it to make it more flexible so we really address a lot of the community banks who are looking for flexibility, who have suffered under a lot of the regulations, who can't comply, who want to continue their character lending or their small—their relationships with their customers whom they see usually on a daily basis, especially in small areas, like rural areas that comprise most of my district.

Mr. TUGGLE. I would think that—I think there is another proposal, the number of loans. The number of loans like this that are made would make a lot of sense.

Ms. TENNEY. Right. Okay.

Mr. TUGGLE. Because that proves that this is a small lender that shouldn't be suffering these expenses.

And I completely agree—and I think what you said goes across a lot of different areas, and that is when you put a lot of expense on a small lender or a product or a small loan, you make it less accessible to people. There is less of it. And I would think that what we should be about are laws and regulations that expand the availability of credit. And these small servicers—I think you said it correctly—know their customers, know who they are dealing with, and have the ability to—

Ms. TENNEY. We did propose, as you indicated in the second half, on the RESPA, the real estate settlement procurement act—or whatever that is. I have done thousands of real estate closings, and I just call it the RESPA statement, which is probably filed somewhere and nobody ever sees it again. But I wanted to—so we had a limit on there of changing that to banks that do 30,000 or less loans. Do you think that is something that would be acceptable?

Mr. TUGGLE. I am not an expert on these smaller lenders, but it sounds reasonable to me. I would also add that perhaps there would be an opportunity to craft a little broader legislation and to give some opportunity for regulators to address problems with direction to make the credit more accessible—

Ms. TENNEY. Thank you. I appreciate that, and I think my time has expired.

I yield back.

Chairman LUETKEMEYER. The gentlelady's time has expired.

We recognize the gentleman from Arkansas, Mr. Hill, who is an addition to our subcommittee today. He is one of our important members of the full Financial Services Committee, but he has also sponsored one of the bills that we are considering today, and we look forward to his discussion.

Mr. Hill, you are recognized for 5 minutes.

Mr. HILL. Thank you, Mr. Chairman. I appreciate you and the ranking member holding this hearing. Thanks for letting an interloper from the full committee come and be a part of your hearing today.

And thanks for your work on the SIFI designation. I think so many people have simply tried to move the number from $50 billion to a higher number, particularly over in the Senate. And I think if I were a regulatory policymaker, I would want a much more substantive activities-based approach. So thank you for your leadership on that.

We are back talking about TRID today. We have talked about that a number of times in this committee. Since the rule was finalized back in 2013, the origin was of course under Dodd-Frank to ask the CFPB to consider merging the truth-in-lending disclosures with the real estate settlement disclosures. The intent was a streamlined, simpler, better form for consumers. That is sort of like the guy who wants a thoroughbred and goes into breeding and produces a camel. We really didn't get that. And in 2015, when the rule went final, it had so many problems with it that the House overwhelming passed my bill, the Homebuyers Assistance Act, 303 to 121, which was to try to delay problems with liability associated with trying to implement this rule.

Again, the CFPB recognized that they had trouble with their rule, and they re-proposed it and asked for more comments. And those comments poured in. And then in April, Director Cordray testified before us, and I discussed with him the problems I had with the lack of clear, legally binding guidance coming out of the CFPB generally and on TILA–RESPA in particular.

So, today, we tackle one of those small challenges. And I appreciate Mr. Tuggle's and Mr. Quaadman's comments on this bill. This bill does two things: Number one, it tries to make sure that we provide accurate information in a very confusing part of the rule, which is disclosing what is the title cost to the consumer. And you can see on your screen: The rule attempts to make a marginal cost analysis. It is on the left. That is what the CFPB currently describes or prescribes for title companies to disclose on that closing statement. But it doesn't really, in my view, do a very good job of it.

So part one of this bill simply says we think that the accurate actually charged amount for the owner's title policy, that is that the seller typically pays to cover their reps and warranties on, that they have good title to the property that they are selling, and the lender's policy typically paid for by the borrower that is covering liability on closing the loan.

Mr. Quaadman, that's pretty confusing. What are your thoughts on this part of the bill's change?

Mr. QUAADMAN. I think it is very welcome. I am laughing a little bit because in a prior life, I didn't do as many real estate closings as Ms. Tenney did, but as a recovering lawyer, I did my fair share. And I think you point out the problem that the rule itself doesn't convey appropriate information to consumers, nor—with the passage of the Dodd-Frank Act, we were supposed to help consolidate and streamline closing documents, and clearly we still have a lot more work to do. I think it bill is an important first step to trying to do that.

Mr. HILL. I appreciate that. The other portion of the bill that was referenced by my friend from Minnesota is trying to align the errors in the bill from 60 days to 210 days. The logic here was to align it with what Dodd-Frank's rulemaking prescribed in the qualified mortgage rule of 210 days. It is not a number pulled out of thin air. It is pulled out one of the most important rules that came out of Dodd-Frank, which is trying to define a qualified mortgage and then defining that for the secondary market. So we attempt to align that error discovery process for TILA–RESPA to that 210-day note that was a result of qualified mortgages, also a part of Dodd-Frank.

As I say, this is an 1,800-page rule trying to merge these forms. I have heard lots of comments from my bankers. Some of them have tongue in cheek said that TRID stands for, "the reason I drink," which, as I say, is tongue in cheek, but it has seen a lot of product problems for consumers. One-time closed loans are now very difficult to do, if not impossible, under the combined form. And so I think consumers have been hurt. Closing times have been extended. So I am pleased that this is a good step forward, and I thank the chairman for letting us have that discussion today.

Chairman LUETKEMEYER. The gentleman's time has expired.

With that, we go to the gentlelady from Arizona, Ms. Sinema, who also is not a member of the subcommittee, but is a distinguished member of the full Financial Services Committee, and we welcome her, and she is recognized for 5 minutes.

Ms. SINEMA. Thank you so much, Mr. Chairman.

And thank you, Chairman Luetkemeyer, for working with me and several other of our colleagues to introduce the Systemic Risk Designation Improvement Act of 2017. As you all know, this common-sense bipartisan legislation removes the arbitrary $50 billion asset threshold established by the Dodd-Frank Act, and requires the Federal Reserve to establish a process to formally designate individuals or groups of financial institution as SIFIs based on a variety of factors including size, complexity, substitutability, and interconnectedness.

My first question is for either Mr. Tuggle or Mr. Quaadman. While not all enhanced prudential standards may be needed for banks below the globally systemic important bank level, if the Federal Reserve felt it was appropriate to place some of those standards, based upon the circumstances of a particular institution, would they be able to do so under the legislation that we have proposed?

Mr. QUAADMAN. Yes, they would be able to. I think one of the things that the bill does is, one, it looks at activities. Two, it looks at existing criteria that the Fed has. So the Fed still could take actions, and they still could have some enhanced regulations. So I don't think it precludes them from doing anything. In fact, what it does is it allows the Fed to tailor a regulatory scheme to fit that bank so we can make sure that that bank is active in a way that they should and the regulation fits its profile.

Ms. SINEMA. Thank you so much.

My second question is for Mr. Tuggle. I think we should all be able to get behind the idea of smarter and better tailored regulations. So, Mr. Tuggle, can you tell me what you think about a smarter or a better tailored regulations impact is on the larger financial system? Does it make it safer, and if so, how?

Mr. TUGGLE. It certainly does make it safer because it is focused on what the real issues are. Regulation that identifies a risk, a real specific risk, in response to that is better regulation that is just across-the-board unrelated to what the risks are. This is a Dodd-Frank example that is very real for us, the Volcker Rule. We are subject to the Volcker Rule.

We are a plain old bank. And there are no real Volcker sorts of concerns about us affecting the financial stability of the United States. But the year that we had to start to implement Volcker, to understand it, to understand it and to develop processes. Now, we spent over 6,000 hours of time with smart, talented people, and we put in place what we had to put in place, and I don't think it added one smidgeon of greater security to our financial system.

Ms. SINEMA. Thank you.

My final question is for Mr. Quaadman. Mr. Quaadman, in your opinion, would the elimination of this arbitration $50 billion threshold and, instead, creating more appropriately tailored regulation of banks of all sizes, would this result in increased lending to small and medium-sized businesses in Arizona and other States across the country?

Mr. QUAADMAN. Yes, and I think for two reasons. One was the issue I raised earlier in terms of how regulatory compliance is really shutting out banks from providing smaller loans to smaller businesses. The other thing is what we consistently hear from our business members is that, increasingly, particularly when you are talking about a bank that is under a SIFI designation, that businesses generally had some form of relationship type lending or relationship with their bank so that the loan officer would understand a business and the cycle of that business and would understand their financing needs, et cetera, and can help work with them to achieve their needs. The problem now is that the regulatory compliance people are more often having a say as to whether a loan should be granted or not. So I think we are going to see increased lending to businesses for both of those reasons. One is the smaller loans, we would be able to open up that flow. The second is that we would empower the people who understand the business to actually weigh the merits as to whether a loan should be issued or not, and I think that would free up a lot of lending that has currently been bottled up, as well as the fact that, with the regulatory costs going down, those banks are just going to have more money to issue loans.

Ms. SINEMA. Thank you so much.

And thank you to all of our panelists.

Mr. Chairman, I just want to thank you again for introducing this legislation. It has been a real privilege and an honor to work with you on it. I commend you on the work, and I look forward to getting this bill to the President.

Thank you. I yield back.

Chairman LUETKEMEYER. The gentlelady yields back. We thank her for her comments.

We have exhausted all the questions for today, and we want to thank the panel for their fine work. The purpose of this hearing was to look at a group of bills that we believe fix problems or tweak the existing law to make financial services entities that they regulate to be better able to serve their customers and clients. And with regards to the SIFI bill that is my bill—and we have discussed it at length—we had a visual aid over here on the side when we were discussing it at a previous time, 20,000 pages of paper, which is kind of an average, probably is a low on average, of what a lot of midsized regional banks are facing whenever they are do a stress test, living will compliance for their designation. It costs millions and millions of dollars. It was a whole table over there, like 5 by 3 by 3, of paper, which a lot of times doesn't get read.

I think it goes back to, in my mind, that banks are in the business of assessing risk. That is what they do for a living. They assess risk, and they decide which risks to take by working with the customers and the businesses and the clients. And regulators should be in this business of assessing the bank's ability to assess risk, not managing the banks on the risks to take, which is what is going on.

And so I firmly believe that we are on the right road with this. A threshold is an artificial get-out-of-jail-free card for some folks, which gets the regulators off the hook from doing their job, in my mind.

And I think, with regard to a couple of other issues we had in committee, I just want to comment on briefly. I had a banker talk to me recently, and he made the comment, "Blaine," he said, "I can do a $50,000 vehicle loan, and it takes about 60 to 90 minutes. The paperwork is about that thick, but it is a depreciable asset, and it can move. I can do a $50,000 home loan; the paperwork is this tall—in fact, we had a gentleman here who was testifying one day, and I asked him how many pages it was, and he said, "Congressman, we don't measure it by the page anymore; we measure it by the pound"—and it takes 60 to 90 days, and it probably costs an average of $2,500 to do."

The same amount of money and here you have an asset that is not mobile, that appreciates in value, and, yet, over here, you have as asset that is mobile and depreciates in value, and look at the difference in paperwork, look at the difference in risk, and, yet, it is out of whack. And I think this is what we have to keep in mind: How do we approach these things? How do we help our constituents and consumers to be able to have access to credit when they are under this big burden over here with regards to home loans and the confinement of the banks in being able to provide that service?

So, again, we want to thank each of you for your testimony today and your expertise that you brought to our discussion.

The Chair notes that some Members may have additional questions for this panel, which they may wish to submit in writing. Without objection, the hearing record will remain open for 5 legislative days for Members to submit written questions to these witnesses and to place their responses in the record. Also, without objection, Members will have 5 legislative days to submit extraneous materials to the Chair for inclusion in the record.

And, with that, the hearing is adjourned.

[Whereupon, at 12:10 p.m., the hearing was adjourned.]

APPENDIX

September 7, 2017

STATEMENT OF ANNE P. FORTNEY

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON FINANCIAL SERVICES
SUBCOMMITTEE ON
FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

ON

LEGISLATIVE PROPOSALS FOR A MORE EFFICIENT FEDERAL FINANCIAL REGULATORY REGIME

SEPTEMBER 7, 2017

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Chairman Luetkemeyer, Congressman Clay, and members of the Subcommittee, thank you for the opportunity to appear before the Subcommittee on Financial Institutions and Consumer Credit.

I am the partner emerita with the Hudson Cook law firm. Our firm specializes in consumer financial services; my practice involved primarily issues arising under consumer protection laws, including the Fair Credit Reporting Act,[1] the Federal Debt Collection Practices Act,[2] the Credit Repair Organizations Act,[3] and similar laws. In all, I enjoyed more than 40 years' experience in the consumer financial services field, including service as Associate Director for Credit Practices at the Federal Trade Commission (FTC), as in-house counsel at a retail creditor, and as a practitioner counseling clients on compliance with the consumer protection laws. I also served as a consultant and an expert witness in litigation involving these consumer protection laws.[4]

Although I am not currently involved in the day-to-day practice of law, I was pleased to receive this Subcommittee's invitation to testify on three bills: the draft of the Credit Services Protection Act (CSPA); H.R. 1849 (the Practice of Law Clarification Act of 2017); and H.R. 2359 (the Fair Credit Reporting Liability Harmonization Act). I believe that my extensive experience with the subject matter of all three bills will assist in understanding the urgent need for their enactment. I commend you for holding this hearing.

I. Overview

While all three bills involve different consumer financial services laws, each of those laws was designed to address industry practices that caused substantial injury to consumers. Prior

[1] 15 U.S.C. § 1681 et seq.
[2] 15 U.S.C. § 1692 et seq.
[3] 15 U.S.C. §§ 1679-1679j.
[4] A detailed description of my background and experience is attached to this statement.

to the Fair Credit Reporting Act, there were inadequate protections regarding the accuracy and confidentiality of consumer report information. Congressional hearings on the Fair Debt Collection Practices Act included testimony about consumer debt collectors' unfair and sometimes abusive acts and practices. The Credit Repair Organizations Act was designed to regulate the conduct of credit repair organizations and to address the injury that these organizations inflicted through their false promises that they could eliminate negative, but accurate, information in consumers' reports. Industry representatives supported the enactment of each of these consumer protection laws.[5]

Today, there is universal support for these laws and for their essential protections for consumers in the financial services marketplace. None of the three bills before you would jeopardize those protections. On the contrary, each bill would make each law more effective and fair for everyone.

The bills would accomplish this result by bringing common sense into the interpretation of each law and by correcting some judicial misinterpretations. The Supreme Court of the United States admitted that the Fair Credit Reporting Act is "less than pellucid."[6] I believe that the Court misunderstood the Fair Debt Collection Practices Act's applicability to the practice of law.[7] If the highest court in the land sometimes struggles to understand these laws, you can imagine the difficulty for the lower courts and for the industry. In the efforts to apply these laws,

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[5] Associated Credit Bureaus (the predecessor to the Consumer Data Industry Association) worked with Congress on the Fair Credit Reporting Act prior to its enactment in 1970. The Act reflected the industry standards for consumer reporting. Similarly, the American Collectors Association supported enactment of the Fair Debt Collection Practices Act in 1977. Finally, the Credit Repair Organizations Act was passed in 1996 at the urging of the consumer credit and credit reporting industry.

[6] *Safeco Insurance Company of America v. Burr,* 551 U.S. 47, 70 (2007). Three federal courts (the U.S. District Court, the U.S. Court of Appeals for the 9th Circuit, and the U.S. Supreme Court) each had very different interpretations of the same language in the Act's provision in the same case.

[7] *Heintz v. Jenkins,* 514 U.S. 291 (1995).

some courts have ignored the Congressional purpose, federal agency policy statements, and the real-world consequences of their interpretations. Some courts' decisions ignored the common sense meaning of the statutes' language. My testimony describes the adverse effects of these decisions and explains how each bill would solve the problems in a manner consistent with common sense and full protection for consumers.

II. H.R. ____, the Credit Services Protection Act

I begin with the Discussion Draft of the Credit Services Protection Act (CSPA). This bill would maintain the Credit Repair Organization Act's (CROA) prohibition against, and enforcement of, illegal credit repair activities, while creating an environment in which legitimate companies may facilitate the delivery of individualized credit education and improvement services to consumers, under the supervision of the Federal Trade Commission (FTC). My testimony describes: (1) the demonstrable consumer demand and need for these services, (2) why CROA, as interpreted by some courts, has created an unnecessary impediment to the provision of these services, and (3) the solution set forth in the CSPA.

A. Need for Individualized Credit Education and Protection Services

Today, more than ever, consumers are provided resources to learn about their credit scores and credit standing. This is in large part due to efforts by Congress to make transparency of credit reports and scores a top priority, along with the efforts of the CFPB to encourage greater access to scores.

Consumers have access to their credit report information in a variety of ways. Since the passage of the Fair and Accurate Credit Transactions Act in 2003, consumers may now request a free annual credit report from each of the nationwide consumer reporting agencies, including Experian, Equifax and TransUnion (through www.annualcreditreport.com). Additionally, since the CFPB launched its Scores on Statements initiative in 2014,[8] more than 50 million credit card account holders have been receiving a free credit score in their monthly statements.[9] Consumers also receive an estimated 120 million credit-score disclosures each year through various statutory notices.[10] However, despite having improved access to their credit score and consumer report information, consumers remain confused about their credit histories and are unsure of how to take control of their finances.

The CFPB's study on consumer reports revealed that "[c]onsumers appreciated the presence of their scores on their [credit card] statement, but had questions about what actions to take once they had seen their scores."[11] Having access to their full credit report did not necessarily alleviate the confusion. While some consumers viewed their credit reports as helpful to improving their scores and general financial situation, many reported that they "were not sure how to improve their scores and were confused by conflicting advice about what actions to take." When consumers want to know more, they often call the consumer reporting agencies.

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[8] See CONSUMER FINANCIAL PROTECTION BUREAU, "CFPB Calls on Top Credit Card Companies to Make Credit Scores Available to Consumers" (February 27, 2014), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-calls-on-top-credit-card-companies-to-make-credit-scores-available-to-consumers/.

[9] CONSUMER FINANCIAL PROTECTION BUREAU, "CFPB Reports That More Than 50 Million Credit Card Consumers Have Access to Free Credit Scores" (February 19, 2015), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-reports-that-more-than-50-million-credit-card-consumers-have-access-to-free-credit-scores/ (noting that in the first year alone, the number of consumers reached by the Scores on Statements initiatives passed the 50 million mark).

[10] Required by the Fair Credit Reporting Act, a credit score disclosure includes a letter sent by a lender advising a consumer that the lender has not been able to approve the application for credit, due at least in part, to the consumer's credit score, and it explains to the consumer the key factors that have negatively impacted the score (such as the number of delinquencies, or the existence of a bankruptcy, etc.). The credit score disclosure directs the consumer to contact the consumer reporting agency from which the report was obtained for more information.

[11] CONSUMER FINANCIAL PROTECTION BUREAU, CONSUMER VOICES ON CREDIT REPORTS AND SCORES (2015), available at: http://files.consumerfinance.gov/f/201502_cfpb_report_consumer-voices-on-credit-reports-and-scores.pdf [hereinafter CFPB Consumer Voices Report].

Consumer reporting agencies, and others in the marketplace, are developing solutions to help consumers know how to improve their financial situation. These consumer education services vary from advising on general steps about managing one's finances (i.e. "pay your bills on time each month"), to providing specific guidance to the consumer as to what that consumer should do about their accounts in the future (i.e. transfer balances from card A to card B). It is the latter, the personalized credit education services, which provide the solution to the very question consumers are asking – "what do I do now?"

Recent studies show the effectiveness of personalized credit education services, and the results are exciting. After completing a personalized credit education program, 62% of consumers had an increase in their credit score, with nearly half of those (30%) seeing a 21 point or greater score improvement. More importantly perhaps, 86% of those participants surveyed answered that their credit management skills had improved and that they were "more capable" than before the education, with 39% of those responding stating they were "much more capable." Eighty-eight percent of consumers who participated in the post-program survey answered that they had a better understanding of what they could do that may positively affect their credit score, with 60% responding they were more likely to request their free annual credit reports, 63% stating they were more likely to look for, and dispute, perceived errors. Individuals with thin files (who lack sufficient credit history information to generate a score) had a 29% increase in the number of tradelines as opposed to those who did not complete the program (who saw only a 7% increase) [12]. This study confirms what industry has observed anecdotally for years: Consumers want and need more education to improve their financial circumstances.

[12] POLICY & ECONOMIC RESEARCH COUNCIL, PERSONALIZED CREDIT EDUCATION: CONSUMER AND SMALL BUSINESS OWNER ATTITUDES, IMPACTS AND IMPEDIMENTS (2016), available at http://www.perc.net/wp-content/uploads/2016/11/CE_PERC_FinalReport_113016web.pdf [hereinafter PERC Report].

Today's consumers demand access to information where, how, and when they want it. Most consumers who request copies of their consumer reports do so online.[13] Consumers demand easy to understand, and where possible, streamlined websites to obtain their services quickly, and the failure to timely provide these services leads to a lower adoption rate. Even where personalized education services were offered free of charge, consumers were still deterred by the requirement that they wait three days to complete the program, with 46% of those surveyed in 2015 indicating they would have used the credit education program if they had not been forced to wait.[14] This means a significant number of consumers who want, and would benefit from, the consumer education services are not using them. This delay is caused by the breadth of the definitions in CROA and various courts' misinterpretations of CROA, which force companies to comply with a law that was never intended to cover them or their products and services. As a result, companies offering credit education must turn consumers away for three days or more before allowing them to try to take advantage of the beneficial service. It is not surprising that few consumers complete these helpful programs or get the timely help that they may need when in the market for credit.

B. CROA and the Courts' Misinterpretations of Credit Repair

More than 20 years ago, at the urging of the FTC and the consumer credit industry, Congress enacted CROA.[15] The Act provided much-needed consumer protection from scam artists and other fraudulent operators who falsely claimed that they could "clean up" or "repair" a consumer's existing credit report history by removing negative information from their files –

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[13] CFPB Consumer Voices Report, *supra* note 11.
[14] Michael Turner, Michael Staten, and Patrick Walker, "Is CROA Choking Credit Report Literacy?" (April 2015), Policy and Economic Research Council (PERC), available at: http://www.perc.net/publications/is-croa-choking-credit-report-literacy/.
[15] 15 U.S.C. § 1679 *et seq.*

even when the information was accurate. These "credit repair" clinics charged exorbitant fees in advance, but failed to produce the promised results. In the process, they also abused the consumer dispute procedures, flooding credit reporting agencies ("CRAs") with frivolous disputes. The accuracy, integrity, and reliability of consumer report information was compromised because CRAs were often forced to delete negative but accurate information in the consumer report file because of this "gaming" of the dispute system. As a result of the incomplete picture painted by these reports, credit grantors were injured when they extended credit to consumers without the benefit of the information.

CROA protects consumers in the following ways: (1) prohibiting the advance payment of fees for services, (2) giving consumers a 3-day right to cancel the services after signing a written contract, during which the services may not be provided, (3) requiring the provision of notice to consumers of their legal right to dispute and remove inaccurate information in their credit report files at no cost, and (4) prohibiting false and deceptive acts or practices in connection with credit repair services. CROA is a strict liability statute: any violation of one of its many technical requirements results in liability, regardless of any consumer harm. CROA provides for a private right of action, including class actions, and the penalties for violation include complete disgorgement of any fees paid by consumers.[16]

In addition, the FTC and the State Attorneys General may enforce CROA.[17] The FTC has vigorously enforced CROA against credit repair operators and has protected consumers from

[16] 15 U.S.C. § 1679(g).
[17] 15 U.S.C. § 1679(h).

misleading and fraudulent practices.[18] In all their CROA enforcement activities, the FTC and State Attorneys General have focused exclusively on true credit repair activities, and have not interpreted CROA's definitions to apply to consumer education or identity theft protection services. In fact, the FTC has testified that it saw "little basis on which to subject the sale of legitimate credit monitoring and similar educational products and services to CROA's specific prohibitions and requirements, which were intended to address deceptive and abusive credit repair business practices." These services, "if promoted and sold in a truthful manner, can help consumers maintain an accurate credit file and provide them with valuable information for combating identity theft."[19]

The FTC's interpretation is consistent with the distinction between (a) credit repair, which is *retroactive* in its effect (you repair, or fix, something that is broken or damaged) and (b) consumer education and other services, including identity theft protection, which are *prospective* in their application (these services help maintain the status quo or improve a situation).

Initially, the courts interpreting CROA adopted this common-sense difference between retroactive "repair" of credit and prospective improvement in credit. *Hillis v. Equifax Consumer Servs. Inc.*, 237 F.R.D. 491, 514 (N.D. Ga. 2006) ("Congress did not intend for the definition of a credit repair organization to sweep in services that offer only prospective credit advice to consumers or provide information to consumers so that *they* can take steps to improve their credit in the future."). More recently, however, some courts have interpreted CROA to

[18] As the FTC testified in 2007 before this Committee, the FTC, in conjunction with other law enforcement agencies state and federal, has enforced CROA in several "sweeps" since its enactment, including Project Credit Despair (bringing 20 enforcement cases in 2006); Operation New ID-Bad Idea I and II (bringing 52 actions in 1999); and Operation Eraser (32 actions filed in 1998). *See* S. HRG. 110–1170 "Oversight of Telemarketing Practices and the Credit Repair Organizations Act (CROA)." Prepared statement of the Federal Trade Commission before the Committee on Commerce, Science, and Transportation. US Senate, 110th Congress, 1st Session. July 31, 2007, page 18.

[19] FTC Congressional Testimony, *supra* note 18 at p. 20.

encompass also "services aimed at improving future creditworthy behavior with prospective promises of improved credit" *Stout v. Freescore, LLC,* 743 F.3d 680, 686 (9th Cir. 2014) and *Zimmerman v. Puccio,* 613 F.3d 60, 72 (1st Cir. 2011) (finding that credit counseling aimed at improving future creditworthy behavior is credit repair). Thus, under these courts' interpretation, CROA may cover any product or service that possibly helps consumers improve their credit, or even prevent deterioration, including products and services that millions of consumers already use, such as credit monitoring and identity protection.

Not surprisingly, such peculiar definitions of credit "repair" have prevented or significantly hampered the offering and delivery of new and innovative consumer credit education products, like personalized credit score simulators, and other credit maintenance and improvement services, even when the providers of the services do, in fact, help consumers prospectively improve their credit histories and credit scores and achieve tangible benefit from the services.[20]

C. The Solution

There is a clear solution to the barriers that CROA and the courts' interpretations of it have created to the development and delivery of new credit education tools and identity theft protection services. Congressman Ed Royce (R-CA) has developed draft legislation, the Credit Services Protection Act ("CSPA"), to create a narrow exemption for the provision of credit education services and credit and identity protection services. The new draft is based upon the feedback from many stakeholders that Congressman Royce and a bipartisan group of lawmakers received on H.R. 347, during the 114th Congress.

[20] PERC Report, *supra* note 12.

This would *not* be a blanket exemption from CROA's requirements for the nationwide consumer reporting agencies and other companies that currently are inhibited from delivering innovative credit education. Rather, the CSPA would enable "authorized credit service providers" ("ACSPs") to provide credit education and identity theft protection services following their registration with the FTC in accordance with the CSPA's requirements for registration, including informing the FTC of their intention to deliver legitimate credit education services and/or credit and identity protection services. These registered entities would be prohibited from engaging in the type of credit repair activities that CROA was intended to prevent, and would be required to follow a stringent set of requirements, including submitting a written certification to the FTC with detailed information about the business, and providing a public representation of adherence to the practices, commitments, and obligations prescribed by the law. Further, each ACSP would be required to provide the FTC with ongoing, biannual audits on its compliance program and other details relating to its products and services.

In addition, the CSPA would adopt the consumer protections in CROA that are relevant for the services that an ACSP provides. These would include a notice explaining the consumer's rights with respect to access to and the ability to dispute information in a credit report file. Consumers would be apprised of their right to receive their credit report, and the right to a free copy of the report annually from the nationwide consumer reporting agencies. Consumers would have the right to cancel the service within three business days of enrollment and to receive a refund for any services not provided during that time.

The safe harbor under the CSPA would not create a loophole for any entity to engage in credit repair free from CROA's liability provisions. If an ACSP were found to have been delivering traditional credit repair, the entity would be subject to CROA's provisions, including a private right of action if the FTC revoked the ACSP's registration. Moreover, the FTC, the CFPB, the State Attorneys General, and consumers, under state law, would maintain existing rights to sue for unfair and deceptive acts or practices by an ACSP.

In sum, the CSPA would provide a framework to enable legitimate businesses to offer existing products and develop innovative new products to protect consumers' credit information from identity theft and to provide the credit information that consumers want and need, and it would accomplish this goal while assuring full protection for consumers in their utilization of these services.

III. H.R. 1849 (the Practice of Law Clarification Act of 2017)

Next, I discuss H.R. 1849, introduced by Representative Trott (R-MI). As its name implies, this bill would clarify that the practice of law by licensed attorneys does not involve debt collection activities that should be subject to the Fair Debt Collection Practices Act (FDCPA).

This bill would exclude law firms and licensed attorneys from the FDCPA's definition of "debt collector," but the exclusion would apply only to the extent that the law firm or attorney engaged in legal proceedings on behalf of a client. The bill would also amend the Consumer Financial Protection Act (CFPA) to exempt licensed attorneys while engaged in such legal proceedings from the Consumer Financial Protection Bureau's (CFPB's) enforcement and supervisory authority.

My support for this bill is based on my experience, first in working with Congressional staff on behalf of a retail creditor when Congress was considering the enactment of the FDCPA in 1977, and then in the mid-1980s as the director of the FTC's division responsible for enforcing the FDCPA. Drawing on this experience, I discuss the history of the FDCPA's applicability to attorneys and my reaction to courts' interpretations of that issue. I also discuss the scope of CFPB's regulatory authority over collection attorneys. As I believe the following demonstrates, H.R. 1849 is a long overdue, common-sense approach to attorneys collecting debt on behalf of their clients using legal proceedings.

A. The FDCPA as Enacted in 1977

Given the broad definition of "debt collector" and the kinds of activities that the Act was designed to police, Congress recognized that certain exemptions were appropriate. One such exemption was "any attorney-at-law collecting a debt ***as an attorney*** on behalf of and in the name of a client."[21] Congress recognized that "debt collection" and the practice of law involve different activities and should be subject to different regulation. An attorney collecting a debt on behalf of a client in a legal proceeding prepares the complaint and other legal documents to be served on the debtor, communicates with the debtor or her attorney in connection with the lawsuit, communicates with the court, and enforces any resulting judgment. On the other hand, a debt collector sends dunning letters to debtors, calls debtors, enters into payment plans with debtors, and skip traces. While an attorney would be subject to standards of professional conduct and overseen by the state bar (or bars) of which she was a member, a debt collector would not. In fact, in 1977, only 37 states and the District of Columbia regulated debt collectors in any capacity. Of those 37 states and the District, only 26 and the District provided "effective protection" against collection abuses according to the Senate Committee on Banking, Housing and Urban Affairs.[22]

Over time, however, a new trend emerged: unscrupulous debt collectors, who happened to also be attorneys, were engaging in abusive collection practices outside of the litigation

[21] Pub. L. 95-109, § 803(6)(F) (1977) (emphasis added).
[22] H.R. REP. NO. 95-38, at 37 (1977).

channel of collection, and evading FDCPA coverage. For example, attorney debt collectors were calling debtors frequently and at odd hours, including late at night, disclosing the debt to third parties, and making false threats.[23] A law license was not required to engage in any of these practices – any non-attorney debt collector could do the same, but would be subject to liability under the FDCPA. Moreover, attorneys were using their law licenses as shields to protect large debt collection operations, staffed primarily by non-lawyers and engaged primarily in non-legal work. These collection firms were "law firms" in name only.[24]

B. Congress Repeals the FDCPA's Attorney Exemption

These abusive practices came to the attention of the FTC and Congress in the mid-1980s. At that time, I was the Associate Director for Credit Practices at the FTC's Bureau of Consumer Protection, and as such directed the FTC's division responsible for FDCPA enforcement. We were concerned about the abuses of the exemption, but also the compliance burden that the FDCPA imposed on attorneys litigating debt collection cases, including highly technical disclosure requirements, limits on contacts with third parties, and rules about ceasing to collect the debt.[25] Testifying on behalf of the FTC, I urged the committee to "retain some form of the attorney exemption," but to also provide clarification concerning the scope of the exemption, including how it would apply to an attorney who does not operate a collection firm, but who also engages in more than occasional collection in the course of her legal practice.[26] In other words, we at the FTC recommended an exclusion for activities in the course of the practice of law,

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[23] H.R. REP. NO. 99-405 (1985).

[24] *To Amend the Fair Debt Collection Practices Act: Hearing on H.R. 237 Before the H. Subcomm. on Cons. Affairs and Coinage of the H. Comm. on Banking, Fin. and Urban Affairs*, 99th Cong. 8-9 (1985) (statement of Anne Fortney, Associate Director for Credit Practices, Bureau of Consumer Protection of the Federal Trade Commission).

[25] *Id.* at 16-19, 24-25.

[26] The FTC had asked Congress four times before 1985 to clarify the attorney exemption. *See id.* at 22-23.

rather than an exemption for attorneys. H.R. 1849 would address the very issues we were concerned about, by creating a narrow and specific exemption from the FDCPA for certain types of attorney litigation activities.

Congress ultimately repealed the attorney exemption in 1986. The stated purpose was to level the playing field between non-attorney debt collectors and attorney debt collectors, and to regulate the *collection* activities, and not the *legal* activities, of attorneys. In other words, Congress did not want to regulate any activities for which a law licensed is required.[27] However, Congress did not replace the broad attorney exemption with a narrower exemption for an attorney's litigation or other legal activities, as the FTC had requested.

Before 1986, the FTC's position was that attorneys engaged in non-litigation collection activities were covered by the FDCPA, because they were not acting as attorneys when they collected debt, and therefore did not fit within the attorney exemption.[28] Since the repeal of the attorney exemption, the FTC has consistently interpreted the FDCPA to apply only to attorneys engaged in non-litigation debt collection, and not to attorneys "whose practice is limited to legal activities (e.g., the filing and prosecution of lawsuits to reduce debts to judgment)."[29]

C. *Heintz v. Jenkins*

Over the next nine years following the repeal of the attorney exemption, it was unclear whether attorneys collecting debt through litigation were subject to the FDCPA. The federal circuit courts split on the issue, which eventually made its way to the U.S. Supreme Court in

[27] 132 CONG. REC. H10031-02 (daily ed. Oct. 14, 1986) (statement of Rep. Annunzio).
[28] *Hearing on H.R. 237*, *supra* note 24, at 13-15 ("The [FTC] takes the position that the [FDCPA] applies to any business that functions as a traditional debt collection firm and engages in the same kind of collection activity, regardless of whether it is owned or operated by an attorney... attorneys or law firms whose operations are virtually indistinguishable from a debt collection agency have no legitimate claim to exemption.").
[29] FEDERAL TRADE COMMISSION, STATEMENTS OF GENERAL POLICY OR INTERPRETATION, STAFF COMMENTARY ON THE FAIR DEBT COLLECTION PRACTICES ACT, 53 Fed. Reg. 50097-02, 50102 (1988).

1995. In *Heintz v. Jenkins*, the Supreme Court held that the FDCPA applies to attorneys who regularly engage in consumer debt collection activity, and regulates both the litigation and non-litigation collection activity of attorneys.[30] The Court disregarded the legislative history of the 1986 amendments and the FTC's 1988 Policy Statement on the scope of the FDCPA. Instead, the Court relied on Congress's failure in 1986 to replace the FDCPA's attorney exemption with a specific, narrower exemption for an attorney's litigation-related activity as proof that Congress intended to regulate all attorney debt collection activities at the time it amended the FDCPA in 1986.

However, the FTC's position remained consistent with the original underlying purpose of the 1986 amendments to the FDCPA. From 1998 until 2006 (the year that the FTC stopped making legislative recommendations in its annual reports), the FTC continued to recommend to Congress in its annual report on FDCPA enforcement that Congress clarify the extent to which the FDCPA applies to collection attorneys' litigation activities.[31] To my knowledge, the FTC has never brought an enforcement action under the FDCPA against a law firm or an attorney for litigation-related collection activity.

D. The Consequences of *Heintz*

Despite the FTC's position, plaintiffs' attorneys have taken *Heintz* at face value, and routinely sue law firms over not only collection activity, but litigation-related activity, including information contained in legal filings. Lower courts, which must follow the Supreme Court's binding precedent in *Heintz*, typically find that litigation-related activities are subject to the

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[30] 514 U.S. 291 (U.S. 1995).
[31] 2006 FTC FDCPA ANN. REP. 11-12 (2006), available at: https://www.ftc.gov/sites/default/files/documents/reports/fair-debt-collection-practices-act-federal-trade-commission-annual-report-2006-types-consumer/p0648042006fdcpareport.pdf.

FDCPA.[32] It is difficult to believe that Congress could have intended the following consequences that flowed from repealing the attorney exemption in 1986.

For example, in 2010, the U.S. Supreme Court issued its opinion in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, bringing to a head a startling trend in FDCPA litigation against law firms and attorneys.[33] In *Jerman*, the Court held that the FDCPA's bona fide error defense – which generally protects from liability a debt collector who makes a bona fide and unintentional error, as long as it has procedures reasonably adapted to avoid such error[34] – does not apply to mistakes of law. In other words, a technical, but harmless, violation of the FDCPA can result in a lawsuit for an attorney exercising good faith legal judgment. Justices Kennedy and Alito, in their dissent in *Jerman*, warned:

> After today's ruling, attorneys can be punished for advocacy reasonably deemed to be in compliance with the law or even required by it. This distorts the legal process. Henceforth, creditors' attorneys of the highest ethical standing are encouraged to adopt a debtor-friendly interpretation of every question, lest the attorneys themselves incur personal financial risk. It is most disturbing that this Court now adopts a statutory interpretation that will interject an attorney's personal financial interests into the professional and ethical dynamics of the attorney-client relationship.[35]

In many instances, plaintiffs suing law firms over legal pleadings have not even suffered any harm, and yet courts routinely find law firms can be sued over technical FDCPA violations for information they included in a complaint, or for harmless errors, or even errors that benefit the consumer. For example, the venue provision of the FDCPA requires a debt collector to sue a debtor in the judicial district in which she lives or in which she signed the contract creating the

[32] *Marquez v. Weinstein, Pinson & Riley, P.S.*, 836 F.3d 808 (7th Cir. 2016); *Kaymark v. Bank of America, N.A.*, 783 F.3d 168 (3d Cir. 2015); *Miljkovic v. Shafritz and Dinkin, P.A.*, 791 F.3d 1291 (11th Cir. 2015); *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007).
[33] 559 U.S. 573 (2010).
[34] 15 U.S.C. § 1692k(c).
[35] 559 U.S. at 622.

debt.[36] Courts generally interpret this rule to mean that a debt collector must sue in the smallest judicial unit that covers where the debtor lives or signed the contract, which is typically a county-level court. But, in some large counties – e.g., Cook County, Illinois – there are multiple judicial sub-districts. The U.S. Court of Appeals for the Seventh Circuit, which is the federal appellate court covering Illinois and several surrounding states, ruled in 1996 that a debt collector could sue a debtor who lived or signed the contract in Cook County in *any* of the judicial sub-districts within Cook County.[37] Debtors generally appreciated this, because they preferred to deal with legal actions close to where they worked, near downtown Chicago, rather than having to travel to suburban courts to handle legal actions. In 2013, relying on this Seventh Circuit case, a law firm, on behalf of a client, sued a debtor in Cook County in a judicial sub-district other than the one in which he lived or signed the contract. At the time the law firm sued the debtor, the venue for its lawsuit complied in all respects with applicable law. Then, in 2014, the Seventh Circuit reversed course, ruling that debt collectors had to sue in the judicial sub-district within Cook County where the debtor resided or signed the contract, and could not sue in any sub-district within the county.[38] Eight days after the Seventh Circuit reversed its 2014 decision, the law firm dismissed the collection case and even refunded an appearance fee that the debtor had paid. Nonetheless, the debtor sued the law firm, arguing that the law firm violated the FDCPA by suing him in the wrong venue. The court ultimately ruled against the law firm, finding that even though it had made a good faith legal judgment that complied in all respects with the existing law at the time, and had dismissed the lawsuit and refunded the debtor's appearance fees when it learned of the new ruling from the Seventh Circuit, the lawsuit was filed

[36] 15 U.S.C. § 1692i(a)(2).
[37] *Newsom v. Friedman*, 76 F.3d 813 (7th Cir. 1996).
[38] *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636 (7th Cir. 2014).

in the wrong judicial district and therefore the law firm could be liable for violating the FDCPA.[39] The debtor alleged no harm – this was merely a technical violation of the FDCPA. He was not dragged into a far-flung court. Instead, he was asked to appear in a court in the same county in which he lived, and within almost a week of learning about the change in position of the Seventh Circuit, the law firm dismissed its case and refunded the debtor's appearance fees.

In another example, a consumer sued a law firm over an affidavit it filed with its debt collection complaint in state court in which the law firm requested attorneys' fees "to the extent permitted by applicable law." The U.S Court of Appeals for the Sixth Circuit explained that the affidavit was not "technically" deceptive—there was no threat to take an action that could not be legally taken—but nonetheless held that because the debt collector filed the lawsuit in *Ohio*, which does not allow attorneys' fees, the affidavit was deceptive in violation of the FDCPA.[40] In other words, an attorney can face liability for a lawful and truthful request in a court filing, which is subject to all the protections afforded by the legal system, including a neutral judge and the rules of civil procedure. These no-harm cases demonstrate that attorneys engaged in litigation can be held liable for a technical violation of the FDCPA, even if they exercise good faith legal judgment, comply with existing binding legal precedent, and the consumer suffers no harm.

No-harm liability for debt collectors continues even after the U.S. Supreme Court's 2016 decision in *Spokeo, Inc. v. Robins*. In *Spokeo*, the Supreme Court held that plaintiffs must allege actual harm or a risk of harm to establish the standing necessary to bring a case in federal court and cannot rely on a mere technical violation of law.[41] However, since *Spokeo*, federal courts

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[39] *Oliva v. Blatt, Hasenmiller, Leibsker & Moore LLC*, 864 F.3d 492 (7th Cir. 2017).
[40] *Gionis v. Javitch, Block, Rathbone, LLP*, 238 Fed. Appx. 24 (6th Cir. 2007).
[41] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), as revised (May 24, 2016).

have routinely found that any deceptive statement is, by itself, without any additional allegation of actual harm or risk of harm, sufficient to establish standing in FDCPA lawsuits.[42] And, in line with those decisions, attorney debt collectors engaged in litigation have also been held liable for pleadings that were allegedly deceptive, but did not harm the consumer. For instance, the U.S. Court of Appeals for the Third Circuit found that a debtor had standing to sue a law firm that demanded certain fees in a foreclosure complaint, even though the debtor suffered no harm from the demand. In that case, the fees were not yet incurred at the time of filing the complaint, but were ultimately incurred and were reasonable.[43]

The encroachment on the attorney-client relationship, and the attorney's ethical obligations to her clients, are not the only ways that the lack of clarity in the FDCPA, and the resulting *Heintz* decision, have affected attorneys collecting debt through litigation. Other provisions of the FDCPA impose hurdles on an attorney's ability to litigate a valid claim on behalf of her client. For example:

- The FDCPA's requirement that a debt collector honor a written cease communication request from a debtor, including a written statement that the debtor refuses to pay the debt,[44] interferes with an attorney's ability to settle lawsuits or negotiate payment plans.
- The FDCPA's prohibition on false and deceptive statements, for which debt collectors are strictly liable,[45] means that a debt collector could be held liable for a pleading in

[42] *See, e.g., Thomas v. John A. Youderian Jr., LLC*, 232 F.Supp.3d 656 (Dist. N.J. 2017) (debtor had standing to bring FDCPA claim for collection letter that included unauthorized fee even though debtor did not actually pay fee); *Schweer v. HOVG, LLC*, LLC, 2017 WL 2906504 (M.D. Penn. July 7, 2017) (debtor had standing to bring FDCPA lawsuit alleging debt validation notice was overshadowed, even though she did not allege injury); *Bautz v. ARS National Services, Inc.*, 226 F.Supp.3d 131 (E.D.N.Y. 2016) (debtor who stated claim for deceptive collection letter had standing to sue under FDCPA without proof of injuries).
[43] *Kaymark v. Bank of America, N.A.*, 783 F.3d 168 (3d. Cir. 2015).
[44] 15 U.S.C. § 1692c(c).

which the collector seeks a portion of the debt or fees that are in dispute. This type of pleading would likely be allowed and even encouraged under state law and court rules, because the amount in dispute is typically what the litigation will resolve.

Debt collection attorneys' compliance burdens do not end at the FDCPA's private right of action. The CFPB has rulemaking, supervisory, and enforcement authority under the FDCPA and under the CFPA. As I will discuss below, the CFPB, interpreting *Heintz*, apparently views its authority as extending to the litigation activities of collection attorneys.

E. The Dodd-Frank Act and the CFPB's Supervisory Authority

In 2010, Congress enacted the Dodd-Frank Act, giving the new CFPB enforcement, supervisory, and rulemaking authority to regulate certain consumer financial products and services, including debt collection.[46] The Dodd-Frank Act expressly excludes attorneys from the CFPB's supervisory and enforcement authority, except under certain circumstances, including when an attorney offers or provides a consumer financial product or service with respect to a consumer, but does not represent the consumer in connection with the product or service.[47]

The legislative history shows that it was Congress's intent that the CFPB not have "authority to regulate the practice of law, which is regulated by the [s]tate or [s]tates in which the attorney in question is licensed to practice."[48] In fact, the purpose was to regulate individuals "who happen to be attorneys... if the conduct is not part of the practice of law or incidental to the practice of law."[49] In other words, Congress intended a practice of law exclusion, not an attorney exemption.

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[45] 15 U.S.C. § 1692e(2).
[46] *See* 12 U.S.C. §§ 5512(a), 5481(15)(A)(x).
[47] 12 U.S.C. § 5517(e)(2)(B).
[48] 156 CONG. REC. E1347-01, E1348-E1349 (daily ed. Jun. 30, 2010) (speech of Rep. Conyers).
[49] *Id.*

In 2012, the CFPB issued its final Larger Participant Rule for the debt collection market.[50] The CFPB interpreted the Dodd-Frank Act to mean that the Bureau has supervisory authority over attorney debt collectors, because attorney debt collectors are providing a consumer financial product or service (debt collection) with respect to a consumer (the debtor), but are not representing that consumer.[51]

The Larger Participant Rules does not distinguish between attorney litigation practices, and attorney debt collection practices. While the CFPB does not expressly include or exclude litigation activities from the scope of its supervisory authority, the CFPB does cite to *Heintz* for the proposition that attorney debt collectors are subject to the FDCPA even when they are litigating.[52] Accordingly, any attorney who meets the definition of "debt collector" under the FDCPA, and also exceeds the income thresholds in the Larger Participant Rule, is subject to CFPB supervision, including in connection with her litigation activities.

F. H.R. 1849 Would Resolve the Problems Created by *Heintz*

As I have said throughout my testimony, the original intent of the repeal of the attorney exemption from the FDCPA was to clarify that attorneys engaged in non-litigation collection activities are subject to the FDCPA. The FTC has always taken the position that the FDCPA should have a clear, narrow practice of law exemption for attorney debt collectors when they litigate on behalf of their clients. The failure to include such an exemption in 1986 resulted in the Supreme Court's decision in *Heintz*, and its progeny, including cases that subject attorneys'

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[50] 12 C.F.R. § 1090.105 (2012).

[51] *Bureau of Consumer Financial Protection, Defining Larger Participants of the Consumer Debt Collection Market*, 77 Fed. Reg. 65775-01, 65784 (October 31, 2012). The CFPB's Larger Participant Rule affects only the scope of its supervisory authority, and does not affect what types of entities are subject to the FDCPA. *Id.* at 65776.

[52] 77 Fed. Reg. 65775-01 at note 76.

legal judgment in litigation to FDCPA liability, and the CFPB's position that it has the authority to supervise attorneys litigating consumer debt collection cases.

H.R. 1849 – which essentially clarifies Congress's intent – solves many of the problems stemming from *Heintz* by creating a specific, narrow practice of law exemption from both the FDCPA and the CFPB's supervisory authority for attorneys that (1) serve, file, or convey formal legal pleadings, discovery requests, or other documents pursuant to the applicable rules of civil procedure, or (2) communicate in connection with a legal action to collect a debt on behalf of a client in, or at the direction of, a court of law, or in the enforcement of a judgment. Specifically, H.R. 1849 addresses the following issues:

- Attorneys can exercise legal judgment, and advocate zealously on behalf of their clients without fear of lawsuits and the reputational risks attendant to those lawsuits;
- Attorneys can exercise legal judgment, and advocate zealously on behalf of their clients without the burden of having to comply with complex technical rules that limit an attorney's ability to settle lawsuits; and
- Attorneys will be subject to supervision and discipline only from their state bars and state supreme courts, which control their ability to practice law, and not from a consumer protection regulator that has in mind only the interests of consumer debtors, who are typically averse to a debt collection attorney's clients.

H.R. 1849 also solves many of the problems that arose from the inclusion of a broad attorney exemption in the original version of the FDCPA. Specifically:

- Attorneys collecting debt are still subject to the FDCPA and the CFPB's supervisory authority when they make collection calls, send dunning letters, attempt to skip trace, or engage in any other activities for which a law license is not required;

- Debt collection law firms that primarily engage in non-litigation debt collection activities, and which employ large numbers of non-attorney staff to do those activities, will still be subject to regulation and supervision;
- The legal process still has built-in protections for debtors (e.g., the judge, rules of civil procedure, and requirements concerning the veracity of court filings); and
- Attorneys collecting debt using legal process will still be subject to the supervision and discipline of their state bars and supreme courts. An attorney who commits almost any act that the FDCPA prohibits, or that would be considered a UDAAP, would also be subject to discipline by her state bar, and could potentially lose her law license. Indeed, the prospect of an attorney losing her law license is at least as foreboding as facing potential monetary liability for a violation of the FDPCA.

G. Conclusion

I believe that H.R. 1849 is a narrowly-tailored, practical solution to the unintended consequences of the 1986 repeal of the attorney exemption to the FDCPA and the Supreme Court's resulting decision in *Heintz*. H.R. 1849 would relieve collection attorneys who are engaged in litigation of unnecessarily burdensome compliance obligations and supervisory interference that inhibit their ability to zealously advocate for their clients. At the same time, H.R. 1849 would retain regulation and oversight of debt collection attorneys engaged in non-litigation activities.

IV. H.R. 2359 (the Fair Credit Reporting Liability Harmonization Act)

I next address H.R. 2359, the FCRA Liability Harmonization Act. This bill was introduced on May 4, 2017 by Representative Barry Loudermilk (R-GA) along with four original cosponsors[53] and, subsequently, eight more cosponsors.[54]

The bill would bring potential liability for FCRA violations in accordance with other titles of the Consumer Credit Protection Act[55] and other consumer financial protection laws, by placing a monetary cap on class action damage awards and eliminating awards of punitive damages. I will explain the scope of the FCRA's coverage of the business world and compare its liability provisions to those found in other titles of the CCPA. I will also describe the unfair litigation landscape under the FCRA and why liability harmonization with other consumer protection laws would benefit consumers, as well as businesses.

A. Range of Businesses Subject to the FCRA

The Fair Credit Reporting Act (FCRA) governs the content and the use of consumer reports, including credit reports. In doing so, the FCRA provides consumers with rights of access and correction, accuracy and data quality, and privacy and confidentiality. The FCRA covers much more than just credit reporting agencies. Because of the broad definitions of a "consumer report"[56] and a "consumer reporting agency,"[57] the Act governs the business of employment screening companies, check verification companies, insurance claims report agencies, tenant screening companies, and medical record and payment agencies. In addition, the Act applies to literally thousands of financial and other companies that furnish information to consumer

[53] Ted Budd (R-NC), Peter King (R-NY), Ed Royce (R-CA) and Ann Wagner (R-MO).
[54] Scott Tipton (R-CO), David Trott (R-MI), Keith Rothfus (R-PA), Tom Emmer (R-MN), Robert Pittenger (R-NC), Frank Lucas (R-OK), Steve Stivers (R-OH) and Bill Huizenga (R-MI).
[55] 15 U.S.C. § 1601 *et seq.*
[56] FCRA § 603(d); 15 U.S.C. § 1681a(d).
[57] FCRA § 603(f); 15 U.S.C. § 1681a(f).

reporting agencies, which compile the reports. Moreover, virtually every business, large and small, uses consumer reports for credit determinations, insurance underwriting, employment background screening, or to meet any legitimate need to assist a consumer in a transaction initiated by the consumer for personal or household purposes.

B. FCRA Civil Liability Provisions

When enacted in 1970, the FCRA created a private right of action for consumers for actual damages they sustained arising from a violation of the Act. The FCRA was amended in 1996 to permit a plaintiff to seek not just actual damages, but also, even in the absence of actual harm, statutory damages of not less than $100 and not more than $1,000 for any "willful" failure to comply with the Act. The 1996 amendments also included punitive damages for willful violations as determined by a court. But, the 1996 amendments failed, inexplicably, to include a cap on the amount of a class action award. The 1996 amendments also expanded the obligations of employers using consumer reports[58] and in 2003, the Fair and Accurate Credit Transactions Act ("FACTA")[59] created new requirements and prohibitions, to be subject to private rights of action.

These amendments and the growing trend of class action lawsuits have significantly changed the environment in which consumer reporting agencies, furnishers, and users of consumer reports operate. This combination of statutory damages, untethered from any actual harm, opened the floodgates to frequent and massive class action judgments against restaurants, retailers, Internet sellers, grocery stores, university systems, financial institutions and even the Walt Disney Company.[60]

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[58] Title II, Subtitle D, Chapter 1, Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (Pub. L. No. 104-208, Sept. 30, 1996).
[59] Title I, Subtitle A, Fair and Accurate Credit Transactions Act (Pub. L. No. 108-159, Dec. 4, 2003).
[60] *See Culberson II and Joseph III v. The Walt Disney Co.*, Case No. BC526351 (2017).

C. Comparison of the FCRA's Civil Liability Provisions with Other Consumer Financial Protection Laws

When it comes to class action litigation, the FCRA is an outlier. The Act is one of several titles of the omnibus Consumer Credit Protection Act. The other titles are the Truth in Lending Act ("TILA"), the Equal Credit Opportunity Act ("ECOA"), the Fair Debt Collection Practices Act ("FDCPA"), and the Electronic Fund Transfer Act ("EFTA"). Every other one of those acts places a monetary cap on class action damage awards. There is a reason for these caps.

The first title of the Consumer Credit Protection Act, TILA, was enacted in 1968 with a civil action recovery provision of $100 to $1,000 in statutory damages and with no class action cap. Within a few years, however, courts realized that the absence of a cap for statutory awards in TILA class action lawsuits was having a devastating effect on creditors. In 1972, in *Ratner v. Chemical Bank New York Trust Company,* a federal district court even went so far as to deny class certification on the grounds that the aggregated statutory damage award, "would be a horrendous, possibly annihilating punishment, unrelated to any damage to the reported class or to any benefit to the defendant for what is at most a technical and debatable violation of the Truth in Lending Act".[61] In order "to protect small business firms from catastrophic judgments" awarded in class actions for technical violations of TILA, Congress amended the Act in 1974 to place a cap for statutory awards in class actions at $500,000 or one percent of the defendant's net worth.[62]

In the years that followed, in enacting subsequent financial consumer protection laws, Congress did not omit a cap on damages. For example, the FDCPA, enacted in 1977, caps a

[61] *Ratner*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972).

[62] Act of October 28, 1974 sec. 408, § 1640(a), 88 Stat. 1500, 1518. The cap was increased to $1,000,000 in 2010. Pub. L. 111-203, § 1416, 124 Stat 1376, 2153 (2010).

class action award at the lesser of $500,000 or one percent of the net worth of the debt collector. The EFTA, enacted in 1990, similarly caps the class action award at the lesser to $500,000 or one percent of net worth. The ECOA does the same. Other statutes using the same metric for a class action cap (the lesser of $500,000 or one percent of net worth) include the Expedited Funds Availability Act[63] and the Homeowners Protection Act.[64] Furthermore, the TILA, FDCPA, and EFTA do not allow any award for punitive damages. ECOA caps the amount of punitive damages. Congress clearly balanced a consumer's right to redress with the impact that unchecked class action litigation could have on industry.

The FCRA was enacted in 1970, well before the problems with TILA's lack of a damages cap became evident and required change. When the FCRA was amended in 1996, the focus was on heightened damages for *willful* violations of the law, as opposed to negligent violations. Unfortunately, the amendment left "willfulness" undefined. In 2007, the Supreme Court in *Safeco Insurance Company of America v. Burr*[65] defined "willful" violations to include not only actions taken knowingly, but also where one acted in reckless disregard of the law. At the same time, *Safeco* made clear that reasonable interpretations of the law were not "willful."[66] While *Safeco* provided some relief, since that decision, courts have often found that whether a defendant acted recklessly is a question of fact,[67] thus eliminating the possibility that the plaintiffs' claims could be resolved without a protracted lawsuit.

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[63] 12 U.S.C. § 4010.
[64] 12 U.S.C. § 4907.
[65] 551 U.S. 47, 57-58 (2007).
[66] "Thus, a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Safeco*, 551 U.S. at 69.
[67] *See e.g. Miller v. Johnson & Johnson, Janssen Pharmaceuticals Inc.*, No. 6:13-cv-1016-ORL-40KRS *10 (M.D. Fla. Jan. 14, 2015).

D. The Consequences of Unlimited Class Action Liability under the FCRA

FCRA private rights of action were intended to be a mechanism to enforce compliance with the law and recover actual damages, but have metastasized to become an opportunity for trial attorneys to target employers and other users of consumer reports in order to bring large class actions alleging technical violations of the statute, often where no consumer harm is alleged. The number of FCRA cases filed annually has increased substantially since the enactment of the FCRA. These claims are lodged not only against large consumer reporting agencies, but also employers and other users of consumer reports across countless industries, including retailers, restaurants, staffing agencies, employment background screeners, financial institutions, among others.

A recurring theme of litigation surrounds technical compliance by employers relating to the use of consumer reports for employment purposes. When using a consumer report for employment purposes, an employer must: (1) provide a "clear and conspicuous" disclosure in writing before the report is procured in a separate document that consists only of the disclosure; (2) obtain the consumer's written authorization; (3) provide a "pre-adverse action" notice to the consumer including the report and the Consumer Financial Protection Bureau's Summary of Rights; and (4) provide a "post-adverse action" notice to the consumer. Employers that include additional information about the job, or the employer on the background check disclosure form, or have some other technical defect on the face of the document, have become attractive targets in class action litigation regardless of whether or not the plaintiffs allege any harm or confusion with the documents.

As a byproduct to the expansion of the types of businesses subject to FCRA liability over the years, the size and cost of FCRA class action litigation has put businesses in the precarious position of settling rather than defending their practices in court. When faced with the looming threat of the expenses of discovery and uncapped liability for class sizes often reaching tens of thousands of members, businesses are effectively forced to enter into settlement negotiations to avoid being forced out of business.

It is difficult to ascertain the actual distribution of a settlement to class members. However, in five out of six lawsuits examined (for which information was publicly available), class members received .000006 percent of the award in one action; .33 percent in another; .966 percent in a third; 12 percent in a fourth; and 15 percent in the fifth. [68] The remainder went to class action lawyers and administrative costs. What is the bottom line? In an uncapped class action environment like the FCRA, class action lawyers are incentivized to bring FCRA class actions and consumers receive little, if any, benefit.[69]

There are countless examples of court approved settlements which result in massive payments to class action attorneys but very modest payments to consumers. These settlements would, in all likelihood, not have occurred but for the absence of caps on the potential amount of a class action award.

Some of these settlements arise from activity that did not harm consumers at all, but still resulted in massive awards – little of which reached these consumers. In *Erin Knights and Tresca Prater, et al. v. Publix Super Markets, Inc.*, 3:14-cv-00720, (M.D. Tenn. Oct. 17, 2014), for example, the Publix supermarket chain agreed to pay nearly $6.8 million to settle a FCRA lawsuit. The FCRA requires employers that conduct pre-employment background checks to

[68] *See*, Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* [hereinafter "Mayer Brown Study"] (December 2013) at 2, *available at* https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf (last viewed August 30, 2017).

[69] *Id.*

provide a written disclosure to applicants prior to the check – and that disclosure must be a "document that consists solely of the disclosure." 15 U.S.C. §1681b(b)(2). Publix allegedly provided the necessary disclosure, but that same document also included other additional language.

The class included more than 90,000 members. Theoretically, each class member was awarded $75, but after awarding attorneys' fees of nearly $2.4 million dollars and class representative service payments, each class member's take home came to around $48. No harm was ever alleged, let alone proven, in that case.

In *Fernandez v. Home Depot USA, Inc.*, No. 8:13-cv-00648 (C.D. Cal. Apr. 21, 2015), the defendant agreed to a $1.8 million class action settlement for claims that were clearly a mere technical violation – that Home Depot included "extraneous information" in their employment background check disclosure form (beyond the notice that Home Depot would conduct a background check and obtain a consumer report on the applicant). There were approximately 120,000 class members, and each eligible class member would stand to receive somewhere between $15 and $100, after the plaintiffs' counsel were awarded $750,000 in fees.

In *Brown v. Delhaize America, LLC et al.*, 1:14-cv-00195 (M.D. N.C. July 20, 2015), two claims were made against Food Lion and others – first, that defendants failed to provide class members with a clear and conspicuous pre-background check employment disclosure consisting solely of the disclosure that a consumer report would be obtained for employment purposes, prior to obtaining the consumer report. The second allegation was for a smaller class claiming adverse employment action was taken based on their background checks without providing those employees with a pre-adverse action notice required by the FCRA.

The parties reached a $3 million settlement. Counsel was permitted to petition for up to one-third of the fund as attorneys' fees, costs, and for an award to the named Plaintiff (Brown) for up to $2,000. Approximately 57,000 class members in the disclosure class were to receive a gross payment of $48 but, after deductions for attorneys' fees and costs, this class took home approximately $31 each. The 2,500 class members in the adverse action class were to receive a gross amount of $96, which was reduced to $61 a person after deducting attorneys' fees and other expenses.

E. Benefits of FCRA Liability Harmonization to Consumers and the Business Community

As detailed above, businesses usually make the million dollar payouts in FCRA class action cases, but consumers aren't the ones seeing the big checks. Research has demonstrated that, for all class actions, class members receive little to no benefit at all.[70] The Consumer Financial Protection Bureau confirmed through its own research that class actions rarely actually put money in the hands of consumers.[71]

In fact, FCRA class actions may have the opposite effect on consumers by driving up the costs of consumer goods and services.[72] The more businesses must budget for anticipated litigation costs, the more they may have to consider increasing their prices. Further, increased FCRA class action litigation has an ancillary impact on the economy. With more constrained budgets, businesses create fewer new jobs and expand less. Innovation is also hindered and companies are less apt to develop new technologies to better serve consumers.

[70] *See* Mayer Brown Study, *supra* note 14, and Joanna Shepherd, Emory University School of Law Legal Studies Research Paper Series, *An Empirical Survey of No-Injury Class* Actions, Research Paper No. 16-402, pages 15 through 18, *available at* http://ssrn.com/abstract=2726905 (last viewed August 30, 2017).
[71] *See* Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, March 2015, *available at* http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (last viewed August 30, 2017).
[72] *See* Shepherd, *supra* note 70, at footnote 60, page 23.

With the reasonable and consistent limits on liability in the FCRA Liability Harmonization Act, consumers could continue to seek redress for violations of the FCRA in court in several ways. Consumers could bring individual cases seeking damages for actual harm and the costs of litigation either through willful noncompliance under section 1681n[73] or negligent noncompliance under section 1681o.[74] Additionally, the tool of class action litigation would still be available for violations affecting a broader population. All of these routes to court permit the award of attorneys' fees, therefore it is fanciful to make the argument that consumers could no longer afford to bring a case or attorneys would no longer take the case.

Finally, the FCRA is vigorously enforced by the Consumer Financial Protection Bureau, the Federal Trade Commission, and state Attorneys General, and the CFPB has supervisory authority over consumer reporting agencies and financial furnishers and consumer report users. The robust oversight and enforcement environment incentivizes FCRA users to adopt compliance policies to ensure their behavior is consistent with the requirements of the FCRA. Additionally, in the FCRA context, because there are so few class actions that actually result in new law being made, there is rarely a case that requires a change corporate behavior. Ultimately a combination of current litigation and regulatory and oversight initiatives make consumer class actions much less important in promoting compliance with the FCRA.

F. Conclusion

The FCRA Liability Harmonization Act would bring relief to businesses by adding reasonable and consistent limits on liability, so that businesses can make real decisions about their litigation risks without essentially being forced into settlement by an out-of-sync and

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[73] 15 U.S.C. § 1681n.
[74] 15 U.S.C. § 1681o.

outdated statute. In this environment, businesses would be free to offer their products and services to consumers without fear of draconian liability.

Statement of the U.S. Chamber of Commerce

ON: Legislative Proposals for a More Efficient Federal Financial Regulatory Regime

TO: House Committee on Financial Services, Subcommittee on Financial Institutions and Consumer Credit

BY: Thomas Quaadman, Executive Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce

DATE: September 7, 2017

1615 H Street NW | Washington, DC | 20062

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Chairman Luetkemeyer, Ranking Member Clay, and members of the Subcommittee on Financial Institutions and Consumer Credit. My name is Tom Quaadman, executive vice president of the Center for Capital Markets Competitiveness (CCMC) at the U.S. Chamber of Commerce (Chamber).

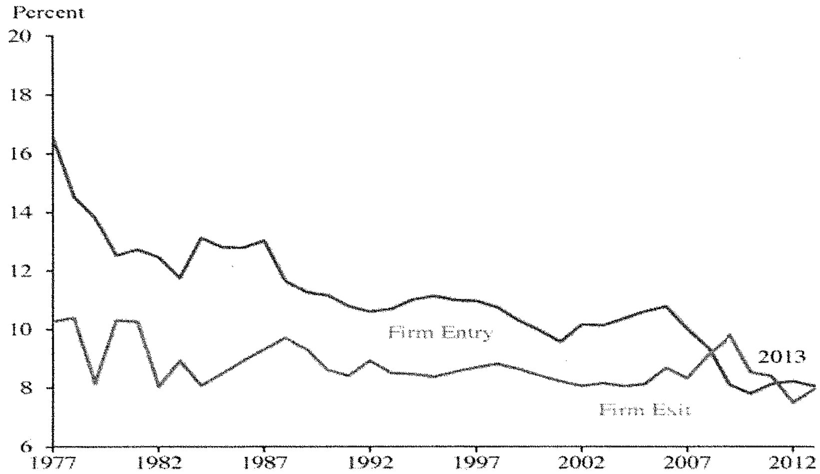
This hearing, "Legislative Proposals for a More Efficient Federal Financial Regulatory Regime," is an important opportunity to address critical matters and fix shortfalls in the federal financial regulatory regime.

America has the most diverse and deepest capital markets in world and businesses use many different types of financing to grow. Entrepreneurs use consumer financial products such as credit cards and home equity loans, Main Street businesses may use bank loans, large businesses will use the debt and equity markets, while businesses that trade overseas will use globally active banks. This diversity in both financing and business organization is unique in the world and has enabled the American economy to be the most prosperous in world history.

Capital markets and financial institutions that fuel economic growth need to be properly regulated to ensure a transparent and reliable structure for businesses, investors and consumers. While policymakers have been laser-focused on stability since 2008, we have lost sight of the fact that you can't have stability without growth. Now that countless rules and regulations have been implemented and the financial crisis is almost a decade behind us, it is critical that we address the second component of a robust economy: growth.

Economic growth has consistently been below historic growth rates since 2008. Numerous reports, ranging from the Census Bureau to the recent Economic Innovation Group report, *Dynamism in Retreat*, demonstrate that business creation is sputtering to historic lows and struggling to outpace business destruction. We are losing the dynamism and creativity that has made our economy unique and enabled it to thrive. As we know, a thriving economy creates jobs, expands businesses, allows for greater capital investment, and promotes financial security. To regain this vital progress, we need to reverse this trend quickly.

Figure 5-3
Firm Entry and Exit Rates in the United States, 1977–2013



Source: U.S. Census Bureau, Business Dynamics Statistics.

There are many reasons for these troubling trends, but the financing of businesses and consumers is a part of the problem. Fortunately, several of the bills under consideration by the Subcommittee are a part of the solution. These bills would help to restore the financing needed for Main Street businesses and their consumers, while ensuring markets are well-regulated.

We thank the Subcommittee for the opportunity to testify and are pleased to offer our views on the legislation below.

H.R. 3312, the Systemic Risk Designation Improvement Act

The U.S. business community depends on banks of all sizes to finance long-term growth, manage cash flow, and help make payroll. While a range of issues impact business financing, we wish to confine our comments to the regulations affecting mid-size and regional banks that are near or above the $50 billion systemically important financial institution ("SIFI") threshold, but not designated as global systemically important banks ("G-SIBs"). Many regulations affecting G-SIBs merit critical examination – for example, those domestic prudential regulations substantively more stringent than the internationally-negotiated standard – but not in the context of today's hearing.

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") established an arbitrary threshold that banks with over $50 billion in assets are deemed a SIFI. These banks are subject to enhanced prudential and supervisory standards by the Board of the Governors of the Federal Reserve System ("Federal Reserve"). The enhanced standards include, but are not limited to: stress-test and capital plan requirements, risk-based and leverage capital requirements, liquidity standards, requirements for overall risk management, and the periodic submission of resolution plans.

SIFI Regulations Are Not Appropriate for Mid-size and Regional Banks

Mid-size and regional banks are pillars of the business community and the broader U.S. economy. They are highly integrated into their local communities, and generally operate strong retail branch networks across several states. Perhaps most importantly, mid-size and regional banks follow a traditional, low-risk business model: the taking of customer deposits and making of loans to consumers and small and mid-size businesses. In addition to directly supporting Main Street, mid-size and regional banks are also important liquidity providers to other financial institutions that support small businesses. Analysis by the Office of Financial Research confirms that mid-size and regional banks simply do not generate or implicate significant systemic risk.[1]

In this context, the application of the enhanced prudential and supervisory standards required by under the Dodd-Frank Act is entirely without warrant. These enhanced regulations are intended to address the risks associated with large, complex, globally-interconnected financial institutions. By indiscriminately applying the enhanced standards to mid-size and regional banks that do not create or implicate systemic risk, the arbitrary asset threshold has imposed enormous and entirely avoidable burdens on the U.S. financial system, the business community, and the broader economy. As detailed below, these burdens are particularly pronounced with respect to small and mid-size business lending.

[1] Office of Financial Research, U.S. Department of the Treasury, BCBS Systemic Risk Importance Indicators Reported by Large U.S. Bank Holding Companies (Feb. 12, 2015), *available at* https://www.financialresearch.gov/briefs/2015/02/12/systemic-importance-indicators-for-us-bank-holding-companies/.

The State of Small and Mid-size Business Lending

Notwithstanding suggestions that overall bank lending is strong, granular analysis of government data and private studies reveals significant constraints in lending to small and mid-size businesses. Across all depository institutions insured by the Federal Deposit Insurance Corporation (FDIC), the total balance of commercial and industrial (C&I) loans smaller than $1 million has increased only 0.188% percent since 2008 – an absolutely dismal statistic given the 26.1% increase in U.S. gross domestic product.[2] The total balance of nonfarm nonresidential (*e.g.*, commercial real estate, or CRE) loans has *declined* by 24.86% in the same time period.[3]

Community Reinvestment Act (CRA) data on small loans to businesses is even more alarming. According to the most recent report by the Federal Financial Institutions Examination Council, originations and purchases of small business loans reported under the CRA declined 44% from 2008 to 2015, from 10.75 million to 6.07 million.[4] Troublingly, business loans less than $100,000 were disproportionately responsible for this decline. These smaller loans – often required by the self-employed, businesses with only a handful of employees, and startups – are perhaps most indelibly linked to the American dream of starting a small business.

Banks from around the nation have told us that the regulatory compliance burdens for loans are the same for a $100,000 loan as for a $1 million dollar loan. These regressive regulatory encumbrances create disincentives for banks to help small businesses.

Arguments that these declines reflect weak demand for small business loans, or that demand is being satiated by alternative, nonbank lenders, are unpersuasive. In April 2017, the twelve Federal Reserve Banks reported the results of their annual survey of small business credit among employer firms.[5] While finding "widespread demand" for small loans – 45 percent of firms applied for funding – there were substantial financing shortfalls. 60 percent of firms obtained less than the amount for

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[2] Federal Deposit Insurance Corporation, Loans to Small Businesses and Farms, FDIC-Insured Institutions, 1995-2016, *available at* https://www.fdic.gov/bank/analytical/qbp/timeseries/small-business-farm-loans.xls.

[3] *Id.*

[4] Federal Financial Institutions Examination Council, Community Reinvestment Act National Aggregate Reports, 1 Originations and Purchases for Small Business and Farm Loans, *available at* https://www.ffiec.gov/craadweb/national.aspx.

[5] Federal Reserve Banks, 2016 Small Business Credit Survey: Report on Employer Firms (Apr. 2017), *available at* https://www.newyorkfed.org/medialibrary/media/smallbusiness/2016/SBCS-Report-EmployerFirms-2016.pdf.

which they had applied, and almost a quarter of small businesses were unable to obtain any financing at all. Last month, the Federal Reserve Banks specifically reported on the financing and credit experiences for startup firms – businesses five years old or younger.[6] The report identified even more significant financing challenges for startup firms. This is particularly troubling, given the outsized role startups play in driving economic growth.

In nation-wide discussions with small businesses and their banks it is clear that there is demand for more capital. However, the demand isn't readily apparent as businesses are disinclined to apply for a loan because of the obstacles in obtaining a loan.

The anemic state of small and mid-size business lending merits the utmost concern from policymakers. Small businesses have long been recognized as key drivers of U.S. innovation, productivity, and job creation – they create over 60% of net new private-sector jobs, employ nearly half of America's workforce, and produce 16 times more patents per employee than larger firms.[7]

Impact of Enhanced Prudential and Supervisory Standards on Lending

Recent scholarly research traces the stagnation and decline in small and mid-size business lending at U.S. banks – and the resulting constraints on job creation and economic growth – directly to the capital and liquidity regime implemented in the wake of the financial crisis. In May 2017, a team of economists concluded that "small business lending in all size categories is statistically significantly less at stress-tested banks" – consistent with the hypothesis that stress-tested banks reduce the supply of credit in order to reduce bank risk – after analyzing Community Reinvestment Act loan origination data.[8] Researchers at The Clearing House came to the same conclusion after analyzing loan data in Federal Reserve and FDIC call reports.[9]

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[6] Federal Reserve Banks, 2016 Small Business Credit Survey: Report on Startup Firms (Aug. 2017), *available at* https://www.newyorkfed.org/medialibrary/media/smallbusiness/2016/SBCS-Report-StartupFirms-2016.pdf.

[7] Office of Advocacy, U.S. Small Business Administration, Frequently Asked Questions About Small Business (Aug. 2017), *available at* https://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf. Statistics on patents per employee can be found in the March 2014 edition of this document, *available at* https://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf.

[8] Viral V. Archarya, Allen N. Berger, & Raluca A. Roman, Lending Implications of U.S. Bank Stress Tests: Costs or Benefits?, J. of Fin. Intermediation (forthcoming; last rev. Aug. 18, 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2972919.

[9] The Clearing House, Are the Supervisory Bank Stress Tests Constraining the Supply of Credit to Small Businesses? (May 2017), *available at* https://www.theclearinghouse.org/-

In March 2017, researchers at Harvard Business School linked the decline in small business lending at U.S. banks to stress tests' relatively severe assumptions about the losses on small business loans, as well as the sheer amount time and effort required of senior managers to comply with the full array of regulations implemented after the financial crisis.[10]

Researchers' conclusions are supported by reports from the business community. In 2016, the Chamber surveyed over 300 corporate financial professionals on their core financial services needs and the indirect regulatory impact of newly adopted financial regulations.[11] Almost 4 in 5 respondents reported they have been affected by changes in the financial services markets, and 50 percent specifically identified increased bank capital charges as having increased their costs and created challenges with respect to financing. Troublingly, one-third of companies expect the regulatory effect to worsen over the next three years.

The Chamber earlier this year released a survey, in conjunction with Morning Consult, on small business lending.[12] The survey of over 500 small businesses found that 77 percent of small businesses think that the resources provided by banks are important to success. A majority felt that affordable credit had not improved in the last year, and 51 percent of small businesses strongly believe that regulations are inhibiting lending to small businesses. 68 percent of small businesses with less than 10 employees do not expect to be able to take another loan or line of credit over the next four years.

H.R. 3312, the Systemic Risk Designation Improvement Act, replaces the arbitrary and groundless $50 billion asset threshold with the Federal Reserve's existing methodology to identify global systemically important bank holding companies

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/media/tch/files/research%20content/2017%2005%2011%20are%20supervisory%20bank%20stress%20tests%20constraining%20the%20supply%20of%20credit%20to%20small%20business%20lending.pdf?la=en.

[10] Brian S. Chen, Samuel G. Hanson, & Jeremey C. Stein, The Decline of Big-Bank Lending to Small Business: Dynamic Impacts on Local Credit and Labor Markets (March 2017), *available at* http://www.people.hbs.edu/shanson/BigBankSmallBiz_paper_20170317_FINAL.pdf.

[11] Center for Capital Markets Competitiveness, Financing Growth: The Impact of Financial Regulation (June 16, 2016), *available at* https://www.uschamber.com/sites/default/files/documents/files/financing_growth_report_16_june_16.pdf.

[12] Morning Consult, Survey of Small Business Executives, Mar. 30, 2017, *available at* http://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/Financial-Services-Survey-For-Small-Businesses-Growth-and-Credit-Go-Hand-in-Hand.pdf?x48633.

subject to a capital surcharge, codified at 12 C.F.R. part 217.[13] This methodology assesses an individual institution on twelve specific systemic indicators across five broad categories: size, interconnectedness, substitutability, complexity, and cross jurisdictional activity.[14] Given the explicit objective of the enhanced standards is to prevent or mitigate risks to financial stability, the wisdom of H.R. 3312's determinative process is self-evident: regulations intended to address systemic risk should be applied with reference to an institution's actual risk profile. This concept – *tailoring* – enjoys broad bipartisan support and is a core principle of good governance.[15]

Such an approach, based upon risk profile and activities, is a much cleaner means to identify and deal with systemic risk. This also provides a balance to allow for financing activities that support growth, thereby promoting a stronger and more stable economy and financial system. The SIFI thresholds in the Dodd-Frank Act, though well intentioned, were painted with a broad brush and have failed at regulating systemic risk, while depriving Main Street businesses of the resources needed to grow.

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[13] As implemented by the Federal Reserve, the G-SIB surcharge is a deeply flawed rule that exemplifies an overly complex, illogical, and unjustifiably burdensome approach to prudential regulation. The Department of the Treasury has further observed that the U.S. G-SIB surcharge was calibrated to be roughly *double* the negotiated international standard, and is facially inconsistent with efforts to bolster the global competitiveness of the U.S. institutions. The incorporation by reference of the G-SIB identification methodology must not be interpreted as an implicit endorsement of the rule, nor dissuade policymakers from appropriately recalibrating the surcharge.

[14] 12 C.F.R. § 217.404. The twelve specific systemic indicators and their respective weightings are: total exposures (20%), intra-financial system assets (6.67%), intra-financial system liabilities (6.67%), securities outstanding (6.67%), payments activity (6.67%), assets under custody (6.67%), underwritten transactions in debt and equity markets (6.67%), notional amount of OTC derivatives (6.67%), trading and available-for-sale securities (6.67%), Level 3 assets (6.67%), cross-jurisdictional claims (10%) and cross-jurisdictional liabilities (10%).

[15] *See, e.g.,* Exec. Order 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011) (requiring the executive departments to "(1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity)"). *See also Examining the Regulatory Regime for Regional Banks: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs* 114th Cong. 32 (prepared statement of Daniel K. Tarullo, Governor, Board of the Governors of the Federal Reserve System) (stating "the Federal Reserve aims not only to achieve the Dodd-Frank Act goal of mitigating risks to U.S. financial stability, but to do so in a manner that limits regulatory costs and the expenditure of supervisory resources where not needed to promote safety, soundness, and financial stability.").

Regulations that unduly discourage small and mid-size business lending are equally harmful, no matter whether they apply to a large bank or a small one. However, the plight of mid-size and regional banks, which simply do not present systemic risk, is particularly unacceptable. The Chamber urges this Subcommittee to support the Systemic Risk Designation Improvement.

The Facilitating Access to Credit Act

We are pleased to see Representative Royce's introduction of the Facilitating Access to Credit Act because this legislation is critical to correct the unintended application of the Credit Repair Organizations Act of 1996 (CROA).

The Chamber believes that an efficient and fair consumer financial marketplace is one in which regulators, through supervision and enforcement, root out and deter fraud and predation. At the same time, regulators should always endeavor to fulfill their important consumer protection mission in a manner that maximizes consumers' access to diverse products and services offered on competitive terms, and that promotes innovation. Importantly, financial regulators should recognize that as of 2013, almost one-in-three Americans was unbanked or underbanked, and accordingly should make good on their promise to "increas[e] the participation of unbanked and underbanked households in the financial mainstream."[16]

One way to improve consumer participation in mainstream financial services is to empower Americans to take greater charge of their financial well-being by, for example, regularly reviewing their credit reports for irregularities. Since we live in a credit-based economy, healthy credit scores are crucial for consumers to buy a home, car, or other necessities, and to create overall financial security for themselves and their family. For these reasons, credit bureaus go to great lengths to work with consumers with less than ideal credit or thin credit files, and have robust financial literacy programs to education consumers about how to achieve good credit.

Unfortunately, the overbroad nature of CROA has had the effect of chilling the credit bureaus from further innovating and providing valuable credit improvement education and programs. In 2014, the Ninth Circuit Court of Appeals extended CROA's reach to cover even credit monitoring services in *Stout vs. Freescore.*

CROA was intended by Congress to deter "[c]ertain advertising and business practices of some companies engaged in the business of credit repair services have

[16] FED. DEPOSIT INS. CORP., 2013 FDIC NAT'L SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 4 (2014).

worked a financial hardship upon consumers, particularly those of limited economic means and who are inexperienced in credit matters."[17] However, the overly broad statutory language has unintentionally swept in valuable credit education and identity theft protection services, in many instances, forcing consumers to jump through specific hurdles that were designed specifically to prevent credit repair scams. CROA is a strict-liability statute that includes, among other protections, a three-day waiting period before services can be delivered. This waiting period is meant to give consumers time to 'cool off' before they agree to proceed with credit repair. However, that same three day waiting period must also be observed by the bureaus and others when a consumer asks them the simple question: "How can I improve my credit score?"

Even the Federal Trade Commission (FTC), the agency tasked with enforcing CROA, stated in congressional testimony the FTC "sees little basis on which to subject the sale of legitimate credit monitoring and similar educational products and services to CROA's specific prohibitions and requirements, which were intended to address deceptive and abusive credit repair business practices."[18] We agree, which is why we support Representative Royce's Facilitating Access to Credit Act and thank the Subcommittee for considering this important piece of legislation.

H.R. 2539, The FCRA Liability Harmonization Act

H.R. 2359, FCRA Liability Harmonization Act, would align the Fair Credit Reporting Act (FCRA) with other financial consumer protection laws by capping the amount of statutory damages allowed in class action lawsuits at one percent of a defendant's net worth or $500,000, whichever is less, and eliminating the possibility of punitive damages. The bill would alleviate the uncertainty of the amount of liability that businesses face in class action lawsuits. The legislation would provide economic stability for a wide range of impacted businesses by reducing the potential for crippling and catastrophic class action damage awards.

Other financial consumer protection statutes, such as the Electronic Fund Transfer Act (EFTA), the Fair Debt Collection Practices Act (FDCPA), the Equal Credit Opportunity Act (ECOA), and the Truth in Lending Act (TILA), place similar caps on damage amounts in class action litigation. When the FCRA was enacted, it only permitted consumers to seek actual damages and did not permit statutory or

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[17] 15 U.S.C. § 1679.

[18] *Oversight of Telemarketing Practices and the Credit Repair Organizations Act (CROA): Hearing Before the Senate Committee on Commerce, Science, and Transportation,* 110th Cong. 8 (2007) (written statement of Lydia B. Parnes, Dir., Bureau of Consumer Prot., Fed. Trade Comm'n).

punitive damages in a private right of action and, therefore, caps on damage awards were unnecessary. As FCRA class action litigation has become more prevalent, however, Congress should appropriately revisit the liability structure of the FCRA.

Bringing the FCRA in line with other financial consumer protection statutes is especially important in light of the current trend of FCRA class action litigation against employers. In recent years, FCRA class action lawsuits have been filed against businesses from a variety of sectors including fast food restaurants, grocers, retailers, universities, and transportation companies. These employers are particularly victimized by lawsuits where consumer harm is not at issue but rather the allegations are highly technical violations related to their use of consumer reports for employment screening. With the possibility of unlimited damages and grave reputational harm, employers and others often settle instead of defending their practices in court.

Now is the time to revisit the FCRA and establish reasonable limits on class action liability. Even with the proposed limits on total economic damages in FCRA class actions, the FCRA would permit consumer redress, but close the loophole for trial attorneys suing over merely technical violations. Under the FCRA Liability Harmonization Act, consumers could continue to bring individual cases seeking damages for actual harm and the costs of litigation. The tool of class action litigation would also still be available for violations impacting a broader population. We support the FCRA Harmonization Act because it fulfills the spirit of FCRA – preventing actual consumer harm – while protecting businesses from frivolous lawsuits.

The TRID Improvement Act

Finally, the Chamber also supports a bill expected to be introduced by Representative French Hill entitled the TRID Improvement Act.

Small businesses, particularly new start-ups, are often funded through consumer financial products. Home mortgages and home equity loans are an important part of the financial mosaic that helps to provide capital to new businesses fueling economic growth.

The Truth In Lending Act and Real Estate Settlement Procedures Act Integrated Disclosure Rule ("TRID rule"), promulgated by the Consumer Financial Protection Bureau ("CFPB"), is designed to combine, integrate and streamline disclosures in the origination and closing of a mortgage. The TRID Rule, however, had vague requirements that created a chilling effect on home sales and mortgages. For years leading up to the finalization of the TRID rule, we explained the difficulty of system implementation and delays due to the limited amount of vendors in the marketplace. The CFPB finally delayed the implementation date slightly, but institutions still need clarification. Although the TRID rule was finalized almost two years ago, financial institutions are still trying to get answers and correct interpretations of the rule from the CFPB.

While we generally encourage streamlined and concise disclosures, the unintended consequences of the TRID Rule have had adverse impacts upon the housing industry, creating both regulatory uncertainty and potential civil liability for mortgage providers. As a consequence, the TRID rule has harmed the ability of entrepreneurs to tap home equity to fuel start-ups. The CFPB has also acknowledged problems with the implementation of TRID.

The TRID Improvement Act would create a cooling off period and provide a means of addressing minor errors. We believe that this is a common-sense step to try and achieve the goals of TRID and ensuring a balance in the marketplace that can help both American homeowners and job creators. While we support this common-sense bill, we urge Congress to provide additional cure language under TRID to assist with TRIC cures that do not fit neatly under the TRID or TILA cure provisions. We would welcome the opportunity to work with Congress on a broader "cure" package to provide much-needed clarity for the marketplace.

We appreciate the work of the Financial Institutions and Consumer Credit Subcommittee on these important bills and issues. The Chamber is prepared to work with the Subcommittee on a bipartisan basis to achieve the reforms necessary to help American businesses and consumers. We must be successful in these efforts to spur economic growth to stimulate investment and create good paying jobs.

September 7, 2017

Testimony of

Charles T. Tuggle, Jr.

On behalf of the

American Bankers Association

before the

Subcommittee on Financial Institutions and Consumer Credit

of the

Committee on Financial Services

United States House of Representatives

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Chairman Luetkemeyer, Ranking Member Clay, and members of the Subcommittee, I am Charles Tuggle, Executive Vice President and General Counsel of First Horizon National Corporation. First Horizon is a $30 billion financial institution headquartered in Memphis, Tennessee. We have 170 bank branches in eight states in the southeast United States. We offer a full range of banking services to consumer and commercial customers in the southeast. Our fixed income business operates nationwide, and our fixed income customers include about half of all banks in the U.S. with portfolios over $100 million, as well as other institutional investors. Later this year, after we get regulatory approval, we plan to merge with another southeastern bank, increasing our assets to $40 billion and roughly doubling our branches.

I appreciate the opportunity to present the views of the American Bankers Association (ABA) on several important bills that would help ease the pressures banks like mine face in meeting the needs of our customers and communities. The ABA is the voice of the nation's $17 trillion banking industry, which is composed of small, mid-size, regional and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits and extend more than $9 trillion in loans.

Thank you, Mr. Chairman, for holding this hearing. It is both timely and beneficial to assess objectively where the current financial regulatory system is achieving policymakers' objectives, and where it is not. Our industry and its regulators both acknowledge that new regulations have overshot their mark in several important ways, imposing unintended costs on consumers, businesses, and the economy. We support Congressional efforts to identify where statutory and regulatory provisions need revision, and to make adjustments that will promote economic activity without compromising systemic stability. The bills under discussion today represent several advances that will be helpful to our customers. More can and needs to be done, and we appreciate the leadership of Chairman Hensarling and the entire Financial Services Committee for advancing much needed reforms.

The ABA is very supportive of the H.R. 3312, the Systemic Risk Designation Improvement Act of 2017, a bipartisan bill that would eliminate the arbitrary dollar threshold currently in place for designation as a systemically important financial institution, commonly known as a SIFI. Instead, this bill would establish a process for identifying and regulating globally systemic institutions based on the nature of their business, not simply their size. This bill offers an opportunity to tailor and focus supervisory oversight to best accomplish the goal of promoting safe and sound banking and protecting against systemic risks.

ABA also supports the Community Institution Mortgage Relief Act and the TRID Improvement Act of 2017. These bills take important steps toward enhancing consistency and efficiency in key aspects of the mortgage lending process. In my testimony, I offer suggestions for how these bills can be made even more effective.

We thank you, Mr. Chairman, for your leadership, not only on the SIFI designation issue but on many common sense proposals that would ease the barriers banks face in meeting the needs of our customers. In the remainder of my testimony, I will discuss each of the three bills in turn.

I. Systemic Risk Designation Improvement Act of 2017 (H.R. 3312)

The ABA strongly supports H.R. 3312. Under the Dodd Frank Act, an institution with $50 billion or more in consolidated assets is automatically deemed to be a "systemically important financial institution" or "SIFI." Each SIFI is subject to much higher levels of regulation ***regardless of the real risk it might pose to the financial system***. This arbitrary size threshold—and the significant regulatory requirements that come with it—has needlessly trapped many banks without any benefit to the system, handcuffing their abilities to provide needed credit and other services to consumers, businesses and their communities.

Institutions over $50 billion vary greatly, by size, scope and geography. Many have a regional retail presence, others specialize in commercial lending. Most are domestically focused but a few are global banks. Most have regional market areas, do not have significant international presence or exposure, and are not engaged in complex market, trading, or investment activities. In fact, many simply offer traditional banking products and services whose risks are well understood by our industry and its regulators. From a systemic viewpoint such banks are no riskier than community banks; the larger banks merely offer traditional products to a larger number of customers over a larger geographic area. By any objective assessment, most banks designated today as being "systemically important" in reality pose no systemic risk at all, either domestically or globally.

For a bank like mine, soon to have $40 billion in assets, the prospect of crossing the arbitrary asset threshold at $50 billion—which will trigger much greater expense and will be a significant drain on existing resources—is very troubling. The fact that we are growing means that we are successfully and effectively meeting the needs of our customers. Good business decisions should not be hijacked by arbitrary cutoffs that bear no relationship with danger to the financial system.

H.R. 3312—a bipartisan piece of legislation—would replace the current automatic SIFI designation with a process for the Federal Reserve Board to make a determination that an individual financial institution, or group of institutions, is systemically important and subject to enhanced supervision and prudential regulation. The Fed would make its determination by analyzing a variety of relevant measures of risk, rather than being bound by the sole criterion of asset size—which taken alone is a poor measure of risk—and allow the regulators to tailor their supervision and reduce regulatory burdens as appropriate. A separate process would apply to global systemically important banks.

ABA believes strongly that the most effective and value-added supervision regime is one that is risk-based and individually tailored, taking into account a wide variety of factors including size, business model, complexity of operations, and other factors relevant to the systemic risk of its activities, products, and services. H.R. 3312 addresses this issue by establishing a process that allows banking regulators to review institutions appropriately and not based on size alone.

We are encouraged by recent comments of some regulators acknowledging the need for more tailored regulation, for better coordination among regulators, and for revisiting regulations that may have led to negative unintended consequences for customers and the economy. But Congress has a critical role in both permitting and driving this change. H.R. 3312 takes an important step forward, to the benefit of our financial system and our economy. We urge support for this legislation.

II. Community Institution Mortgage Relief Act

We support the Community Institution Mortgage Relief Act introduced by Rep. Tenney. This bill would provide needed relief for smaller lenders with regard to escrow practices. The legislation would exempt lenders with $50 billion in assets or less from escrow requirements on Higher Priced Mortgage Loans (HPML) they hold in their portfolios and it would provide regulatory relief for small servicers, defined as those servicing 30,000 loans or fewer, by exempting them from various servicing requirements.

The important exemptions detailed in this legislation recognize the strong history of small institutions in providing high-quality mortgage servicing, even with limited staff and resources. Given their excellent track record, small servicers should be incentivized to continue to service mortgage loans. Unfortunately, under current rules, banks generally must provide escrow services for certain types of mortgage loans (subject to limited and often confusing exemptions), even to borrowers who don't want those services. There are efficiencies of scale to providing escrow services which smaller banks cannot enjoy. This, combined with compliance costs, makes it more expensive for smaller lenders to offer escrow services. The result is that all borrowers end up paying more, even those who don't want to avail themselves of escrow services. Even worse, some customers will face fewer credit choices as small local lenders choose to limit their participation in the mortgage market rather than take on the additional expense of adding escrow services.

Existing regulatory efforts to provide exemptions and other relief from escrow mandates have resulted in a complicated and confusing hodgepodge of requirements which makes compliance difficult. Under current escrow rules, exemptions are limited based upon a complex web of qualifiers, including geographic limitations (the servicer must be in a defined rural or underserved area), size limitations (the servicer must be under an asset cap of $2 billion), and servicing portfolio limitations (the servicer cannot service more than 2,000 loans annually).

This legislation seeks to simplify and provide some relief—goals we support. The bill could be improved, however. In its current form it adds complexity and hard-wires certain limitations and thresholds that might better be achieved through regulation. Over time, the regulators will be in a position to adjust the rules to address changing market conditions.

Also, we are concerned about the $50 billion cutoff in the current bill. It is, at best, an imprecise measure of a smaller servicer. Although size-only regulations may be a simple shortcut for supervising financial institutions, they are a poor proxy for market signals or risk; distort business decisions for institutions close to the threshold; and misallocate resources of the institution and regulators. Moreover, they needlessly burden many financial institutions which have noncomplex operations and business models; as a result they increase costs and reduce products and services available to bank customers.

For example, an institution which is well over $50 billion in assets may not be heavily engaged in mortgage lending or servicing. That institution may hold and service few loans, but under the approach taken by this bill, would still have to comply with escrow requirements on any HPML loans. The cost and complexity of doing so may force that institution to abandon mortgage lending and servicing in that market segment entirely, depriving the bank's customers of a convenient and trusted option and eliminating a competitor from the market. A cutoff based on the number of loans being serviced would be a better alternative than the asset size cutoff included in the bill. The loan cutoff for small servicers which is included in the current bill is clear and consistent, and it comports with feedback we have received from member banks about the appropriate number of loans which generally ought to define a "small" servicer.

III. TRID Improvement Act of 2017

The ABA appreciates the efforts undertaken by Rep. Hill in beginning to address the many unanswered questions about liability and compliance under the new Truth in Lending and Real Estate Settlement Procedure Act Integrated Rules, also known as the Know Before You Owe or "TRID". We believe the TRID Improvement legislation is an important first step, but there are many more steps needed to provide clarity under the rules. We offer the following comments as a starting point for discussion of further efforts that might be undertaken to bring clarity to the rules, and we stand ready to work with Rep. Hill and any other members of the committee in developing further legislation.

The housing market plays a vital role in the growth of our economy, creating jobs, fostering communities, and improving the standard of living of homeowners. In spite of record low interest rates for years, the housing market has been weak and still is far from its potential. While homeownership levels may have been over-stimulated before the financial crisis, it is shocking that now, ten years later, homeownership has fallen to levels not seen in 50 years. This result is shocking but should not be surprising. The cost of originating a home loan has doubled since 2009, to over $7,000 according to one of our members. As a major mortgage lender, this same bank reports that TRID's massive compliance costs added 350,000 man hours (or 175 full time employees/year), and cost $25 million for implementation with the likelihood for spending twice that over the next five years. This is not an isolated case, but is repeated for every bank involved in mortgage lending. Ultimately, it is the homebuyer that bears the added costs and the inconvenience of a more cumbersome and confusing process with slower times to closing.

There is a serious need to clarify liabilities under the new TRID rules, which the TRID bill does not address. A most critical element of uncertainty continues to be the scope and effect of RESPA and TILA's liability provisions given the integration of the two sets of disclosures. Since the launch of the TRID reform implementation process, banks have expressed significant anxiety about which remedies are effective under which circumstances, and about the extent to which those remedies affect non-creditors, including settlement agents and investors.

The continued uncertainty in liability forces industry stakeholders to assume that the more stringent liability will apply in all instances of non-compliance, even if that is not the intent of the law or the Consumer Financial Protection Bureau (Bureau). In the long run, the resulting impact to consumers is grim—lenders and investors will avoid exposure to uncertainty and confusion, which will result in diminished product choice and increased costs for borrowers. ABA has consistently called for more transparency regarding risks that stem from unintentional mistakes and technical non-compliance with the TRID rules. The complexity of the regulations, the intricacy of the TRID disclosure forms, and the infinite number of scenarios involved in mortgage finance create a situation where inadvertent mistakes and noncompliance are unavoidable.

In addition, there are differences in the interpretation of various TRID provisions between lenders and investors. These would be easily resolved by clarity in how TRID liabilities apply. In short, it is the Bureau's responsibility as a policy maker to affirm with certainty what law they are relying on for the different provisions. That is good public policy. It will also result in more consistent outcomes for consumers when courts interpret the law, and, most importantly, it is a critical piece of information for compliance so banks know what cure provisions apply. Congress should direct the Bureau to provide this clarity to the marketplace.

In a comment letter[1] ABA filed jointly with the Consumer Bankers Association on October 18, 2016, we recommended that the Bureau provide a more detailed description of the specific statutory

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[1] https://www.aba.com/Advocacy/commentletters/Documents/cl-KBYO-2016Oct.pdf

provisions under RESPA and/or TILA (or other statutes) it relied upon for each provision of the TRID disclosure provisions contained in the Bureau's December 2013 final TRID rule. The two Associations stated that it is only though a more precise description of the statutory authority for each disclosure element that industry stakeholders and government authorities will be able to properly identify penalties and liabilities applicable under the law. The comments below, taken from that letter, can serve as a basis for legislation that would mandate the Bureau act if it does not do so on its own.

First, we have submitted recommendations for sample documents containing a bright-line matrix of all the various disclosure elements of the Loan Estimate and Closing Disclosure forms (i.e., the Projected Payments table; Estimated Taxes, Insurance & Assessments table; adjustable rate and payment tables, among others). In such a matrix, the Bureau could explicitly address how liability might attach to any specific error. Any such matrix should include: (1) each regulatory provision that provides for a disclosure item or requirement; (2) a description of the statutory section relied upon for each disclosure item or requirement; (3) if curable, how it may be cured, e.g., as a tolerance refund, as a non-numeric clerical error, or under Section 130(b) of TILA; and (4) any comments. We understand that developing such a matrix would require that the Bureau issue additional clarifications beyond the items defined by the present proposed rulemaking. Nonetheless, we think this additional effort would be of considerable value, as stakeholders urgently need this guidance, and consumer interests would be greatly enhanced by the added clarity.

Second, although the Bureau informally issued a blank Loan Estimate and Closing Disclosure that included annotations to the statutory sections under Part B of TILA that were "referenced" in the preamble to the TRID rule, these annotated disclosures are of limited usefulness because they are informal, do not specifically address individual disclosure items, and for some provisions may conflict with the preamble of the 2013 final rule with respect to the statutory authority relied on or implemented. If the Bureau provided a matrix as described herein, issued via official commentary to the regulations, it would facilitate proper application of the law, and would allow market participants to recognize and manage their responsibility and/or accountability in the transaction.

Third, the cure provisions under TRID are extremely limited. Only two cure provisions exist under the regulation: one for tolerance violations and the other for non-numeric clerical errors. This means that there is no provision for lenders to fix other inadvertent mistakes that may not actually harm a borrower. While there is an additional cure provision under the statute that may have broader applicability, the extent to which the statutory cure provision is available with respect to TRID violations is unclear, because it historically has been applied only in the context of numerical under-disclosures of the annual percentage rate and finance charge, rather than to the substantial amount of information that must be disclosed under TRID. For this reason, there are many different interpretations in the industry regarding the applicability of the statutory cure provisions.

In a December 29, 2015 letter to the financial industry, Bureau Director Cordray added interpretive details to these cure provisions by stating that, "consistent with existing [TILA] principles, liability for statutory and class action damages would be assessed with reference to the final closing disclosure issued, not to the loan estimate, meaning that a corrected closing disclosure could, in many cases, forestall any such private liability." We read this statement to mean that the Bureau believes that many TILA violations on the Loan Estimate or Closing Disclosure may be "cured" with a corrected final closing disclosure. It would be useful for Congress to direct the Bureau to formalize formalized this interpretation via incorporation of this language into TRID's regulatory text or commentary.

ABA would be pleased to work with the committee on legislation to effectuate these recommendations.

Summary

ABA believes that common sense proposals are desperately needed that will make our regulatory system more efficient and effective. Doing so would free up scarce resources for banks that can be used instead on meeting the needs of customers and communities. Clearer and more streamlined rules also help the regulators devote resources to where the risks truly lie rather than wasting resources as a result of arbitrary asset thresholds or confusing and conflicting rules that create uncertainty and legal risks—which ultimately reduce access to credit.

The three bill we discussed today make significant advances to rationalize the system. More can and needs to be done and ABA stands ready to assist in this process. Thank you again, Mr. Chairman for your leadership to bring some much needed relief to our financial system and the communities across the country we serve.

NCLC

NATIONAL CONSUMER LAW CENTER®

Advancing Fairness in the Marketplace for All

Testimony before the

U.S. HOUSE OF REPRESENTATIVE COMMITTEE ON FINANCIAL SERVICES

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

regarding

"Legislative Proposals for a More Efficient Federal Financial Regulatory Regime"

September 7, 2017

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of the U.S. House of Representative Committee on Financial Services

regarding

"Legislative Proposals for a More Efficient Federal Financial Regulatory Regime"

September 7, 2017

INTRODUCTION AND SUMMARY

Mr. Chairman, Ranking Member Clay, and Members of the Subcommittee, thank you for inviting me to testify today regarding the six bills being considered at this hearing. I offer my testimony here on behalf of the low-income clients of the National Consumer Law Center.[1] We oppose each of the following bills because they will all harm the interests of American consumers:

1. **H.R. 2359, the FCRA Liability Harmonization Act**, would dramatically reduce accountability for credit bureaus and other companies, including when they wrongfully label innocent consumers as deadbeats, criminals, or terrorists. The bill eliminates punitive damages under the Fair Credit Reporting Act (FCRA), no matter how egregious the violation. It caps both statutory damages and actual damages for class actions to

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[1] The National Consumer Law Center is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys, as well as community groups and organizations, from all states who represent low-income and elderly individuals on consumer issues. As a result of our daily contact with these advocates, we have seen many examples of the damage wrought by consumer abuses from every part of the nation. It is from this vantage point that we supply these comments. This testimony was written by Chi Chi Wu, with assistance from Carolyn Carter, Alys Cohen, April Kuehnhoff, Andrew Pizor, and Lauren Saunders of NCLC; Christine Hines of the National Association of Consumer Advocates, and Marcus Stanley of Americans for Financial Reform.

$500,000, no matter how many thousands or millions of consumers harmed or the extent of their losses caused by illegal conduct

2. The **Credit Services Protection Act of 2017** creates an unnecessary and harmful exemption for credit bureaus from the Credit Repair Organizations Act (CROA) and potentially allows illegitimate credit repair outfits to escape CROA. The bill substitutes weaker and far less enforceable provisions for the protection of CROA. These provisions fail to prohibit advance fees, lack clear disclosure of the right to cancel, allow providers to keep part of advance payments after cancellation, cannot be privately enforced, preempts state law and state attorney general enforcement authority, and could limit the CFPB's authority over the credit bureaus with respect to credit monitoring and identity theft prevention products.

3. **H.R. 1849, the Practice of Law Clarification Act of 2017,** exempts collection attorneys, who have a long history of illegal and abusive conduct, from essential protections against abusive and deceptive debt collection practices.

4. **H.R. 3312, the Systemic Risk Designation Improvement Act of 2017,** would put major new constraints on the ability of the Federal Reserve to provide basic oversight of large bank holding companies that are not among the largest eight global mega-banks, by prohibiting any enhanced systemic risk regulation of such banks unless the Federal Reserve passes special regulations that must be ratified by a two-thirds vote of all financial regulators. It would actually increase systemic risk by dramatically restricting prudential oversight over these large bank holding companies.

5. The **Community Institution Mortgage Relief Act** would create loopholes for abuse by rolling back essential consumer protections and inappropriately extend to larger institutions the carefully tailored exemptions that currently apply to community banks.

6. The **TRID Improvement Act of 2017** undermines incentives to comply with common sense mortgage disclosure requirements and weakens crucial incentives for lenders to exercise due diligence and self-oversight.

Our opposition to each of these bills is discussed further below.

I. H.R. 2359, the FCRA Liability Harmonization Act, would dramatically reduce accountability for credit bureaus and other companies

H.R. 2359 drastically decreases the consequences for credit bureaus, background check agencies, and other "consumer reporting agencies" when they violate the Fair Credit Reporting Act (FCRA), including when they malign the reputations of innocent Americans by falsely claiming they are deadbeats, criminals, or even terrorists. The bill would eliminate punitive damages, both in class actions and in individual cases, for willful violations of the FCRA, no matter how egregious the conduct. It would impose an arbitrary, one-size-fits-all cap on both statutory damages *and actual damages* for class actions to $500,000, no matter how many thousands or millions of consumers were harmed or the extent of their losses caused by the illegal conduct.

H.R. 2359 thus radically reduces accountability for credit bureaus, background check agencies, and other companies with respect to the most serious violations that they commit in besmirching the good names of innocent Americans. While being mislabeled a deadbeat, criminal, or terrorist by itself causes significant harm, the consequences go beyond that – this type of inaccurate information deprives consumers of their ability to access credit, employment, rental housing, and more.

Limiting the consequences for wrongdoers under the FCRA would enable credit bureaus and background check agencies to disregard federal protections meant to ensure accurate reporting of credit records and other consumer reports. The bill also would have a deleterious effect on the marketplace due to the almost inevitable spread of defective data and information on millions of consumers and workers that would result.

FCRA violations are far from just "technical" as supporters of this bill suggest. FCRA statutory and punitive remedies are only awarded when a company violates the law willfully or in reckless disregard of the law. Punitive damages have been a feature of the FCRA since its enactment in 1970. The bill's provisions would restrict damages where consumers already have met the burden of proving that the perpetrator understood the law and violated it anyway. And notably, the three major credit bureaus (Equifax, Experian and TransUnion) are often the top three most complained-about companies to the Consumer Financial Protection Bureau (CFPB) every month, with the vast majority of complaints involving incorrect information on consumers' credit reports. *See, e.g.*, Consumer Financial Protection Bureau, *Monthly Complaint Report*, Vol. 21, March 2017, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201703_cfpb_Monthly-Complaint-Report.pdf.

Consumer losses caused by credit reporting malfeasance are all too real. For example, Angela Williams of Cocoa, Fla. was rightfully awarded punitive damages by a jury after spending 13 years wrangling with, and submitting multiple disputes to, Equifax to fix her credit report, which had contained at least 25 accounts that did not belong to her. Ms. Williams was wrongfully pursued by creditors and debt collectors, and repeatedly denied credit due to the company's systemic failure to fix the errors in her credit report. She suffered an enormous financial and emotional toll from the experience.

Another example of the real and dramatic harm caused by reporting agencies is the case of Richard Williams, who was repeatedly falsely labeled a criminal by First Advantage Background Services Corp. First Advantage's error was confusing Richard Williams with 'Ricky Williams,' who had the same birthdate as Richard and had been convicted or charged for a number of crimes including felony burglary and battery on a pregnant woman. This error cost Richard at least two jobs. First Advantage's error was especially outrageous given clear evidence that the two were different individuals, such as an on-line record that indicated that "Ricky" was still incarcerated at the same time Richard was applying for employment about 300 miles away. First Advantage also twice failed to use its special procedures for reviewing common names. A jury understandably awarded punitive damages to Richard, who was unemployed except for a short period for over 1 ½ years due to First Advantage's error. In fact, Richard Williams' attorney suggested a range of amounts in punitive damages and the jury, clearly outraged by the background reporting company's unlawful conduct, awarded the highest amount suggested.

Another example of egregious harm caused by credit reporting errors is from June of this year, when a California jury awarded statutory and punitive damages to 8,000 consumers in a class action after finding that TransUnion violated the FCRA when it recklessly misidentified class members as terrorists and drug dealers in their credit reports, confusing the consumers with similarly named individuals on a government watch list. TransUnion's liability for significant damages was appropriate as it willfully engaged in the exact same conduct that had resulted in a verdict against it upheld by an appellate court just six years earlier. But the company declined to implement changes that could have reduced false matches. Trans Union's failure to properly verify affected consumers' information caused them tremendous injury. For example, the lead class member, Sergio Ramirez, alleged that he was prevented from buying a car because TransUnion told lenders he potentially matched two entries on the government watch list. The remedies in these cases were aimed at compensating harmed consumers, deterring similar bad behavior and protecting the marketplace from future damage.

Additional examples of consumers who were harmed by false and inaccurate information are included in Attachment A, and a letter from over 30 public interest organizations opposing H.R. 2359 is attached as Attachment B.

H.R. 2359 would deny consumers such as Angela Williams, Richard Williams, and Sergio Ramirez the ability to seek full accountability for the outrageous violations of the FCRA that affected their lives. In each case, a jury of ordinary Americans determined that the credit bureau or background check company should rightfully be penalized for its flagrant offenses. The bill restricts the remedies for consumers without sound or logical justification. In addition to eliminating punitive damages and capping class action damages at $500,000, the latter limitation would apply to a "series of class actions." Thus, consumers could potentially be limited to one recovery of $500,000, even if the credit bureau or other reporting company continued to break the law, necessitating a second class action. Furthermore, supporters of H.R. 2359 claim that the bill merely "harmonizes" the FCRA with other consumer laws, but no other consumer law limits *actual* damages in class actions to $500,000.

More fundamentally, the FCRA is unique among consumer laws because it supplants common law claims such as defamation and slander, which traditionally have allowed for punitive damages, when consumer reporting agencies are involved. As part of the legislative bargain for the FCRA's protections, common law claims are severely restricted against reporting agencies and other industry actors. *See* 15 U.S.C. § 1681h(e) ("no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency,...except as to false information furnished with malice or willful intent to injure such consumer"). Thus, without strong remedies under the FCRA, consumers are left powerless to combat and deter false claims that ruin their financial reputations.

Under H.R. 2359, a company that willfully violates the law would escape punitive damages meant to punish and deter wrongdoing, and consumers would be denied justice for the losses caused by poor credit reporting and data practices. Careless and inaccurate credit reporting and data collection can devastate a consumer's wellbeing and financial health, including his or her pursuit of employment and access to credit. Liability for wrongful acts is a proven and powerful incentive for companies to comply with the law. By removing key tools to hold industry players accountable, the bill would weaken incentives to act properly and exacerbate misconduct in this sector, injuring more consumers and ultimately the marketplace.

II. The Credit Services Protection Act of 2017 creates an unnecessary and harmful exemption for credit bureaus from the Credit Repair Organizations Act.

The Credit Services Protection Act of 2017 would exempt the big three credit bureaus – and possibly many illegitimate credit repair organizations – from the Credit Repair Organizations Act (CROA). Instead, the bill would substitute a weaker and far less enforceable law governing "authorized credit services providers." The bill eliminates private remedies, preempts state law and state attorney general enforcement authority, and could limit the Consumer Financial Protection Bureau's authority as well.

This exemption from CROA is unnecessary and harmful to consumers and would remove protections for credit monitoring, identity theft prevention, and other products that are of dubious value. These products have been the subject of highly deceptive marketing as revealed by enforcement actions taken just this year by the Consumer Financial Protection Bureau (CFPB).

Currently, CROA applies to any person who provides services that purport to improve a consumer's credit record if they charge money for such services. Only non-profit organizations and a few other entities are exempted. The proposed amendment exempts from CROA any "nationwide consumer reporting agency" under the FCRA, 15 U.S.C. § 1681a(p) – *i.e.*, the credit bureaus Experian, Equifax and TransUnion - or any of their subsidiaries or affiliates. It also exempts any other entity that obtains the status of "authorized credit services provider" by applying and obtaining approval from the Federal Trade Commission (FTC). Approval is automatic after 60 days if the FTC does not act.

For years, the credit bureaus have sought an exemption from CROA in order to expand their sale of high-priced credit monitoring, identity theft prevention, and other subscription products. In addition to being far less effective for identity theft prevention than the simple tool of state-law mandated security freezes, the marketing of the credit bureaus' products has been notoriously rife with deception and abuse. These abuses are well-documented and include:

- Just this past January and March 2017, the CFPB took enforcement actions against all three credit bureaus for deceptive practices in their marketing of credit monitoring subscriptions. The CPFB ordered Equifax and TransUnion to refund over $17.6 million to consumers who were deceived into buying these subscriptions, plus pay fines totaling

$5.5 million. The Bureau also ordered Experian to pay a fine of $3 million for its deceptive practices.

- Ten years ago, the FTC took similar action against Consumerinfo.com d/b/a Experian Consumer Direct, ordering that credit bureau to refund nearly $1 million for deceptive practices in its promotion of credit monitoring products.
- The CFPB took enforcement actions against several of the largest credit card issuers (including Discover, Capital One, JPMorgan Chase, and Bank of America) over misleading marketing tactics in the sale of add-on products, including credit monitoring services. Collectively, these banks paid $1.38 billion in restitution and $79 million in civil fines in these cases.

There is absolutely no reason to exempt the credit bureaus from CROA so they can aggressively offer even more paid products similar to credit monitoring without the protections of the Act. While the proposed amendment does create a separate regulatory scheme for "authorized credit services providers," these protections are far weaker than CROA. Weaknesses of the proposed bill include:

- ***Eliminates protections.*** The bill does not include CROA's existing prohibition against charging advance fees. Nor does it require written contracts for these products, or require authorized credit services providers to provide copies of the contract to the consumer. It allows authorized credit services providers to sell products without CROA's existing requirement to retain signed disclosures for a minimum of two years to insure compliance.
- ***No clear right to cancel.*** The bill gives the consumer a three-day right to cancel a contract for these products, *but does not require that the consumer ever be notified of this*

right or that any notice be conspicuous, making it mere window dressing and a departure from other consumer protection laws.

- ***Requirement to pay fees.*** The bill creates a new requirement that a consumer who terminates a contract must pay "reasonable value for services actually rendered." In contrast under CROA, consumers may cancel without any penalty within 3 days. Thus, the bill allows credit bureaus to charge and retain steep "setup" fees or all of their fees upfront, so long as they refund some portion if the consumer cancels. The bill also could be read to imply that a consumer who has been sold a subscription for three years of credit monitoring services at $29.95 a month can cancel it only within the first three days, and has no right to cancel it later on if the services prove unsatisfactory or unnecessary.
- ***Automatic approval of applications after 60 days.*** The bill would allow a large number of organizations, not just the major credit bureaus, to escape from CROA. Illegitimate credit repair organizations are likely to apply *en masse* for registration with the FTC. Section 427(c)(3) of the bill provides that, unless the FTC acts upon an application within 60 days, it is "deemed as approved" and the applicant "shall be registered as an authorized credit services provider."
- ***Eliminates consumer remedies.*** This bill removes private remedies for consumers against the credit bureaus and other authorized credit services providers. It does not include a right of action for violation of its new additional provisions, including the prohibition against untrue or misleading statements regarding the services offered for credit education or identity theft prevention. More importantly, even when CROA does apply to a credit bureau or authorized services provider, it provides that only the FTC can enforce CROA with respect to those entities.

- ***Preempts stronger state laws.*** The bill preempts state laws that provide great consumer protection for credit education, identity theft protection and credit repair services offered by a credit bureau or an authorized credit services provider.
- ***Protections might be eliminated in fine print.*** Unlike CROA, there is nothing in the new additional provisions that states that any waiver of its protections is void and unenforceable. Thus, it is possible that the fine print of a contract could completely waive the bill's protections.
- ***Might eliminate CFPB authority.*** Section 425 of the bill could be interpreted to eliminate CFPB authority, making the FTC the sole enforcement authority for the credit bureaus with respect to credit education and identity protection services. The bill might have prevented the CFPB from bringing the recent enforcement actions discussed above.
- ***Denies state attorney general authority.*** Section 425 also appears to deny state Attorneys General the ability to enforce these provisions—either against one of the credit bureaus or against any other entity that obtained automatic approval of an application as an authorized credit services provider.

The credit bureaus claim that CROA impedes them from providing credit education to consumers. However, CROA merely institutes protections when the credit bureaus *charge for these products*. A plethora of websites and businesses provide the same or greater credit education than the credit bureaus for free, such as NerdWallet and CreditKarma. These websites earn revenue through referrals to credit card products but do not charge upfront fees and the consumer is not required to sign up for a credit card. In fact, one of the credit bureaus – TransUnion – is now offering a version of credit monitoring which is actually free using this model, thus showing that the credit bureaus can offer these products without seeking an upfront payment.

On a global level, facilitating the credit bureaus' sale of highly profitable credit monitoring products would in fact give them a vested interest in the inaccuracy of the credit records they maintain. The more that consumers are concerned about inaccuracies in their credit records, the better these products will sell. There is no need or reason to give the credit bureaus an exemption from CROA. A letter from over 50 consumer, civil rights, and community organizations opposing the Credit Services Protection Act of 2017 is attached as Attachment C.

III. H.R. 1849, the Practice of Law Clarification Act of 2017, would allow collection attorneys a free pass from federal consumer protections regarding debt collection

H.R. 1849, the Practice of Law Technical Clarification Act of 2017, would eradicate essential protections against abusive and deceptive debt collection practices by collection attorneys. Passage of this bill would hurt consumers, especially people who have recently lost jobs, had a death in the family, or suffered another type of devastating personal loss.

In 1986, as the result of clear findings of abuses by debt collection attorneys, Congress amended the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692a, to ensure that attorneys who meet the statutory definition of debt collector must comply with all of the provisions of the law. Pub. L. No. 99-361, 100 Stat. 768 (effective July 9, 1986). Prior to this amendment, law firms were immune from the requirements of the FDCPA even when they were operating as debt collectors. They even advertised their competitive advantage over debt collection agencies that were required to comply with the FDCPA's consumer protections. H.R. Rep. No. 405, 99th Cong., 1st Sess. (Nov. 26, 1985) *reprinted in* 1986 U.S.C.C.A.N. 1752, 132 Cong. Rec. H10534 (daily ed. Dec. 2, 1985). H.R. 1849 would turn back the clock on this important protection for struggling families by exempting attorney conduct from the consumer protections provided by the FDCPA.

Americans file more consumer complaints with state and federal officials about debt collectors than any other industry. Recent enforcement actions by federal agencies have highlighted numerous and widespread abusive and deceptive practices by collection law firms and attorneys. *See, e.g.,* Complaint, Consumer Fin. Protection Bureau v. Weltman, Weinberg & Reis Co., L.P.A. (N.D. Ohio Apr. 17, 2017); Consent Order, In the Matter of Pressler & Pressler, LLP, Sheldon H. Pressler, and Gerald J. Felt ¶ 39 (Apr. 25, 2016); Consumer Fin. Protection Bureau v. Frederick J. Hanna & Assoc., Stipulated Final Judgment and Order, 14-cv-02211-AT, at ¶¶ 10-11 (D.Ga. 2015).

Yet this bill would eliminate Consumer Financial Protection Bureau enforcement actions against law firms and attorneys. Your constituents would be harmed by this change in the law.

The FDCPA is a critical consumer protection statute designed to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). In order to achieve this goal, it is critical that Congress ensure that the statute applies broadly to *all* debt collectors. A letter from 35 consumer, civil rights and community organizations opposing H.R. 1849 is attached as Attachment D.

IV. H.R. 3312, the Systemic Risk Designation Improvement Act of 2017,' actually increases systemic risk

H.R. 3312 would put major new constraints on the ability of the Federal Reserve to provide basic oversight of large bank holding companies that are not among the largest eight global mega-banks already designated by international regulators as global systemically significant banks. The legislation appears to prohibit any enhanced systemic risk regulation of such banks unless the Federal Reserve passes special regulations that must be ratified by a two-thirds vote of all financial regulators.[2] These restrictions on basic prudential authorities are unprecedented and would significantly weaken the Federal Reserve's oversight authority as compared to its pre-crisis level.

Far from improving systemic risk regulation, this legislation increases the likelihood of big bank failures that could put at risk the economic security of millions of families. H.R. 3312 affects oversight of 27 large bank holding companies, which each hold over $50 billion in assets but are not among the eight U.S. global mega-banks. These banks, while smaller than the very largest Wall Street mega-banks, are still are among the largest one-half of one percent of all banks in the U.S. – enormously larger than community banks. Collectively, they hold over $4 trillion in assets, around a quarter of all banking system assets. Over sixty percent of deposits in the state of Ohio and over half of deposits in the state of Pennsylvania are held by large regional banks deregulated by this legislation. Should these banks become insolvent, there could be major economic impacts on regions that depend on them.

Large regional banks of a similar size to those affected by this bill played a major role in the 2008 financial crisis. Banks such as Countrywide, Washington Mutual, Wachovia, and Indymac were all significant participants in the housing bubble, and all of them failed during the 2007-2008 period. Their failures placed major stress on the financial system. H.R. 3312 would dramatically restrict prudential oversight of these kinds of large regional banks, putting our financial system at risk.

V. Community Institution Mortgage Relief Act would create loopholes for abuse

The Community Institution Mortgage Relief Act would roll back essential consumer protections and extend to larger institutions the carefully tailored exemptions that currently apply

[2] Specifically, these regulations must be ratified by a two-thirds vote of members of the Financial Stability Oversight Council (FSOC).

to community banks. Rather than expanding access to credit, the bill would create loopholes for abuse.

The bill raises the exemption from the Real Estate Settlement Procedures Act (RESPA) for small mortgage servicers from those servicing 5,000 loans to those servicing 30,000 loans. It also creates an exception that swallows the rule by supplementing the carefully tailored small lender exemption in the Truth in Lending Act that relieves them from the obligation to establish escrow accounts for higher-priced mortgages. Lenders with up to $50 billion in assets would be exempt. Targeted small-bank exemptions on servicing and escrow requirements should not be extended beyond community banks to larger banks and non-banks. Larger institutions operate with a different business model.

The CFPB already has provided small mortgage lenders and servicers with exemptions from specific rules, providing additional flexibility. Small banks play a critical role in providing borrowers from rural and other underserved markets greater access to credit. They participate much less in the capital market, have smaller transactions, and rely upon closer ties to the borrowers and communities that they serve. Expanding current exemptions to larger institutions, however, opens the door to abuses by larger banks primarily doing business outside the communities where they are based and by non-banks, which still make most of the risky, subprime mortgage loans.

Currently, companies that, along with their affiliates, are servicing no more than 5,000 loans are exempt from certain regulations if they own or originated those loans. This bill would not only increase that number six-fold but it also would remove the requirement that the loans be ones owned or originated by the servicer. As a result, much larger institutions would be exempted from procedures recently adopted to improve mortgage servicing efficiencies and better align the incentives of mortgage servicers with those of investors, communities, and homeowners. By removing the requirement to own or originate the exempted loans, the bill would provide an exemption on loans where the servicer has much less of an investment in the loan's overall performance. Expansion of the small servicer exemption would unwind key protections recently adopted to prevent avoidable foreclosures.

The bill's escrow exemption also is overly broad and contrary to the lessons of the recent financial crisis. Escrow accounts protect consumers by ensuring that they have funds for reoccurring homeownership-related expenses, such as property taxes and insurance premiums. The current escrow requirement for higher-priced loans is modest and limited, and should not be further narrowed. It only applies to subprime loans and requires establishment of an escrow for only five years, after which the homeowner can choose to close the account. Moreover, the current rule already contains a specified exemption for small creditors operating predominantly in rural and underserved areas. Such creditors, along with their affiliates, must have total assets of less than $2 billion and must have extended no more than 2,000 first-lien covered transactions during the preceding calendar year.

The escrow rule was established because, in the years leading up to the financial crisis, many homeowners with subprime loans received loans without escrow included and then were surprised to find they owed additional monthly payments beyond their loan payments. It is not appropriate to exempt larger institutions from the requirement to establish escrows. These lenders have the resources to establish such accounts and the borrowers receiving these loans benefit from the streamlined payments. Moreover, the bill does not appear to require lenders exempted from the escrow requirement to hold the loans on their books going forward. This limits the lender's incentive to ensure the loan is affordable long-term. Overall, by reducing the number of consumers that benefit from escrow protections, the bill increases the likelihood that consumers of higher-cost mortgages will not have the necessary funds to pay for ownership-related expenses.

We urge Congress to reject the Community Institution Mortgage Relief Act, which harms homeowners and communities by removing key protections for home lending and mortgage servicing.

VI. TRID Improvement Act of 2017 weakens incentives for mortgage lenders to self-monitor and promptly correct disclosure errors

We oppose the TRID Improvement Act of 2017, which undermines incentives to comply with common sense mortgage disclosure requirements and substantially weakens decades-old consumer protections. These amendments will weaken crucial incentives for lenders to exercise due diligence and self-oversight.

The existing statute encourages lenders to audit closed loans for compliance errors and to promptly correct them. The incentive for doing so is that the lender will not be liable for errors that it discovers and fixes on its own initiative. This bill, however, significantly extends the period of time a lender has after discovering a disclosure error to make a correction. This change will discourage lenders from promptly correcting inaccurate disclosures even when they are aware of them.

Of even greater concern, however, is the provision that eliminates the incentive to self-monitor, or to even be careful about accurate disclosures in the first place. This amendment will allow a lender to eliminate any post-closing compliance program and to ignore errors until a homeowner injured by deceptive disclosures tries to exercise her remedies under the law. This change will be particularly harmful to the majority of homeowners who will never realize that their lender's sloppiness has resulted in misleading and perhaps costly disclosure errors. Even a supervisory action by a regulatory agency would be unable to provide meaningful accountability. Instead, the lender could correct errors found by a regulator without any additional liability. Under such a system, lenders will have little reason to get it right the first time. Addressing errors, even if systemic, would simply be a cost of doing business.

The existing error correction provision has been in the Truth in Lending Act for decades. It promotes accuracy and transparency by giving lenders a way to correct innocent mistakes without exposing themselves to liability. The proposed amendment will, instead, limit a lender's incentive to adopt business practices to ensure generally accurate disclosures. The existing error correction rule has served as a reasonable safety valve for lenders engaged in active compliance oversight. Undermining these provisions will promote inaccurate disclosure, decrease incentives to comply with existing requirements, and interfere with a transparent, efficient mortgage market.

The same bill also includes changes to how title insurance premiums are disclosed under the Real Estate Settlement Procedures Act (RESPA). The regulation of title insurance has long been a matter of state law. Federal regulations only address how the cost is disclosed. Given the many options and calculations involved, disclosing the correct cost of insurance can be a complicated matter and the CFPB carefully studied the best way to do so before issuing the current regulations. We believe such complex issues are best delegated to agencies that have the capacity to properly evaluate them with input from all parties. The CFPB has done so and can make appropriate changes as needed through the regulatory process. Hardwiring the disclosure of title insurance premiums by statute will prevent the disclosure rules from adjusting to a rapidly changing housing market.

As currently drafted, the bill only amends RESPA. In doing so, the insurance costs disclosed under TILA will be different from those disclosed under this bill. This type of inconsistency will confuse consumers. But even if that problem is fixed, this bill is also problematic because of the precedent it sets. The purpose of TILA and RESPA is to protect consumers and the economy through clear, effective disclosures. The CFPB has been charged with implementing this approach and can continue to exercise its authority to calibrate disclosures with the needs of the market. This bill, however, allows one participant in the mortgage market to dictate how to disclose their fees. That will take consumers back to the days of forms designed to obscure rather than clarify the true cost of mortgage settlement services.

Conclusion

For the above-stated reasons, we urge Congress to reject all of the proposals that are the subject of this hearing. Thank you very much for the opportunity to testify today. I would be happy to answer any questions.

Attachment A

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NACA
National Association of Consumer Advocates

Consumers Wrongfully Labeled by Credit Reporting and Background Check Agencies Must Have Full Access to Remedies

Consumer reporting agencies are notorious for failing to fix avoidable errors on credit reports and background check reports. These errors can obstruct meaningful events in consumers' lives, such as their ability to obtain a mortgage for a home, a car, rental housing or employment. There are instances where the failures of credit reporting and background check agencies (CRAs) are so damaging to consumers' circumstances that remedies are awarded to reform and deter the misconduct to prevent future harm to others. H.R. 2359, titled the "FCRA Liability Harmonization Act," would remove critical remedies for individuals and for consumers who band together to seek accountability for harm caused by the same wrongdoing. It would eliminate punitive damages in individual cases and limit damages in class action cases, no matter how egregious the misconduct.

Below are examples showing CRAs whose conduct was so detrimental that individual consumers were unable to get serious errors in their credit reports or background checks fixed until they sued in court, and examples of consumers who banded together in class actions to seek accountability for violations of their rights under the Fair Credit Reporting Act. Under H.R. 2359, these consumers would have been denied the ability to seek adequate remedies against bad actors.

Angela Williams v. Equifax

Angela Williams of Cocoa, Fla. had an Equifax report that included at least 25 accounts that did not belong to her. The accounts which had negative information belonged to a stranger with a similar name and Social Security number. Angela spent 13 years trying to get her credit report fixed. She sent multiple disputes to Equifax, but new accounts from the other woman would still appear in Angela's credit report. In addition, Equifax would send Angela's information to creditors and debt collectors, who in turn wrongfully pursued her for the other woman's debts. Equifax's continued failure to fix Angela's reports took an enormous financial and emotional toll on her. Her credit score dropped and she was denied credit repeatedly. She was even told to leave a store after an employee viewed her credit report. Eventually, Angela sought legal help and filed a lawsuit against Equifax. Equifax long fought Angela's suit despite glaring evidence that it failed to fix the harmful errors in Angela Williams' credit report. Ultimately after a trial, a jury entered a verdict against Equifax for its misconduct and awarded actual and punitive damages to Angela.

Julie Miller v. Equifax

Julie Miller of Marion County, Oregon first discovered a problem with her credit report when a bank denied her a loan in early December 2009. Equifax had merged Miller's credit file with a different person who had the same name and a similar Social Security number, but who lived in a different state and who had a bad credit record. Miller alerted Equifax 8 times between 2009 and 2011 to correct the inaccuracies. Yet Equifax did not once correct its numerous mistakes. In addition, because Equifax failed to fix her record, Miller could not help her disabled brother who was unable to get credit on his own. Miller eventually sued Equifax for its wrongdoing. A jury awarded her compensatory and punitive damages. "For two years [Miller] was frustrated, overwhelmed, angry, depressed, humiliated, fearful about misuse of her identity, and concerned for her damaged reputation," wrote the judge in her case. "Equifax engaged in reprehensible conduct that caused real harm to Miller...Equifax should be punished financially for that wrongful conduct. [The punitive damages award] should be enough to deter Equifax...from repeating this type of conduct in the future."

David Daugherty v. Ocwen

David Daugherty of West Virginia discovered that his single mortgage serviced by Ocwen Financial Corp was listed twice on his Equifax credit report. Due to poor file maintenance, Equifax had added a second listed account or "tradeline," for the Ocwen account. One tradeline reported the mortgage as current, while the other incorrectly showed that the mortgage payment was in foreclosure and over 120 days past due. In fact, Daugherty was current on his loan. Daugherty sent numerous disputes to Equifax to fix the record. Equifax, in turn, asked Ocwen to investigate the dispute. At least 12 times, Ocwen, the mortgage servicer, would respond that the reporting was correct for both tradelines despite the fact that they were contradictory. Meanwhile, Daugherty, in anticipation of a "balloon" payment on his mortgage, sought to refinance his mortgage but was denied several times due to the negative reporting. He also was turned down for other credit. Daugherty's inability to obtain a mortgage caused him emotional trauma and significant anxiety because he feared he would lose his family home due to the false foreclosure tradeline. He filed suit, and Equifax subsequently deleted the erroneous tradeline. After trial, a jury awarded Daugherty actual damages as well as punitive damages to hold Ocwen accountable.

Richard Williams v. First Advantage

After Richard Williams of Florida obtained a B.A. degree in 2009 he struggled to find a good job during the years following the Great Recession. First Advantage Background Services Corp., a background check firm, made his job search even harder when it repeatedly provided incorrect information labeling him as a criminal to employers. When Richard applied for a job with Rent-A-Center, First Advantage's background check report matched Richard with the criminal records for 'Ricky Williams,' who had the same birthdate as Richard and had been charged for an illegal drug sale. Richard's job application was rejected as a result. When he learned of the error, Richard successfully disputed the erroneous information and a new corrected report was issued, but by then, Rent-A-Center had chosen another candidate. A year later, another job opportunity was lost for Richard when First Advantage provided an inaccurate background check report to potential employer Winn Dixie. First Advantage again wrongly matched Richard Williams with the criminal records for 'Ricky Williams' which included convictions for felony burglary and battery on a pregnant woman. First Advantage failed to adequately assess the records, which had clear evidence that the two were different individuals. For example, an on-line record indicated that the other man was incarcerated at the same time Richard was applying for employment about 300 miles away. First Advantage also twice failed to use its special procedures for reviewing common names. As a result of its errors, Richard was, except for a short period, unemployed for over 1 ½ years. Richard filed a lawsuit and a jury rendered a verdict against First Advantage, awarding actual and punitive damages. Richard's attorney suggested a range of amounts of punitive damages for the jury to consider, and the jury awarded the highest amount suggested.

Class action resolves widespread inaccurate reporting of consumer bankruptcy discharges
White v. Experian Information Solutions

Consumers in a class action alleged that the Big Three credit reporting agencies (Experian Information Solutions, Inc., Trans Union, LLC, and Equifax Information Services, LLC – "CRAs") recklessly failed to follow reasonable procedures to ensure the accurate reporting of debts discharged in bankruptcy and refused to adequately investigate consumer disputes regarding the status of discharged accounts. Creditors frequently had failed to report an updated status for these accounts, and the CRAs failed to update the accounts. The systemic and widespread failure to provide consumers a "fresh start" after a bankruptcy discharge, was, for many years one of the most serious problems in the credit reporting system. Thousands of consumers were deprived of employment, mortgage, housing rentals, credit or auto loans. The CRAs eventually agreed to a settlement that required them to revise their procedures. They agreed to treat all pre-bankruptcy debts as discharged unless the creditor or debt collector provided information showing that a debt was excludable from discharge. It resulted in a major reform in credit reporting, benefitting millions of consumers. The CRAs also agreed to a settlement payment of $45 million to compensate about 770,000 class members. The settlement payment covered "convenience awards" for some class members and actual damages awards for others, as well as costs.

Class action compensates consumers misidentified in credit reporting as terrorists and criminals
Ramirez v TransUnion LLC

In 2017, a California jury rendered a verdict for 8,000 consumers in a class action after finding that the credit reporting agency TransUnion violated the Fair Credit Reporting Act when it carelessly misidentified class members as terrorists and criminals in their credit reports, confusing the consumers with similarly named individuals on a government watch list. Trans Union defended its poor matching procedures by arguing that consumers weren't financially harmed by the inaccuracies. Yet its conduct caused tremendous injury to class members. The lead class member for example alleged that he was prevented from buying a car because TransUnion told lenders he potentially matched two entries on a government watch list. Besides the name, there were other factors, including birthdates, which showed Ramirez was not any of the persons on the government list. Ramirez said that when he tried to get off of TransUnion's list, the company's customer service agents failed to explain how the error could be corrected. Transunion could have delivered better results in its credit reporting but its active failure to ensure accuracy amounted to willful violation of the FCRA. The jury awarded nearly $60 million in statutory and punitive damages to the harmed consumers.

Conclusion

Class actions and the Fair Credit Reporting Act are critical in these and other cases because individual consumers do not have the ability to fix these issues without banding together with other similarly harmed consumers. Punitive damages are necessary to deter egregious conduct and ensure meaningful consequences when CRAs recklessly mislabel consumers as deadbeats or criminals and repeatedly fail to correct these slanderous errors. H.R. 2359, which proposes eliminating punitive damages, a $500,000 limit on statutory damages, and a $500,000 limit on actual damages in class actions would obstruct consumers' rights under federal law. If applied to these cases, the class members and individual consumers would not have been adequately compensated for the harm suffered and the violation of their federal rights. Further, the CRAs would not have been deterred from engaging in future wrongdoing and similarly harming other consumers' livelihood and wellbeing.

###

Attachment B

September 6, 2017

Hon. Jeb Hensarling, Chairman
Hon. Maxine Waters, Ranking Member
U.S. House Financial Services Committee
Washington, DC 20515

Re: *H.R. 2359 (Rep. Loudermilk), FCRA Liability Harmonization Act (Oppose)*

Dear Chairman Hensarling and Ranking Member Waters:

The undersigned public interest organizations write to urge your opposition to H.R. 2359, titled the "FCRA Liability Harmonization Act." The legislation would restrict remedies for American consumers whose credit reports and background check reports were recklessly distorted and who suffered serious consequences as a result, including losing their ability to access credit such as a mortgage, a car loan, rental housing, or employment. Limiting damages in Fair Credit Reporting Act (FCRA) legal actions, as this bill proposes, would embolden credit reporting and background check agencies to disregard federal protections meant to ensure accurate reporting of credit records and other consumer reports. The bill would allow bad actors in the credit reporting industry to wrongfully label consumers as deadbeats, terrorists, and criminals without fear of meaningful consequences. It also would have a deleterious effect on the marketplace due to the spread of defective data and information on millions of consumers and workers that almost inevitably would result.

H.R. 2359 would restrict Americans' access to justice without sound justification. It would amend the FCRA to eliminate punitive damages awards for individuals when credit reporting and background check agencies willfully break the law, no matter how egregious the industry player's conduct. It also would dictate a one-size-fits-all cap on damages in class actions to $500,000 for groups of consumers who seek accountability against bad actors in the industry, no matter how many thousands or millions of consumers harmed or the extent of their losses caused by the illegal conduct. An arbitrary cap on statutory damages in class actions would deter and practically block the most effective method for harmed consumers to stop systemic willful violations of the FCRA. And without class actions, it is not economically feasible in many cases for consumers to pursue claims on their own.

FCRA violations are far from just "technical" as supporters of this bill suggest. FCRA statutory and punitive remedies are only awarded when a company willfully violates the law. The bill's provisions would restrict damages where harmed consumers already have met the burden of proving that the perpetrator understood the law and violated it anyway. And notably, the three credit reporting agencies consistently are among the top most complained-about companies, with the vast majority of complaints involving incorrect information on consumers' credit reports.[1]

Consumer losses caused by credit reporting malfeasance are all too real. For example, Angela Williams of Cocoa, Florida was rightfully awarded actual and punitive damages by a jury after spending 13 years wrangling with, and submitting multiple disputes to, Equifax to fix her credit report, which had contained at least 25 accounts that did not belong to her. Ms. Williams was wrongfully pursued by creditors and debt collection agencies and repeatedly denied credit due to the company's systemic

[1] Consumer Financial Protection Bureau, *Monthly Complaint Report*, Vol. 20, February 2017, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201702_cfpb_Monthly-Complaint-Report.pdf

failure to fix the errors in her credit report. She suffered an enormous financial and emotional toll from the experience.

Just this year, a California jury awarded statutory and punitive damages to 8,000 consumers in a class action after finding that the credit reporting agency TransUnion violated the FCRA when it willfully misidentified class members as terrorists and criminals in their credit reports, confusing the consumers with similarly named individuals on a government watch list. TransUnion's liability for willfully engaging previously in the exact same conduct had been upheld by an appellate court, but initially declined to implement changes that could have reduced false matches making it a serial willful violator of the FCRA. Trans Union's failure to properly verify affected consumers' information caused them tremendous injury. The lead class member for example alleged that he was prevented from buying a car because TransUnion told lenders he potentially matched two entries on a government watch list. The remedies in these cases were aimed at compensating harmed consumers, deterring similar bad behavior, and protecting the marketplace from future damage.

Under H.R. 2359, a company that willfully violates the law would escape punitive damages meant to punish and deter wrongdoing, and consumers would be denied justice for the losses caused by poor credit reporting and data practices. As demonstrated, careless and inaccurate credit reporting and data collection can devastate a consumer's well-being and financial health, including his or her pursuit of employment and access to credit. Liability for wrongful acts is a powerful incentive for companies to comply with the law. By removing key tools to hold industry players accountable, the bill would weaken incentives to act properly and would exacerbate misconduct in this sector, injuring more consumers and ultimately the marketplace.

The Committee should reject this harmful proposal.

Sincerely,

A New Way of Life Re-Entry Project
Allied Progress
American Association for Justice
Americans for Financial Reform
Baltimore Neighborhoods, Inc.
Center for Digital Democracy
Center for Justice & Democracy
Center for Responsible Lending
Community Justice Project
Community Service Society of New York
Connecticut Legal Services, Inc.
Consumer Action
Consumers for Auto Reliability and Safety
D.C. Consumer Rights Coalition
Demos
East Bay Community Law Center
Florida Alliance for Consumer Protection
Georgia Watch
Greater Hartford Legal Aid, Inc.
Homeowners Against Deficient Dwellings
The Impact Fund
Legal Action Center
NAACP
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low-income clients)
National Workrights Institute
Ohio Justice & Policy Center
Public Citizen
Public Justice
Public Justice Center
Social Justice Law Project
Texas Watch
U.S. PIRG
Virginia Poverty Law Center
Workplace Fairness
Youth Represent

ATTACHMENT C

September 6, 2017

The Honorable Jeb Hensarling
Chairman
House Committee on Financial Services
Washington, DC 20515

The Honorable Maxine Waters
Ranking Member
House Committee on Financial Services
Washington, DC 20515

Re: Credit Services Protection Act of 2017 (Royce) (Oppose)

Dear Chairman Hensarling and Ranking Member Waters:

The undersigned consumer, civil rights and community organizations write to express our strong opposition to the misleadingly-named "Credit Services Protection Act" (Royce). This bill would exempt the big three credit bureaus – and possibly many illegitimate credit repair organizations – from the Credit Repair Organizations Act (CROA). Instead, the bill would substitute a weaker and far less enforceable law governing "credit services providers." The bill eliminates private remedies, preempts state law and state attorney general enforcement authority, and could limit the Consumer Financial Protection Bureau's authority as well.

This exemption from CROA is unnecessary and harmful to consumers and would remove protections for credit monitoring, identity theft prevention, and other products that are of dubious value. These products have been the subject of highly deceptive marketing as revealed by enforcement actions taken just this year by the Consumer Financial Protection Bureau (CFPB).

Currently, CROA applies to any person who provides services that purport to improve a consumer's credit record if they charge money for such services. Only non-profit organizations and a few other entities are exempted. The proposed amendment exempts from CROA any "nationwide consumer reporting agency" under Section 603(p) of the Fair Credit Reporting Act – i.e., the credit bureaus Experian, Equifax and TransUnion - or any of their subsidiaries or affiliates. It also exempts any other entity that obtains the status of "authorized credit services provider" by applying and obtaining approval from the Federal Trade Commission (FTC). Approval is automatic after 60 days if the FTC does not act.

For years, the credit bureaus have sought an exemption from CROA in order to expand their sale of high-priced credit monitoring, identity theft prevention, and other subscription products. In addition to being far less effective for identity theft prevention than the simple tool of state-law mandated security freezes, the marketing of the credit bureaus' products has been notoriously rife with deception and abuse. These abuses are well-documented and include:

- Just this past January and March 2017, the CFPB took enforcement actions against all three credit bureaus for deceptive practices in their marketing of credit monitoring subscriptions. The CPFB ordered Equifax and TransUnion to refund over $17.6 million to consumers who were deceived into buying these subscriptions, plus pay fines totaling $5.5 million. The Bureau also ordered Experian to pay a fine of $3 million for its deceptive practices.

- Ten years ago, the FTC took similar action against Consumerinfo.com d/b/a Experian Consumer Direct, ordering that credit bureau to refund nearly $1 million for deceptive practices in its promotion of credit monitoring products.
- The CFPB took enforcement actions against several of the largest credit card issuers (including Discover, Capital One, JPMorgan Chase, and Bank of America) over misleading marketing tactics in the sale of add-on products, including credit monitoring services. Collectively, these banks paid $1.38 billion in restitution and $79 million in civil fines in these cases.

There is absolutely no reason to exempt the credit bureaus from CROA so they can aggressively offer even more paid products similar to credit monitoring without the protections of the Act. While the proposed amendment does create a separate regulatory scheme for "authorized credit services providers," these protections are far weaker. Weaknesses of the proposed bill include:

- ***Eliminates protections.*** The bill does not include CROA's existing prohibition against charging advance fees. Nor does it require written contracts for these products, or require authorized credit services providers to provide copies of the contract to the consumer. It allows authorized credit services providers to sell products without CROA's existing requirement that they retain signed disclosures for a minimum of two years to insure compliance.

- ***No clear right to cancel.*** The bill gives the consumer a three-day right to cancel a contract for these products, *but does not require that the consumer ever be notified of this right or that any notice be conspicuous*, making it mere window dressing and a departure from other consumer protection laws.

- ***Requirement to pay fees.*** The bill creates a new requirement that a consumer who terminates a contract must pay "reasonable value for services actually rendered." In contrast under CROA, consumers may cancel without any penalty within 3 days. Thus, the bill allows credit bureaus to charge and retain steep "setup" fees or all of their fees upfront, so long as they refund some portion if the consumer cancels. The bill also could be read to imply that a consumer who has been sold a subscription for three years of credit monitoring services at $29.95 a month can cancel it only within the first three days, and has no right to cancel it later on if the services prove unsatisfactory or unnecessary.

- ***Automatic approval of applications after 60 days.*** The bill would allow a large number of organizations, not just the major credit bureaus, to escape from CROA. Illegitimate credit repair organizations are likely to apply *en masse* for registration with the FTC. Section 427(c)(3) provides that, unless the FTC acts upon an application within 60 days, it is "deemed as approved" and the applicant "shall be registered as an authorized credit services provider."

- ***Eliminates consumer remedies.*** This bill removes private remedies for consumers against the credit bureaus and other authorized credit services providers. It does not include a right of action for violation of its new additional provisions, including the prohibition against untrue or misleading statements regarding the services offered for credit education or identity theft prevention. More importantly, even when CROA does apply to a credit bureau or authorized services provider, it provides that only the FTC can enforce CROA with respect to those entities.

- ***Preempts stronger state laws.*** The bill preempts state laws that provide great consumer protection for credit education, identity theft protection and credit repair services offered by a credit bureau or an authorized credit services provider.

- ***Protections might be eliminated in fine print.*** Unlike CROA, there is nothing in the new additional provisions that states that any waiver of its protections is void and unenforceable. Thus, it is possible that the fine print of a contract could completely waive the bill's protections.

- ***Might eliminate CFPB authority.*** Section 425 of the bill could be interpreted to eliminate CFPB authority, making the FTC the sole enforcement authority for the credit bureaus with respect to credit education and identity protection services. The bill might have prevented the CFPB from bringing the recent enforcement actions discussed above.

- ***Denies state attorney general authority.*** Section 425 also appears to deny state Attorneys General the ability to enforce these provisions—either against one of the credit bureaus or against any other entity that obtained automatic approval of an application as an authorized credit services provider.

The credit bureaus claim that CROA impedes them from providing credit education to consumers. However, CROA merely institutes protections when the credit bureaus *charge for these products*. A plethora of websites and businesses provide the same or greater credit education than the credit bureaus for free, such as NerdWallet and CreditKarma. These websites earn revenue through referrals to credit card products but do not charge upfront fees and the consumer is not required to sign up for a credit card. In fact, one of the credit bureaus – TransUnion – is now offering a version of credit monitoring which is actually free using this model, thus showing that the credit bureaus can offer these products without seeking an upfront payment.

On a global level, facilitating the credit bureaus' sale of highly profitable credit monitoring products would in fact give them a vested interest in the inaccuracy of the credit records they maintain. The more that consumers are concerned about inaccuracies in their credit records, the better these products will sell. There is no need or reason to give the credit bureaus an exemption from CROA.

The Credit Services Protection Act of 2017 weakens an important law available to consumers. We strongly urge your opposition.

Sincerely,

Allied Progress
Americans for Financial Reform
Arizona Community Action Association
Arizona PIRG
Arkansans Against Abusive Payday Lending
CALPIRG
Center for Economic Integrity
Center for Responsible Lending
ConnPIRG
Consumer Action
Consumer Federation of America
CoPIRG
East Bay Community Law Center
Empire Justice Center
Florida Alliance for Consumer Protection
Florida PIRG
Georgia PIRG
Georgia Watch
Greater Boston Legal Services (on behalf of its low-income clients)
Illinois PIRG
Indiana PIRG
Iowa PIRG
Jacksonville Area Legal Aid, Inc.
Kentucky Equal Justice Center
Maryland Consumer Rights Coalition
Maryland PIRG
MassPIRG
MontPIRG
MoPIRG
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low-income clients)
National Housing Resource Center
NCPIRG
NHPIRG
NJPIRG
NMPIRG
Ohio PIRG
Oregon PIRG (OSPIRG)
PennPIRG
PIRG in Michigan (PIRGIM)

Public Good Law Center
Public Justice Center
Reinvestment Partners
RIPIRG
TexPIRG
Virginia Citizens Consumer Council
Virginia Poverty Law Center
WashPIRG
West Virginia Center on Budget and Policy
WISPIRG
World Privacy Forum

Attachment D

NCLC® NATIONAL CONSUMER LAW CENTER®

May 5, 2017

United States House Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

RE: Groups strongly oppose H.R. 1849 – Practice of Law Technical Clarification Act of 2017

Dear Committee Members:

The undersigned community, consumer, and civil rights groups urge you to oppose H.R. 1849, the Practice of Law Technical Clarification Act of 2017. Passage of this bill would hurt consumers, especially people who have recently lost jobs, had a death in the family, or suffered another type of devastating personal loss. It would eradicate essential protections against abusive and deceptive debt collection practices by collection attorneys.

In 1986, as the result of clear findings of abuses by debt collection attorneys, Congress amended the Fair Debt Collection Practices Act (FDCPA)[1] to ensure that attorneys who meet the statutory definition of debt collector must comply with all of the provisions of the law.[2] Prior to this amendment, law firms were immune from the requirements of the FDCPA even when they were operating as debt collectors. They even advertised their competitive advantage over debt collection agencies that were required to comply with the FDCPA's consumer protections.[3] H.R. 1849 would turn back the clock on this important protection for struggling families by exempting attorney conduct from the consumer protections provided by the FDCPA.

Americans file more consumer complaints with state and federal officials about debt collectors than any other industry. Recent enforcement actions[4] by federal agencies have highlighted numerous and widespread abusive and deceptive practices by collection law firms and attorneys. Yet this bill would eliminate Consumer Financial Protection Bureau enforcement actions against law firms and attorneys. Your constituents would be harmed by this change in the law.

The FDCPA is a critical consumer protection statute designed to "eliminate abusive debt collection practices by debt collectors."[5] In order to achieve this goal, it is critical that Congress ensure that the statute applies broadly to *all* debt collectors.

We strongly urge you to oppose H.R. 1849 and reject this attempt to weaken the FDCPA. For more information, please contact Margot Saunders (MSaunders@nclc.org) or April Kuehnhoff (AKuehnhoff@nclc.org) at the National Consumer Law Center.

Sincerely,

Americans for Financial Reform (AFR)
Arizona Community Action Association
Center for Responsible Lending
Civil Justice, Inc.
Connecticut Legal Services, Inc.
Consumer Action
Consumer Federation of America

Consumers League of New Jersey
Consumers Union
Corporation for Enterprise Development (CFED)
Florida Alliance for Consumer Protection
Kentucky Equal Justice Center
Legal Aid Society of the District of Columbia
Legal Services of New Jersey
MFY Legal Services, Inc.
Michigan Consumer Law Section[6]
Michigan Poverty Law Program
Mountain State Justice, Inc.
NAACP
National Association of Consumer Advocates
National Center for Law and Economic Justice
National Consumer Law Center (on behalf of its low-income clients)
National Legal Aid & Defenders Association
New Economy Project
New Leaf's Mesa Community Action Network
North Carolina Justice Center
Protecting Arizona's Family Coalition
Public Good Law Center
Public Interest Law Center
Public Justice Center
Public Law Center
South Carolina Appleseed Legal Justice Center
Tzedek DC
U.S. Public Interest Research Group (PIRG)
Woodstock Institute

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[1] 15 U.S.C. § 1692a.

[2] Pub. L. No. 99-361, 100 Stat. 768 (effective July 9, 1986).

[3] H.R. Rep. No. 405, 99th Cong., 1st Sess. (Nov. 26, 1985) *reprinted in* 1986 U.S.C.C.A.N. 1752, 132 Cong. Rec. H10534 (daily ed. Dec. 2, 1985)

[4] *See, e.g.,* Complaint, Consumer Fin. Protection Bureau v. Weltman, Weinberg & Reis Co., L.P.A. (N.D. Ohio Apr. 17, 2017); Consent Order, In the Matter of Pressler & Pressler, LLP, Sheldon H. Pressler, and Gerald J. Felt ¶ 39 (Apr. 25, 2016); Consumer Fin. Protection Bureau v. Frederick J. Hanna & Assoc., Stipulated Final Judgment and Order, 14-cv-02211-AT, at ¶¶ 10-11 (D.Ga. 2015).

[5] 15 U.S.C. § 1692(e).

[6] The Consumer Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest. The position expressed is that of the Consumer Law Section only and is not the position of the State Bar of Michigan.

Statement for the Record
September 7, 2017
U.S. House of Representatives
House Financial Services Committee
Financial Institutions and Consumer Credit Subcommittee hearing entitled,
"Legislative Proposals for a More Efficient Federal Financial Regulatory Regime"

Thank you for including this statement in the record for today's hearing on proposals for a more efficient regulatory regime. The American Land Title Association, founded in 1907, is the national trade association representing 6,100 title insurance companies, title and settlement agents, independent abstracters, title searchers, and real estate attorneys. With offices throughout the United States, ALTA members conduct title searches, examinations, closings, and issue title insurance that helps protect the property rights of millions of American homebuyers every year.

ALTA members provide two primary services to homebuyers and financial institutions. The first service is the preparation and issuance of title insurance policies protecting both purchasers and mortgagor of real property. Insurance products, including title insurance, are regulated by the states and fall outside of federal regulation as part of the business of insurance. Additionally, title professionals act as third-party settlement agents in real estate and mortgage transactions. This service is subject to federal regulation pursuant to the Real Estate Settlement Procedures Act (RESPA), which is within the jurisdiction of the Consumer Financial Protection Bureau (CFPB).

The TRID Improvement Act of 2017 amends the RESPA to allow for the calculation of a simultaneous issue discount when disclosing title insurance premiums. Under the TRID rule, the CFPB mandates that the correct and actual price of title insurance products be withheld from consumers. By law, our industry is prohibited from disclosing the actual cost of title insurance policies the homebuyer will pay at closing. This is the only cost disclosed under TRID at closing that the CFPB prevents consumers from receiving their actual charge. The Bureau's requirement that buyers and sellers receive incorrect information about the cost of title insurance is the item that our members say confuses consumers the most at closing. The Bureau is obligated to make this simple change, and apparently despite the overwhelming evidence it has received about this confusion through comments the Bureau has received, Congressional action seems to be needed to compel the Bureau to address this matter.

TILA-RESPA-Integrated-Disclosure Forms

In 1968, Congress passed the Truth in Lending Act (TILA) to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[1] RESPA was then enacted by Congress six years later.

For nearly 50 years, these laws required lenders and settlement agents to provide consumers with similar but different disclosures at the beginning and end of their mortgage and

[1] 15 U.S.C. §1601.

real estate transactions. However, these laws changed when Congress adopted Section 1032 of the Dodd-Frank Act, which required the CFPB to "propose for public comment rules and model disclosures that combine the disclosures required under the Truth in Lending Act and sections 4 and 5 of the Real Estate Settlement Procedures Act of 1974, into a single, integrated disclosure." This regulation is more than just two new disclosure forms. It represents a paradigm shift in the way real estate settlements occur in this country. The Bureau started this rulemaking process in 2011, issued a final rule in 2013, implemented the new disclosures in 2015, proposed amendments in 2016 and issued final amendments this past summer. The Final Rule on TRID amendments published last month does not include this fix. The Bureau ignored a simple solution. Instead, the Final Rule says: "This final rule does not contain any revisions that implicate fundamental policy choices, such as the disclosure of simultaneous issuance title insurance premiums, made in the TILA-RESPA Final Rule."

Homebuyers deserve to know the true and accurate cost of buying a home. With respect to title insurance costs, the disclosure rule fails to meet this obligation. For the overwhelming majority of real estate transactions, the rule requires a complicated formula that discloses to consumers an inaccurate price for title insurance. Under the TRID rule, the CFPB mandates that the correct and actual price of title insurance products be withheld from consumers. Not only does this hinder consumers' understanding of transaction costs,[2] but it is at odds with what consumers want to know, according to ALTA's research.

In the majority of states, when a homebuyer purchases a lender's title insurance policy concurrently with an owner's title insurance policy, the lender's policy is typically issued at a discounted rate (often called "simultaneous issue pricing"). This discount is offered because much of the title search, examination and underwriting that goes into preparing a lender's title insurance policy also supports the owner's policy.

We appreciate that the Bureau is attempting to show consumers the marginal cost of purchasing on owner's title insurance policy; however, we are greatly concerned about the confusion it causes consumers. In absence of a solution, the Bureau requires our industry to inaccurately disclose consumers' costs for title insurance and exposes ALTA members to potential class action lawsuits and market conduct examination errors—not to mention actively dissuade homebuyers from purchasing financial protection for their largest investment.

In real life, the TRID regulation plays out the following way in California:

[2] This problem is exacerbated in the nearly half of states where it common for the seller to pay for all or a portion of the buyers title insurance costs. In these states, the CFPB's mandated formula not only leads to an incorrect disclosure of the cost of title insurance but confusion over how much the seller is obligated to pay.

California

Here is how the rule works when applied to a transaction
where the sales price is $200,000 and there is a $190,000 loan:

The Rule	vs. Reality
OTP on Closing Disclosure = $676.00 (OTP Premium) $902.00 (LTP Simultaneous Premium) + $409.00 (Full LTP Premium) – $635.00	**OTP Actually Charged = $902.00** (OTP Premium)
LTP on Closing Disclosure =$635.00 (Full LTP Premium, with no discounts for Simultaneous Issue)	**LTP Actually Charged = $409.00** (LTP Simultaneous Premium)

Terminology Key:
OTP: Owner's Title Insurance Policy
LTP: Lender's Title Insurance Policy

LTP Simultaneous Premium: a discounted lender's title insurance premium that is issued in accordance to promulgated state rates or insurance company filed rates when both a lender's and owner's title insurance policies are simultaneously issued

In real life, the TRID regulation plays out the following way in Arkansas:

Arkansas

Here is how the rule works when applied to a transaction
where the sales price is $200,000 and there is a $190,000 loan:

The Rule	vs. Reality
OTP on Closing Disclosure = $177.50 (OTP Premium) $525.00 (LTP Simultaneous Premium) + $35.00 (Full LTP Premium) – $382.50	**OTP Actually Charged = $525.00** (OTP Premium)
LTP on Closing Disclosure =$382.50 (Full LTP Premium, with no discounts for Simultaneous Issue)	**LTP Actually Charged = $35.00** (LTP Simultaneous Premium)

Terminology Key:
OTP: Owner's Title Insurance Policy
LTP: Lender's Title Insurance Policy

LTP Simultaneous Premium: a discounted lender's title insurance premium that is issued in accordance to promulgated state rates or insurance company filed rates when both a lender's and owner's title insurance policies are simultaneously issued

In real life, the TRID regulation plays out the following way in Missouri:

Missouri

Here is how the rule works when applied to a transaction where the sales price is $200,000 and there is a $190,000 loan:

The Rule	**vs.** **Reality**
OTP on Closing Disclosure = $128.20 (OTP Premium) $210.00 (LTP Simultaneous Premium) + $10.00 (Full LTP Premium) - $91.80	**OTP Actually Charged = $210.00** (OTP Premium)
LTP on Closing Disclosure =$91.80 (Full LTP Premium, with no discounts for Simultaneous Issue)	**LTP Actually Charged = $10.00** (LTP Simultaneous Premium)

Terminology Key:
OTP: Owner's Title Insurance Policy
LTP: Lender's Title Insurance Policy

LTP Simultaneous Premium: a discounted lender's title insurance premium that is issued in accordance to promulgated state rates or insurance company filed rates when both a lender's and owner's title insurance policies are simultaneously issued

Consumer Research

In July 2016, ALTA partnered with Survata, a national market research company, to collect data on consumer experiences related to their purchase of title insurance and the Know Before You Owe (KBYO) required disclosures. Survata is a recognized leader in online consumer research. It works with universities, advertising companies and Fortune 500 companies to get the consumer data needed to make better informed decisions. A copy of the survey and its results is attached to this letter.

Using the Survata platform, we polled 2,000 current and prospective homeowners, defined as those who plan to buy a home within the next 12 months. The survey posed 14 questions to these consumers about their preferences for learning information about title insurance and using mortgage disclosures. The results were census representative with a margin of error of 2.2%. Respondents received no cash compensation for their participation.

As part of the survey, consumers were shown KBYO-compliant closing disclosure forms. This included title insurance premiums using the rule's methodology. Respondents were asked to identify the price for each title policy. After identifying the price of the policies, they were then informed of the actual cost of title insurance. The survey measured their initial reactions.

Nearly twice as many consumers reacted negatively to the inaccurate disclosure than reacted positively

The data shows that the Bureau's rule is not working as intended and is not improving transparency or consumer understanding when it comes to title insurance.

In fact, this research shows that the majority of people this rule is intended to help find it confusing. When presented with the true cost for title insurance, almost one third of homeowners responded with the statement, "I'm confused." It confirms the anecdotal evidence our members reported from their experience with consumers.

This confusion is concerning. It runs counter to the rule's purpose of helping consumers receive "timely and understandable information to make responsible decisions about financial transactions."[3] The title and settlement industry has attempted to help by providing education. Some states such as Texas[4] and Florida[5] even mandate additional disclosures to address this confusion. However, consumer education at the time of closing is not ideal and potentially minimizes the value of the CFPB's otherwise helpful disclosures for consumers.

While this confusion is disconcerting, it is not the most troubling finding from the survey.

The most troubling data point is that 10% of consumers felt that they were being taken advantage of by not being told the true cost of title insurance on the disclosure. Frankly, this is 10% too many.

The purpose of the CFPB is to protect consumers by ensuring markets are fair, transparent and competitive.[6] As President Obama put it, to "make sure that people aren't taken advantage of."[7] Unfortunately, the Bureau's decision to require the inaccurate disclosure of title premiums is producing the opposite effect.

In contrast, only 27% of consumers found the CFPB's mandated title insurance disclosure helpful. These respondents appreciated knowing the marginal cost of buying an owner's title insurance policy.

The study also showed that 40% of homeowners were neither helped nor hurt by the CFPB's disclosure. These consumers responded that they either did not focus on individual line items or were satisfied since the total cost of title insurance was the same.

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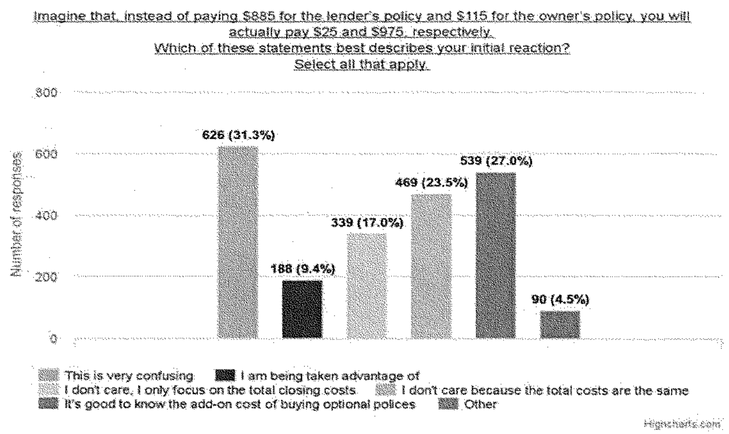
[3] 12 U.S.C § 5511(b)(1).

[4] Texas Disclosure Form T-64. Texas Department of Insurance, Commissioner's Order 4038, Effective 08/01/2015- 28 TAC §9.2. available at http://www.tdi.texas.gov/title/documents/t64form.pdf.

[5] Florida Insurance Premium Disclosure & Settlement Agent Certification. Florida Department of Financial Services. Rule 69B-186.008, F.A.C. available at https://www.myfloridacfo.com/division/agents/Licensure/Forms/documents/DFS-H1-2146.pdf

[6] 12 U.S.C § 5511(a)

[7] Remarks on Senate Action to Block the Nomination of Richard A. Cordray to be Director of the Consumer Financial Protection Bureau and an Exchange with Reporters. December 8, 2011.



This research confirms that the accurate disclosure of title premiums would be more beneficial for consumers than the rule's current requirement. In KBYO's preamble, the Bureau said that the "technical disclosure of the owner's and lender's title insurance premiums" is outweighed by the need to provide consumers with a "clear disclosure of the required cost for the lender's title insurance alone, and the additional incremental cost to be paid by the consumer for the optional owner's title insurance premium."[8] However, according to consumers, this is not the case.

Only about one-quarter of homeowners agreed with this sentiment. Meanwhile our consumer testing[9] suggests that over 40% would be better served by seeing the true cost of title insurance on the disclosure. This would lead to increased consumer understanding and trust in the transaction.

Along with measuring consumer reactions to the inaccurate disclosure of title premiums, we obtained a deeper understanding about important disclosure concepts for consumers. This is especially important for products and services like owner's title insurance, which is not required by the lender.

Consumers Care More about Accuracy and Detail than Incremental Costs

In the study, we asked homeowners to rank from most to least important, the factors they care about when analyzing their transaction. According to survey results, the CFPB was largely

[8] 78 F.R. 79964.

[9] This disclosure was not a topic that was tested during the extensive consumer research conducted by the CFPB in developing the disclosures. See "Know Before You Owe: Evolution of the Integrated TILA-RESPA Disclosures." Kleimann Communication Group. Presented July 9, 2012. Available at http://files.consumerfinance.gov/f/201207_cfpb_report_tila-respa-testing.pdf

successful in developing the mortgage disclosures. However, the results also show that accuracy and detail are more important to consumers than the marginal costs of products.

We learned that consumers want mortgage disclosures to provide a detailed breakdown of all the costs for service. This was far and away the most important factor for homeowners.

The second most important factor is the ability to easily compare estimates to final figures. This is something the KBYO disclosures do really well. Closely following this factor is the ability to compare the disclosures to the actual costs consumers will pay and confirming the seller is paying the correct amount. At the bottom of the rankings is providing marginal cost of optional products and seeing bottom-line amounts like cash-to-close.

These findings show that consumers would find more value in the mortgage disclosures if they showed accurate costs for title insurance instead of the incremental costs.

Showing the actual cost of title insurance is an easy fix

Amending the rule to require the disclosure of the actual cost of title insurance is the best way to achieve the Bureau's missions to ensure "consumers are provided with timely and understandable information to make responsible decisions about financial transactions."[10]

The best way to address this is to modify the Official Interpretations for §1026.37(f)(2), §1026.37(g)(4) and §1026.38(g)(4). These comments should allow the industry to disclose title insurance the same way as every other cost (i.e., the actual cost the consumer will pay for the service based on the best information reasonably available).

The Bureau could have easily resolve this issue by requiring mortgage lenders and settlement agents to disclose the actual title insurance premium rates required in the state in which the real property is located. We are not proposing to change the regulation's requirements surrounding the disclosure of title premiums on the Loan Estimate, which would require an amendment to the regulation. Rather, the Bureau can provide a simple modification to the Official Interpretation by striking the following language:

Comment 38(g)(4)-2:

In a jurisdiction where simultaneous issuance title insurance rates are permitted, any owner's title insurance premium disclosed under **§ 1026.37(g)(4) or** § 1026.38(g)(4) is calculated by using the full owner's title insurance premium~~, adding any simultaneous issuance premium for issuance of lender's coverage,~~ and then deducting ~~the full premium for lender's coverage disclosed under § 1026.38(f)(2) or (f)(3)~~ **any policy cost differences due to the simultaneous purchase of a lender's title insurance policy.**

[10] 12 U.S.C § 5511(a).

Making this simple change would be relatively easy for the industry to implement. It would not require new software coding or development, like other changes in the proposal. Rather, it would require vendors to turn off existing coding. It would not only help consumers, but make it easier for companies to comply with state insurance laws. We strongly urge the Bureau to make this change in this rulemaking.

Instead, the Bureau ignored a simple solution. Finally, the need for better consumer education about mortgage costs and title insurance is paramount. According to our study, the majority of homebuyers make the decision to purchase an owner's title insurance policy before they reach the closing. We believe this scenario will only continue to increase as the title and settlement industry utilizes the tools in ALTA's Homebuyer Outreach Program (HOP). This innovative program provides title companies with tools for educating consumers about the benefits of title insurance. While less than a year old, the program is proving to be successful with title agents increasingly utilizing HOP's resources in their education of consumers.

This is important because our study showed that the most important factor for consumers when making the decision to purchase an owner's title insurance policy is a full understanding of the benefit of the service to them. The cost of the service was the second most important factor. Toward the bottom of the list was the impact of the decision on other home buying costs.

Conflict with State Law

Accurately disclosing the price of title insurance policy premiums will also help the title industry comply with state regulations. Under state insurance laws, title insurance companies are only allowed to charge the policy premium rates promulgated or filed with the state. If the Bureau declines to fix this problem, our industry often addresses the Bureau's requirement to knowingly disclose incorrect title insurance premiums by providing a second disclosure to the homebuyer showing the actual premium cost. Our industry uses this additional disclosure to prove to state insurance regulators and potential class action plaintiffs that they were charged the correct policy rates under state insurance law. These additional disclosure forms contribute to homebuyer confusion about the actual costs of their title insurance policies, closing costs and homeownership in general.

As Congress considers regulatory reform, it is important to note that title insurance is regulated at the state level and our settlement business is regulated at the federal level. Historically, this dual regulatory structure has been rather complimentary; however, with ever increasing regulation, our members must comply with regulations that overlap and contradict one another. This creates a complex compliance environment and increased costs for our members' businesses, additional liability for our mortgage lender clients and confusion and frustration at the closing table for homebuyers.

ALTA and its members are committed to educating consumers about how title insurance provides peace of mind by protecting their property rights. Consumers benefit from having the actual cost of title insurance disclosed on the mortgage disclosures. This is not only supported by research, but also by our members' experiences every day at closing tables across the country.

We appreciate today's hearing on the TRID Improvement Act of 2017.

CUNA Credit Union National Association

Jim Nussle
President & CEO

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601 Pennsylvania Avenue NW
South Building, Suite 600
Washington, D.C. 20004-2601

September 6, 2017

The Honorable Blaine Luetkemeyer
U.S. House of Representatives
Washington, DC 20515

The Honorable Lacy Clay
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Luetkemeyer and Ranking Member Clay:

On behalf of the Credit Union National Association (CUNA), I am writing in advance of the Financial Services Subcommittee on Financial Institutions and Consumer Credit hearing to be held on September 7, 2017 entitled "Legislative Proposals for a More Efficient Federal Financial Regulatory Regime." CUNA represents America's credit unions and their 110 million members.

Credit unions accept that they must operate in a regulated environment. However, one-size-fits-all regulation does not work for Main Street—credit unions, small banks, and the consumers and small businesses they serve. It has created a rigged system, favoring the mega banks that can afford to comply with the "solutions" dreamt up in Washington—the very institutions that caused the crisis that hurt so many. Now, overregulation of small or less complex institutions is hurting consumers, costing them time and money, and limiting their choices. Local member-owned credit unions know their members better than Washington bureaucrats, which is why now is the time for Congress to enact regulatory reform that works for credit union members.

To that end, we appreciate that the Subcommittee is considering several bills today that provide regulatory relief, which would allow credit unions to more fully serve their members with safe and affordable products and services. These bills include H.R. 2359, the "FCRA Liability Harmonization Act;" the "Community Institution Mortgage Relief Act of 2017;" and the "TRID Improvement Act of 2017." Credit unions appreciate the opportunity to share their views on the legislation as outlined below.

H.R. 2359, the "FCRA Liability Harmonization Act," would create a more appropriate balance by capping the amount of FCRA statutory damages, which would align them with many other financial consumer protection laws. Consumers would continue to have important consumer protections and opportunities for relief under the FCRA; however, it would result in less frivolous FCRA class action litigation. As such, we support this effort to create a better, and more equitable system, for those seeking to be made whole.

The "Community Institution Mortgage Relief Act of 2017" makes two important changes to the Real Estate Settlements Procedures Act (RESPA) to reduce the burden on small financial institutions. The proposal would exempt mortgage loans made by financial institutions under $50 billion in assets from RESPA's escrow requirements; and, the legislation would also exempt mortgage servicers that service fewer than 30,000 mortgages annually from the requirements of Section 6 of RESPA. The two changes made by this proposal would provide important regulatory relief to credit unions and help them to continue efficiently serving their members. We strongly support this proposal and encourage its enactment.

The "TRID Improvement Act of 2017" would provide a reasonable hold- harmless period for enforcement of the CFPB's TILA-RESPA Integrated Disclosures (TRID) rule for those that make good-faith efforts to comply. This proposal would be very important for credit unions as it would ensure the rule has minimal impact on consumers and residential home mortgage closings. We strongly support this proposal and encourage its enactment.

On behalf of America's credit unions and their 110 million credit union members, thank you for your leadership on this issue.

Sincerely,

Jim Nussle
President & CEO

NARCA
THE NATIONAL CREDITORS BAR ASSOCIATION™

The National Creditors Bar Association supports H.R. 1849, *The Practice of Law Technical Clarification Act of 2017.* The legislation, the "Practice of Law Technical Clarification Act," would clarify that the Fair Debt Collection Practices Act ("FDCPA") does not apply to creditor attorneys engaged in litigation activities and would expand Section 1027(e) of the Dodd-Frank Act ("DFA") to cover both consumer and creditor attorneys.

Congress passed the FDCPA in 1977 to eliminate deceptive, unfair and abusive conduct by third-party debt collectors. The FDCPA originally contained a complete exemption for attorneys. When Congress repealed the "attorney-at-law" exemption to the FDCPA in 1985, the sponsor of the amendment explained that that the intent was to regulate only non-litigation collection activities performed by attorneys:

> The Fair Debt Collection Practices Act regulates debt collection, not the practice of law. Congress repealed the attorney exemption to the act, not because of attorney's conduct in the courtroom, but because of their conduct in the backroom. Only collection activities, not legal activities, are covered by the act. ... Actions which can only be taken by those possessing a license to practice law are outside the scope of the act.[1]

Despite this clear intent, the Supreme Court in *Heintz v. Jenkins*[2] held that collection attorneys can be subject to the FDCPA even when engaged in litigation. Since *Heintz*, attorneys are routinely sued in federal court for their conduct in state court proceedings that is construed as a technical violation of the FDCPA. This occurs because the FDCPA is a strict liability statute that encourages separate litigation for statutory damages and, notably, attorneys' fees for even harmless technical violations that occur when a judge has oversight over an attorney's conduct. An attorney who voluntarily corrects his or her mistake to the benefit of the consumer cannot escape this liability despite the lack of harm.

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[1] 132 Cong. Rec. H. 10031 (1986).
[2] 514 U.S. 291 (1995).

A case decided by the Northern District of California[3] illustrates the collection attorney's dilemma. The attorney filed suit against a husband and wife for the assignee of a consumer debt but omitted listing the name of the original creditor in the state court complaint. Although the Court determined that there was no dispute that the consumers owed the obligation and that the creditor was entitled to collect it, the Court awarded statutory damages under the FDCPA's "strict liability" provision based on the attorney's failure to list the name of the original creditor. Notably, state court rules do not require that the original creditor be identified in the state court complaint. The astonishing aspect of this ruling is reflected in the fact that the consumer's lawyer received $113,000 in attorneys' fees, in contrast to the $1,000 statutory damages awarded to the purported aggrieved consumers.

As reflected by the following quote, the issue addressed by H.R. 1849 was even addressed previously by the Federal Trade Commission:

> Because it still seems impractical and unnecessary to apply the FDCPA to the legal activities of litigation attorneys, and because ample due process protections exist in that context, the Commission continues to recommend that Congress re-examine the definition of "debt collector" ... .[4]

Some consumer organizations have described H.R.1849 as a complete attorney exemption from the FDCPA. Such an interpretation is wholly contrary to the plain language of the legislation. H.R. 1849 clarifies the intent that the FDCPA should not apply to litigation-related attorney conduct that is already subject to judicial oversight. The legislation retains the FDCPA's applicability to attorney extrajudicial activities such as demand letters and phone calls.

These consumer organizations argue that "H.R. 1849 would turn back the clock on this important protection for struggling families by exempting attorney conduct from the consumer protections provided by the FDCPA." In fact, as the American Bar Association points out in their statement of support for H.R. 1849 that the opposite is true. The exemption in H.R. 1849 is not broad, and consumers continue to retain their right to redress egregious actions related to litigation by the judge in the state court litigation and with an attorney's state bar and state supreme court.

> **The scope of the legislation is narrowly tailored and would only exempt creditor lawyers engaged in litigation activities; it would not create a broad exemption for lawyers' non-litigation debt collection activities.** H.R. 1849 would clarify that while the FDCPA does not apply to lawyers' filing of lawsuits and other litigation activities already subject to judicial oversight, the Act would still apply to lawyers' extrajudicial collection activities, such as

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[3] De Amaral v. Goldsmith & Hull, case no. 12-cv-03580-WHO.

[4] Federal Trade Commission, *Annual Report: Fair Debt Collection Practices Act* (June 2000). This recommendation was included in the FTC's Annual Report on the FDCPA from 1998-2006. Beginning in 2007, the FTC's Annual Report on the FDCPA no longer contained legislative recommendations.

demand letters and phone calls to debtors. Similarly, while the bill would expand the current exemption in Section 1027(e) of the DFA to include both creditor and consumer lawyers, the CFPB would retain its existing authority over lawyers and others engaged in non-litigation collection activities. [5]

Consumer organizations have referenced "recent enforcement actions" as highlighting "numerous" and "widespread" abusive and deceptive practices by collection law firms and attorneys. The first definition for "numerous" in the dictionary is: *"Great in number; many."* The three examples cited by the consumer organizations hardly meet the definition of numerous. Of the three, two of the consent order agreements held no admission of guilt or record of consumer harm and the third case is in active litigation pending outcome.

For centuries, lawyers have been permitted reasonable latitude in connection with statements made in court complaints so that a lawyer would not be subject to suit from a disgruntled opposing party for making an erroneous claim in a pleading on behalf of a client. Moreover, lawyer conduct in a court proceeding is better addressed by the judge overseeing the proceeding. This common law litigation immunity protected attorneys from frivolous lawsuits based solely on unsuccessful litigation. Subjecting attorneys to liability in the event their legal arguments are unsuccessful is in direct conflict with the ethical duty to assert the client's best case.[6] The FDCPA's strict liability, compounded by the disallowance of a bona fide error defense for mistakes of law,[7] contravenes United States history in which the regulating of attorneys and the standards of professional conduct to which attorneys must abide have been left exclusively to the States.[8] H.R. 1849 would reaffirm the original intent underlying the FDCPA and support this historical position to retain attorney regulation under the purview of the states by amending the FDCPA and clarifying Section 1027(e) of DFA.

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[5] American Bar Association, Preserving State Court Regulation of the Legal Profession - ABA Supports H.R. 1849, the "Practice of Law Technical Clarification Act of 2017" (May 2017).

[6] *Johnson v. Riddle*, 305 F.3d 1107, 1123 (10th Cir. 2002).

[7] *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 604 (2010).

[8] *Leis v. Flynt*, 439 U.S. 438, 442 (1979).

President
J. Christopher Phillips

TLTA
TEXAS LAND TITLE ASSOCIATION

Executive Vice President & CEO
Leslie Midgley, CAE

September 7, 2017

The Honorable Jeb Hensarling
Chairman
The House Financial Services Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman,

I am writing on behalf of the Texas Land Title Association (TLTA). We represent nearly 13,000 title professionals throughout Texas. TLTA members protect the property rights of Texans and bring certainty, efficiency and security by researching titles, safely conducting closings and issuing title insurance to protect real property owners and mortgage lenders against losses from defects in titles.

Our association is writing in support of the proposed legislation by Congressman French Hill (R-AR) that would make modifications to the TRID rulemaking. We thank you for holding a hearing on this legislation and this important bill.

For some time in Texas, we have been troubled by the lack of clear and fair disclosures prohibited by TRID rules that bar the showing of discounted premiums for the cost of a land title insurance policy when both a lender and owner's policy are purchased simultaneously.

This is not unique to Texas. In half the states, including our biggest states, like California, Florida, Ohio and New York, all have discounted rates for simultaneous issue of both policies. Unfortunately, as currently constructed, TRID rules require that the full rates for both policies be disclosed to consumers, sowing a great deal of confusion.

Ironically, although TRID was supposed to reduce paperwork and make disclosure clearer, some states, like Texas (in order to comply with state law), had to add yet another disclosure document to consumers in the closing process.

The Texas Department of Insurance issued an order in August 2015 stating the following:

> *In addition, the Texas Disclosure is necessary to show the actual price for title insurance in a simultaneous-issue transaction in Texas. In approximately half the states, including Texas, title companies offer a discount on the loan policy when both a loan policy and an owner's policy are purchased in a single transaction. However, the instructions for the Closing Disclosure require the agent to list the loan policy at the full, undiscounted premium and to show the simultaneous-issue discount as if it applied to the owner's policy instead. In Texas and other states, this requirement will cause the owner's and loan policy premiums on the*

Closing Disclosure to differ from the actual amounts charged for each policy. This scenario becomes even more confusing for consumers in Texas, as well as in 30 other states, where the seller pays, or is likely to pay, for the owner's policy. Because the Closing Disclosure requires the agent to apply the simultaneous-issue discount to the owner's policy rather than the loan policy, the form will inaccurately state the seller's contribution to the title insurance costs. Further, by showing the higher-priced full loan policy amount rather than the discounted loan policy amount, the borrower's cash-to-close number in the Closing Disclosure is rendered inaccurate and overstated.

We think it is important that consumers get the most accurate disclosures possible when purchasing a home. It makes little sense to mislead them on the cost of title insurance policies. Further, an owner's policy is in the strong interest of a consumer to protect their investment in a home for any title defects – exactly what CFPB was designed to protect.

We would hope the Congress would act on Rep. Hill's legislation and correct this oversight.

Thank you again for your attention to this issue.

Sincerely,

J. Christopher Phillips
President

Leslie Midgley
Leslie Midgley, CAE
Executive Vice President and CEO

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AFR Americans for Financial Reform

September 6, 2016

Dear Representative,

On behalf of Americans for Financial Reform, we are writing to express our opposition to H.R. 3312, the "Systemic Risk Designation Improvement Act of 2017."[1] This legislation is a gift to some of the largest banks in the country. The cumbersome regulatory process laid out in this bill puts unprecedented new constraints on the ability of the Federal Reserve to engage in safety and soundness regulation of large regional bank holding companies even when regulators come to the conclusion that action is needed. It would also end requirements on the Federal Reserve to improve their previously inadequate oversight of large regional banks, a class of bank which contributed significantly to the financial crisis.

Besides being dangerous, there is no evidence that the drastic changes in HR 3312 are actually needed or called for. As detailed below, the Federal Reserve already tailors its supervisory regime to the size and risk of banks, with the strongest rules for the largest and most systemically significant Wall Street banks and less stringent requirements for banks below $250 billion in size. With the latest FDIC data showing record revenues for banks and rates of return at their highest levels in a decade, Congress should not be considering deregulatory gifts to large banks.[2]

Large Regional Banks, The Financial Crisis, and Systemic Risk

HR 3312 affects oversight of 27 large bank holding companies (BHCs), which each hold over $50 billion in assets but are not one of the eight largest U.S. banks with global operations. These banks, while smaller than the very largest Wall Street mega-banks, are well within the largest one percent of the 5,800 insured banks in the U.S. – enormously larger than community banks. Collectively, they hold over $4 trillion in assets, around a quarter of all banking system assets. They hold an even larger portion of assets in particular regions. For example, over sixty percent of deposits in the state of Ohio and over half of deposits in the state of Pennsylvania are held by large regional banks deregulated by this legislation. Should these banks become insolvent, there could be major economic impacts on regions that depend on them.

Large regional banks of a similar size to those affected by this bill played a major role in the 2008 financial crisis. Large regional banks such as Countrywide, Washington Mutual, Wachovia, and IndyMac were all significant participants in the housing bubble. For example, in the year 2006, Countrywide, holding less than $200 billion in assets, originated 17 percent of all the

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[1] Americans for Financial Reform is an unprecedented coalition of more than 200 national, state and local groups who have come together to reform the financial industry. Members of our coalition include consumer, civil rights, investor, retiree, community, labor, faith based and business groups. A list of coalition members is available at http://ourfinancialsecurity.org/about/our-coalition/

[2] Federal Deposit Insurance Commission, *Quarterly Banking Profile, Second Quarter 2017*, Available at https://www.fdic.gov/bank/analytical/qbp/2017jun/qbp.pdf

mortgage lending in the U.S.[3] All of these large regional banks failed during the 2007-2008 period. The need to manage these multiple bank failures involving over $1 trillion in total assets placed an unprecedented burden on the financial system. Many large regional banks that did not fail took substantial Federal assistance. Large BHCs with more than $50 billion in assets received twice as much TARP capital assistance per dollar of assets as smaller banks did.[4]

In all of these cases, the Federal Reserve and other key banking regulators missed signs of instability at these banks and failed to act until it was too late. Congress responded to the failure of regulatory oversight for these large banks by demanding that regulators do a better job at controlling the risks of large bank holding companies. H.R. 3312 would reverse that change, and eliminate the requirement that the Federal Reserve engage in improved oversight of these large BHCs. But this is not all. The bill would also limit Federal Reserve authority over these large banks in a manner that is unprecedented since the passage of the Bank Holding Company Act in 1956. The changes in this legislation go far beyond the narrow or limited technical changes that some regulators have suggested regarding the application of Title I of Dodd-Frank.

H.R. 3312 and the Regulation of Large Regional Bank Holding Companies

In Title I of the Dodd-Frank Act Congress responded to the financial crisis experience by demanding improved oversight of the nation's largest banks. Title I requires the Federal Reserve, as the primary regulator of bank holding companies, to apply enhanced safety and soundness standards to all BHCs over $50 billion, including increased levels of loss-absorbing capital, stress testing, and credit exposure limits.[5] Dodd-Frank requires a tailored and graduated system of risk controls which ensures that all banks over $50 billion are more strictly regulated than community banks, but that regional banks are not regulated as stringently as the very largest Wall Street banks that are systemically critical to the national and global economy.

The Dodd-Frank Act specifically instructs the Federal Reserve to tailor the application of prudential standards to the size of the institutions involved and their activities. The Federal Reserve has followed this directive and has scaled its prudential requirements to bank size and complexity. For example, additional leverage capital requirements apply only to banks over $250 billion, and the toughest capital and risk management rules apply only to eight of the largest and most complex U.S. banks designated as Global Systemically Important Banks (G-SIBs). Likewise, the full rules for liquidity risk management apply only to banks with over $250 billion in assets, and in a recently finalized rule the Federal Reserve relaxed quantitative stress test requirements for banks under $250 billion.[6]

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[3] Freeman, Willoe and Wells, Peter Alfred and Wyatt, Anne, "Insights from the Failure of the Countrywide Financial Corporation," March 14, 2013.
[4] See data on p. 91 in Government Accountability Office, "Government Support for Bank Holding Companies: Statutory Changes To Limit Future Support Are Not Yet Fully Implemented", GAO-14-18, November 2013.
[5] Title I also mandates the Federal Deposit Insurance Corporation (FDIC) and the Federal Reserve to require some form of resolution planning for large regional banks in case of bank failure.
[6] Federal Reserve Board, "Amendments to the Capital Plan and Stress Test Rules", Federal Register, Volume 82, Number 22, February 3, 2017.

H.R. 3312 would eliminate the Congressional mandate to strengthen rules for large regional banks. It would also drastically weaken Federal Reserve oversight authority by effectively eliminating the Federal Reserve's discretionary authority over large banks in cases where such banks had not been determined to be individually critical to the entire U.S. financial system.

The legislation mandates that enhanced prudential oversight would apply to only the eight largest banks in the U.S., which have already been designated as globally systemically significant. If the Federal Reserve wished to apply enhanced prudential standards to large regional banks it would be subject to a complicated set of hurdles that would be difficult if not impossible to meet:

- The Federal Reserve could apply enhanced safety and soundness standards to a single large regional bank, but only if it could demonstrate that the individual bank posed a threat to the financial stability of the United States, and that the bank was not being treated differently from other banks of similar size and complexity.

- The Federal Reserve could also pass regulations applying enhanced prudential standards to a new class of banks such as large regional banks, even if they were not individually designated as global systemically significant banks. However, such a regulation would have to be approved by two-thirds of all financial regulators (members of the Financial Stability Oversight Council, or FSOC) as well as the Secretary of the Treasury.

These restrictions represent major new limitations on the capacity of the Federal Reserve to make basic decisions on bank safety and soundness. For many decades, well before the 2008 financial crisis, bank supervisors have had clear discretionary authority to take action to address risks at major banks. HR 3312 would for the first time place major restrictions on this authority as it applies to core safety and soundness protections such as capital requirements, stress testing, credit exposure limits, and more. This legislation goes beyond reversing Dodd-Frank and weakens regulatory authority even compared to the period before the 2008 financial crisis.

Section 4 of the legislation does include a "Rule of Construction" which states that the legislation should not be construed to prohibit the Federal Reserve from prescribing enhanced prudential standards for any individual bank. But this "Rule of Construction" in no way reverses or affects the unprecedented restrictions placed on the Federal Reserve's authority elsewhere in the bill. These restrictions do not strictly speaking "prohibit" action, but they make it prohibitively difficult. If HR 3312 passed and the Federal Reserve attempted to exercise its authority to control risks at large regional banks, affected banks would be quick to either lobby the FSOC and the Treasury Secretary to block new regulatory measures, or to mount a lawsuit claiming that the Federal Reserve had not met requirements to demonstrate that a particular bank could single-handedly threaten the financial stability of the United States.

In sum, H.R. 3312 dramatically restricts oversight of some of the largest banks in the country, increasing risks to regional economies and to financial stability, and therefore to the prosperity of families and communities. We urge you to reject it. For more information please contact AFR's Policy Director, Marcus Stanley, at marcus@ourfinancialsecurity.org or 202-466-3672.

Americans for Financial Reform

BETTER
MARKETS

Updated Fact Sheet: Everything You Need To Know About the $50 Billion Threshold

Section 165 of the Dodd-Frank Act requires the Federal Reserve (Fed) to establish regulatory standards based on individualized risk analysis for bank holding companies with assets greater than $50 billion that are more stringent than those that apply to bank holding companies with fewer assets, which do not pose similar risks to the financial stability of the United States.

Recent discussions to change the $50 billion threshold have focused on either raising the dollar threshold or eliminating it entirely. One suggestion is to replace the easy-to-understand, easy-to-administer $50 billion threshold with a new, complicated, multi-factor and largely political process. This would effectively eliminate the Fed's discretion in applying existing law, rendering some systemic risk oversight and enforcement functions ineffective.

Although there is heated rhetoric surrounding proposals to eliminate or significantly change the $50 billion threshold, the plain facts – and the language of the law itself - show that the Fed has the discretion to appropriately tailor its standards for each bank, on a sliding scale of risk, and that the Fed has made good use of this authority.

Currently, that $50 billion threshold affects only 44 of the approximately 6,500 banks in the United States. [1] In other words, it excludes more than 99% of all banks in the United States from enhanced review by the Fed.

Size of Institution	Number of Institutions
$2 Trillion and Over	2
$1 Trillion and $2 Trillion	2
$500 Billion to $1 Trillion	2
$400 Billion to $500 Billion	1
$300 Billion to $400 Billion	4
$200 Billion to $300 Billion	8
$100 Billion to $200 Billion	18
$50 Billion and $100 Billion	7
$10 Billion and $50 Billion	76
$1 Billion and $10 Billion	Approximately 580
$1 Billion and Below	Approximately 5830

Source: Federal Financial Institution Examination Council NIC as of March 31, 2017

[1] https://www.ffiec.gov/nicpubweb/nicweb/HCSGreaterThan10B.aspx

The first fact to remember is that the $50 billion threshold is merely the beginning of the analysis of what the Fed might -- or might not -- require upon a closer look at an institution above the threshold. Those requirements are based on size, complexity, activities and other factors that lead to varying risk profiles for banks above $50 billion. As such, the Fed does not treat all banks above the threshold the same way. Indeed, the statute provides the Fed with a significant amount of discretion to tailor the enhanced standards that it applies. Therefore, to evaluate proposals to change the threshold it is necessary to understand what happens today when a U.S. bank holding company has $50 billion or more in assets. The answer lies in the text of the Dodd-Frank Act and in the regulation implementing the law.

The starting point for an analysis of the $50 billion threshold is Section 165 of the Dodd-Frank Act. In particular, Section 165(a) of the Dodd-Frank Act requires the Fed to establish "enhanced supervision and prudential standards" for bank holding companies with more than $50 billion assets that are both (1) stronger than the standards applicable to smaller institutions and (2) increase in strength based on an evaluation of each bank holding company's unique riskiness.

The statute requires the Fed to apply certain standards and also provides the Fed with full discretion in applying other enhanced standards. Most importantly, the law grants the Fed broad discretion to tailor **any** standards that it applies under Section 165(a):

Standards the Fed MUST Apply, but MAY Tailor As Part of Enhanced Supervision:

(i) Risk-based Capital Requirements and Leverage Limits;
(ii) Liquidity Requirements;
(iii) Overall Risk Management Requirements including the Formation of a Risk Committee;
(iv) Resolution Plan and Credit Exposure Report Requirements;
(v) Concentration Limits; and
(vi) Annual Stress Tests.

Standards the Fed MAY Apply and MAY Tailor As Part of Enhanced Supervision:

(i) Contingent Capital Requirements;
(ii) Enhanced Public Disclosures;
(iii) Limitations on Short-term Debt; and
(iv) Such Other Prudential Standards as the Board Determines are Appropriate.

The law also gives the Fed discretion to establish, on its own, a threshold higher than $50 billion for the application of certain enhanced standards:

Standards From Which the Fed may Exempt Entirely Certain Banks Above $50 Billion:

(i) Contingent Capital Requirements;
(ii) Resolution Plan and Credit Exposure Report Requirements;
(iii) Concentration Limits;
(iv) Enhanced Public Disclosures; and
(v) Limitations on Short-term Debt.

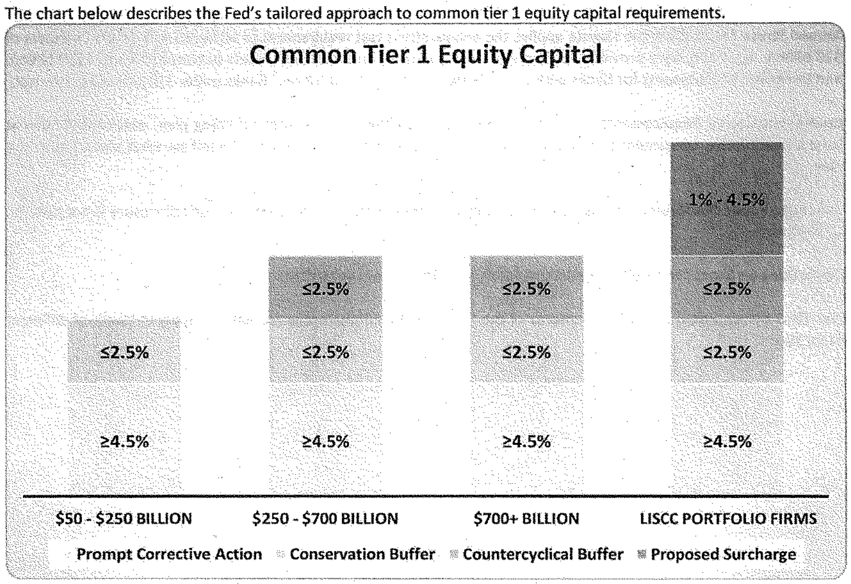
As is clear, the statute gives an immense amount of flexibility and discretion to the Fed. Indeed, even as to the standards that the Fed must apply, the law gives the Fed discretion as to how and how much to apply each standard.

The next point of analysis is the implementation of the law by the Fed. Through a series of rulemakings, the Fed has further explained how it will apply such enhanced standards. In general, the standards increase as the bank holding company's total consolidated assets and risk profile increase. These standards do not apply to nonbank financial companies designated by FSOC (which are subject to other standards).

The sections below describe how the Fed has implemented these standards.[2]

Risk-based Capital Requirements and Leverage Limits: Under rules implementing the Basel 3 capital standards, banks with total consolidated assets between $50 billion and $250 billion are subject to enhanced capital and leverage standards under the "standardized approach." Banks with total consolidated assets in excess of $250 billion are subject to the "advanced approach," which imposes a more stringent standard that the "standardized approach." Additionally, under the "advanced approach" banks with total consolidated assets in excess of $700 billion and those subject to the Large Institution Supervision Coordination Committee are subject to additional capital and leverage surcharges.

The chart below describes the Fed's tailored approach to common tier 1 equity capital requirements.



Liquidity Requirements: Banks with total consolidated assets between $50 and $250 billion are subject to a less stringent review by the Fed than banking organizations with total consolidated assets in excess of $250 billion.

[2] Federal Reserve Board, *Enhanced Prudential Standards for Bank Holding Companies and Foreign Banking Organizations*, 79 Fed. Reg. 17240 (Mar. 27, 2014); Dodd-Frank Act Stress Test 2015: Supervisory Stress Test Methodology and Results at 15 (March 2015); Office of the Comptroller of the Currency, et al., *Liquidity Coverage Ratio: Liquidity Risk Measurement Standards*, 79 Fed. Reg. 61440 (Oct. 10, 2014); Federal Reserve Board, *Risk-Based Capital Guidelines: Implementation of Capital Requirements for Global Systemically Important Bank Holding Companies*, 79 Fed. Reg. 75473 (Dec. 18, 2014).

Overall Risk Management Requirements including the Formation of a Risk Committee: Under the statute, institutions with more than $10 billion in assets are required to establish a risk committee. For banks with total consolidated assets greater than $50 billion, regulations require the committee to be independent and report directly to the board of directors.

Resolution Plan and Credit Exposure Report Requirements: U.S. financial institutions engaged primarily in banking activities with less than $100 billion in non-depository institution assets may submit a tailored proposal under the "Less Detailed Resolution Plan Alternative."

Concentration Limits: The statute limits the ability of any company subject to enhanced prudential standards from having credit exposure to any unaffiliated company that exceeds 25 percent of the bank's capital. Each bank, through its risk management process, is required to adhere to this limitation, although the Fed has the discretion to exempt an institution entirely if it deems it appropriate.

Annual Stress Tests: While the statute applies the annual stress test requirement to all banks with assets in excess of $10 billion, regulators have provided less stringent requirements for banks with assets between $50 and $250 billion, and lesser still requirements for banks with assets between $10 and $50 billion.[3] Banks under $10 billion are exempt.

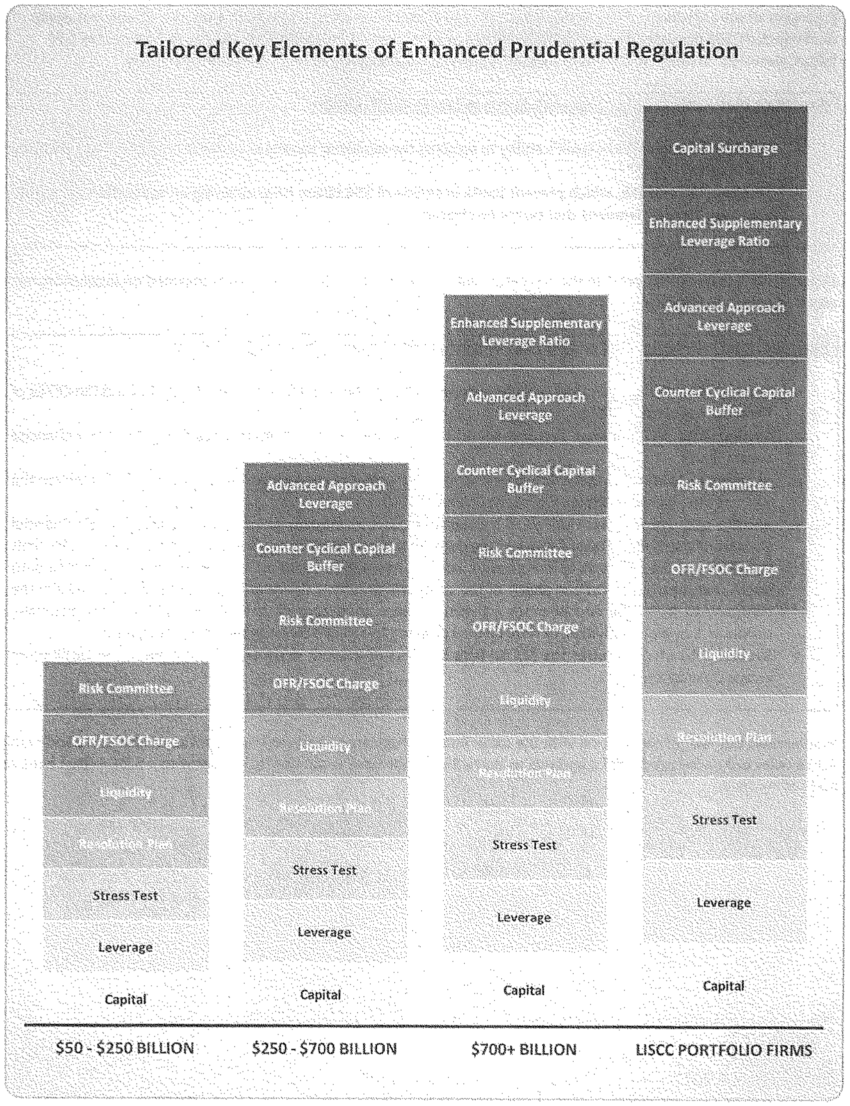
Contingent Capital Requirements: The rule requires banks to have a contingency funding plan, which must have at least a quantitative assessment and an event-management process. The Fed does not itself say what should be in the plan.

Enhanced Public Disclosures: Enhanced disclosure in a number of areas is required, and such disclosure is not tailored by bank size.

Limitations on Short-term Debt: Regulations for this section are not yet written.

The chart below details which key elements of the Fed's enhanced prudential regulations apply to banks of different asset size:

[3] For example, on September 26, 2016 Fed Governor Tarullo announced the "elimination of the qualitative portion of CCAR for nearly all the firms with less than $250 billion in assets, along with some record keeping and reporting requirements."



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A number of other sections of the Dodd-Frank Act – unrelated to prudential standards that may or may not apply under Section 165 discussed above -- impose certain requirements on bank holding companies in excess of $50 billion. However, in only two circumstances do regulators lack flexibility to tailor those requirements:

Provisions that Apply to Companies with Assets in Excess of $50 Billion:

- Section 163, which limits bank's ability to acquires ownership or control of any other bank without notifying the Fed; and
- Sections 723 and 763, which prevent banks in excess of $50 billion from receiving an exemption as an end-user from the requirement that swaps be cleared.

Other provisions of the Act provide the regulators with the ability to tailor requirements imposed on institutions with assets in excess of $50 billion:

Provisions that may be Tailored to Apply to Companies with Assets in Excess of $50 Billion:

- Section 144, which allows the Treasury to impose assessments and fees on these banks to fund the Office of Financial Research ("OFR");
- Section 318, which allows the Fed to collect assessments and fees necessary to conduct enhanced supervision;
- Section 116, which allows the Office of Financial Research to require reports from companies to inform the work of the Financial Stability Oversight Council (FSOC)
- Section 121, which allows the Fed, if it determines that a company poses a "grave threat to the financial stability of the United States," and has the determination upheld by a 2/3 affirmative vote of FSOC to: limit the ability of the company to merge with, acquire, consolidate with, or otherwise become affiliated with another company, restrict the ability of the company to offer a financial product or products, require the company to terminate one or more activities, impose conditions on the manner in which the company conducts 1 or more activities, or require the company to sell or otherwise transfer assets; and
- Section 765, which requires the SEC to limit conflicts of interest in control of swap execution facilities or swaps clearing agencies.

In summary, the Fed, in conjunction with the other banking regulators, has used its discretion under the Dodd-Frank Act to tailor enhanced prudential standards so that a $50 billion bank is not treated the same as a $250 billion bank or a $2 trillion bank.

Updated on 9.5.2017

NCLC® NATIONAL CONSUMER LAW CENTER®

May 5, 2017

United States House Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

RE: Groups strongly oppose H.R. 1849 – Practice of Law Technical Clarification Act of 2017

Dear Committee Members:

The undersigned community, consumer, and civil rights groups urge you to oppose H.R. 1849, the Practice of Law Technical Clarification Act of 2017. Passage of this bill would hurt consumers, especially people who have recently lost jobs, had a death in the family, or suffered another type of devastating personal loss. It would eradicate essential protections against abusive and deceptive debt collection practices by collection attorneys.

In 1986, as the result of clear findings of abuses by debt collection attorneys, Congress amended the Fair Debt Collection Practices Act (FDCPA)[1] to ensure that attorneys who meet the statutory definition of debt collector must comply with all of the provisions of the law.[2] Prior to this amendment, law firms were immune from the requirements of the FDCPA even when they were operating as debt collectors. They even advertised their competitive advantage over debt collection agencies that were required to comply with the FDCPA's consumer protections.[3] H.R. 1849 would turn back the clock on this important protection for struggling families by exempting attorney conduct from the consumer protections provided by the FDCPA.

Americans file more consumer complaints with state and federal officials about debt collectors than any other industry. Recent enforcement actions[4] by federal agencies have highlighted numerous and widespread abusive and deceptive practices by collection law firms and attorneys. Yet this bill would eliminate Consumer Financial Protection Bureau enforcement actions against law firms and attorneys. Your constituents would be harmed by this change in the law.

The FDCPA is a critical consumer protection statute designed to "eliminate abusive debt collection practices by debt collectors."[5] In order to achieve this goal, it is critical that Congress ensure that the statute applies broadly to *all* debt collectors.

We strongly urge you to oppose H.R. 1849 and reject this attempt to weaken the FDCPA. For more information, please contact Margot Saunders (MSaunders@nclc.org) or April Kuehnhoff (AKuehnhoff@nclc.org) at the National Consumer Law Center.

Sincerely,

Americans for Financial Reform (AFR)
Arizona Community Action Association
Center for Responsible Lending
Civil Justice, Inc.
Connecticut Legal Services, Inc.
Consumer Action
Consumer Federation of America

Consumers League of New Jersey
Consumers Union
Corporation for Enterprise Development (CFED)
Florida Alliance for Consumer Protection
Kentucky Equal Justice Center
Legal Aid Society of the District of Columbia
Legal Services of New Jersey
MFY Legal Services, Inc.
Michigan Consumer Law Section[6]
Michigan Poverty Law Program
Mountain State Justice, Inc.
NAACP
National Association of Consumer Advocates
National Center for Law and Economic Justice
National Consumer Law Center (on behalf of its low-income clients)
National Legal Aid & Defenders Association
New Economy Project
New Leaf's Mesa Community Action Network
North Carolina Justice Center
Protecting Arizona's Family Coalition
Public Good Law Center
Public Interest Law Center
Public Justice Center
Public Law Center
South Carolina Appleseed Legal Justice Center
Tzedek DC
U.S. Public Interest Research Group (PIRG)
Woodstock Institute

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[1] 15 U.S.C. § 1692a.

[2] Pub. L. No. 99-361, 100 Stat. 768 (effective July 9, 1986).

[3] H.R. Rep. No. 405, 99th Cong., 1st Sess. (Nov. 26, 1985) *reprinted in* 1986 U.S.C.C.A.N. 1752, 132 Cong. Rec. H10534 (daily ed. Dec. 2, 1985)

[4] *See, e.g.,* Complaint, Consumer Fin. Protection Bureau v. Weltman, Weinberg & Reis Co., L.P.A. (N.D. Ohio Apr. 17, 2017); Consent Order, In the Matter of Pressler & Pressler, LLP, Sheldon H. Pressler, and Gerald J. Felt ¶ 39 (Apr. 25, 2016); Consumer Fin. Protection Bureau v. Frederick J. Hanna & Assoc., Stipulated Final Judgment and Order, 14-cv-02211-AT, at ¶¶ 10-11 (D.Ga. 2015).

[5] 15 U.S.C. § 1692(e).

[6] The Consumer Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest. The position expressed is that of the Consumer Law Section only and is not the position of the State Bar of Michigan.

NCLC
NATIONAL CONSUMER LAW CENTER

NACA
National Association of Consumer Advocates

Consumers Wrongfully Labeled by Credit Reporting and Background Check Agencies Must Have Full Access to Remedies

Consumer reporting agencies are notorious for failing to fix avoidable errors on credit reports and background check reports. These errors can obstruct meaningful events in consumers' lives, such as their ability to obtain a mortgage for a home, a car, rental housing or employment. There are instances where the failures of credit reporting and background check agencies (CRAs) are so damaging to consumers' circumstances that remedies are awarded to reform and deter the misconduct to prevent future harm to others. H.R. 2359, titled the "FCRA Liability Harmonization Act," would remove critical remedies for individuals and for consumers who band together to seek accountability for harm caused by the same wrongdoing. It would eliminate punitive damages in individual cases and limit damages in class action cases, no matter how egregious the misconduct.

Below are examples showing CRAs whose conduct was so detrimental that individual consumers were unable to get serious errors in their credit reports or background checks fixed until they sued in court, and examples of consumers who banded together in class actions to seek accountability for violations of their rights under the Fair Credit Reporting Act. Under H.R. 2359, these consumers would have been denied the ability to seek adequate remedies against bad actors.

Angela Williams v. Equifax

Angela Williams of Cocoa, Fla. had an Equifax report that included at least 25 accounts that did not belong to her. The accounts which had negative information belonged to a stranger with a similar name and Social Security number. Angela spent 13 years trying to get her credit report fixed. She sent multiple disputes to Equifax, but new accounts from the other woman would still appear in Angela's credit report. In addition, Equifax would send Angela's information to creditors and debt collectors, who in turn wrongfully pursued her for the other woman's debts. Equifax's continued failure to fix Angela's reports took an enormous financial and emotional toll on her. Her credit score dropped and she was denied credit repeatedly. She was even told to leave a store after an employee viewed her credit report. Eventually, Angela sought legal help and filed a lawsuit against Equifax. Equifax long fought Angela's suit despite glaring evidence that it failed to fix the harmful errors in Angela Williams' credit report. Ultimately after a trial, a jury entered a verdict against Equifax for its misconduct and awarded actual and punitive damages to Angela.

Julie Miller v. Equifax

Julie Miller of Marion County, Oregon first discovered a problem with her credit report when a bank denied her a loan in early December 2009. Equifax had merged Miller's credit file with a different person who had the same name and a similar Social Security number, but who lived in a different state and who had a bad credit record. Miller alerted Equifax 8 times between 2009 and 2011 to correct the inaccuracies. Yet Equifax did not once correct its numerous mistakes. In addition, because Equifax failed to fix her record, Miller could not help her disabled brother who was unable to get credit on his own. Miller eventually sued Equifax for its wrongdoing. A jury awarded her compensatory and punitive damages. "For two years [Miller] was frustrated, overwhelmed, angry, depressed, humiliated, fearful about misuse of her identity, and concerned for her damaged reputation," wrote the judge in her case. "Equifax engaged in reprehensible conduct that caused real harm to Miller…Equifax should be punished financially for that wrongful conduct. [The punitive damages award] should be enough to deter Equifax…from repeating this type of conduct in the future."

David Daugherty v. Ocwen

David Daugherty of West Virginia discovered that his single mortgage serviced by Ocwen Financial Corp was listed twice on his Equifax credit report. Due to poor file maintenance, Equifax had added a second listed account or "tradeline," for the Ocwen account. One tradeline reported the mortgage as current, while the other incorrectly showed that the mortgage payment was in foreclosure and over 120 days past due. In fact, Daugherty was current on his loan. Daugherty sent numerous disputes to Equifax to fix the record. Equifax, in turn, asked Ocwen to investigate the dispute. At least 12 times, Ocwen, the mortgage servicer, would respond that the reporting was correct for both tradelines despite the fact that they were contradictory. Meanwhile, Daugherty, in anticipation of a "balloon" payment on his mortgage, sought to refinance his mortgage but was denied several times due to the negative reporting. He also was turned down for other credit. Daugherty's inability to obtain a mortgage caused him emotional trauma and significant anxiety because he feared he would lose his family home due to the false foreclosure tradeline. He filed suit, and Equifax subsequently deleted the erroneous tradeline. After trial, a jury awarded Daugherty actual damages as well as punitive damages to hold Ocwen accountable.

Richard Williams v. First Advantage

After Richard Williams of Florida obtained a B.A. degree in 2009 he struggled to find a good job during the years following the Great Recession. First Advantage Background Services Corp., a background check firm, made his job search even harder when it repeatedly provided incorrect information labeling him as a criminal to employers. When Richard applied for a job with Rent-A-Center, First Advantage's background check report matched Richard with the criminal records for 'Ricky Williams,' who had the same birthdate as Richard and had been charged for an illegal drug sale. Richard's job application was rejected as a result. When he learned of the error, Richard successfully disputed the erroneous information and a new corrected report was issued, but by then, Rent-A-Center had chosen another candidate. A year later, another job opportunity was lost for Richard when First Advantage provided an inaccurate background check report to potential employer Winn Dixie. First Advantage again wrongly matched Richard Williams with the criminal records for 'Ricky Williams' which included convictions for felony burglary and battery on a pregnant woman. First Advantage failed to adequately assess the records, which had clear evidence that the two were different individuals. For example, an on-line record indicated that the other man was incarcerated at the same time Richard was applying for employment about 300 miles away. First Advantage also twice failed to use its special procedures for reviewing common names. As a result of its errors, Richard was, except for a short period, unemployed for over 1 ½ years. Richard filed a lawsuit and a jury rendered a verdict against First Advantage, awarding actual and punitive damages. Richard's attorney suggested a range of amounts of punitive damages for the jury to consider, and the jury awarded the highest amount suggested.

Class action resolves widespread inaccurate reporting of consumer bankruptcy discharges
White v. Experian Information Solutions

Consumers in a class action alleged that the Big Three credit reporting agencies (Experian Information Solutions, Inc., Trans Union, LLC, and Equifax Information Services, LLC – "CRAs") recklessly failed to follow reasonable procedures to ensure the accurate reporting of debts discharged in bankruptcy and refused to adequately investigate consumer disputes regarding the status of discharged accounts. Creditors frequently had failed to report an updated status for these accounts, and the CRAs failed to update the accounts. The systemic and widespread failure to provide consumers a "fresh start" after a bankruptcy discharge, was, for many years one of the most serious problems in the credit reporting system. Thousands of consumers were deprived of employment, mortgage, housing rentals, credit or auto loans. The CRAs eventually agreed to a settlement that required them to revise their procedures. They agreed to treat all pre-bankruptcy debts as discharged unless the creditor or debt collector provided information showing that a debt was excludable from discharge. It resulted in a major reform in credit reporting, benefitting millions of consumers. The CRAs also agreed to a settlement payment of $45 million to compensate about 770,000 class members. The settlement payment covered "convenience awards" for some class members and actual damages awards for others, as well as costs.

Class action compensates consumers misidentified in credit reporting as terrorists and criminals
Ramirez v TransUnion LLC

In 2017, a California jury rendered a verdict for 8,000 consumers in a class action after finding that the credit reporting agency TransUnion violated the Fair Credit Reporting Act when it carelessly misidentified class members as terrorists and criminals in their credit reports, confusing the consumers with similarly named individuals on a government watch list. Trans Union defended its poor matching procedures by arguing that consumers weren't financially harmed by the inaccuracies. Yet its conduct caused tremendous injury to class members. The lead class member for example alleged that he was prevented from buying a car because TransUnion told lenders he potentially matched two entries on a government watch list. Besides the name, there were other factors, including birthdates, which showed Ramirez was not any of the persons on the government list. Ramirez said that when he tried to get off of TransUnion's list, the company's customer service agents failed to explain how the error could be corrected. Transunion could have delivered better results in its credit reporting but its active failure to ensure accuracy amounted to willful violation of the FCRA. The jury awarded nearly $60 million in statutory and punitive damages to the harmed consumers.

Conclusion

Class actions and the Fair Credit Reporting Act are critical in these and other cases because individual consumers do not have the ability to fix these issues without banding together with other similarly harmed consumers. Punitive damages are necessary to deter egregious conduct and ensure meaningful consequences when CRAs recklessly mislabel consumers as deadbeats or criminals and repeatedly fail to correct these slanderous errors. H.R. 2359, which proposes eliminating punitive damages, a $500,000 limit on statutory damages, and a $500,000 limit on actual damages in class actions would obstruct consumers' rights under federal law. If applied to these cases, the class members and individual consumers would not have been adequately compensated for the harm suffered and the violation of their federal rights. Further, the CRAs would not have been deterred from engaging in future wrongdoing and similarly harming other consumers' livelihood and wellbeing.

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U.S. HOUSE CONSIDERS TROJAN HORSE BILL TO WEAKEN CREDIT BUREAU LAWS

TUESDAY, SEPTEMBER 5, 2017
By Ed Mierzwinski
Consumer Program Director
http://www.uspirg.org/blogs/eds-blog/usp/us-house-considers-trojan-horse-bill-weaken-credit-bureau-laws

What would you do if you knew that the Big 3 credit bureaus (Experian, Equifax and TransUnion) were all among the **Top Five** leaders in complaints posted in the full Consumer Financial Protection Bureau Public Consumer Complaint Database (Equifax has more complaints than Wells Fargo!) and that their mistake-ridden reports cause consumers to either be denied jobs or pay more for or be denied credit due to those mistakes? Well, if you were the leadership of the House Financial Services Committee, you'd consider not one, but two bills to make this worse by both eliminating strong consumer protections, capping penalties and eliminating the deterrent of punitive damages when credit bureaus wreck consumer lives. (**Note on the chart:** The Top Ten companies are responsible for over half of the 848,325 complaints in the database today; the chart includes all complaints posted since the inception of the database until today; the CFPB has handled over 1.2 million complaints to date; some have been referred to other agencies; others are still being processed.)

One bill, from Rep. Ed Royce (CA), will be justified by claims it is ostensibly simply to let credit bureaus do consumer education, but they already can do that. Under the Credit Repair Organizations Act, which they are currently subject to, the bureaus simply cannot charge you fees for services that they do not first provide. Mr. Royce's bill hides massive weakening of consumer protections inside a Trojan Horse bill that you will hear is only about letting the credit bureaus help people but actually is all about letting credit bureaus -- and perhaps many others that make the bureaus seem like upstanding citizens in comparison -- hawk over-priced credit repair products with little oversight or culpability if they violate the weak new proposed standards.

A second bill, the Orwellian-named FCRA Liability Harmonization Act, HR2359, from Barry Loudermilk (GA), Mr. Royce and other majority members of the committee would eliminate punitive damages and cap other damages payable to consumers harmed by violations of the Fair Credit Reporting Act.

CFPB Database 6 Sept 2017-Top Companies

Rank	Company	Complaints	% of Total
1	BANK OF AMERICA, NATIOI	68,872	8.1%
2	**EQUIFAX, INC.**	56,876	6.7%
3	WELLS FARGO & COMPAN\	56,711	6.7%
4	**Experian Information Solut**	53,908	6.4%
5	**TRANSUNION INTERMEDIA**	48,138	5.7%
6	JPMORGAN CHASE & CO.	45,658	5.4%
7	CITIBANK, N.A.	37,089	4.4%
8	OCWEN LOAN SERVICING L	25,055	3.0%
9	CAPITAL ONE FINANCIAL C(	22,142	2.6%
10	Navient Solutions, LLC.	20,644	2.4%
	Total In Database	**848,325**	**51.3%**
	Percent of All Complaints About Big 3		18.7%

Fortunately, our collegue Chi Chi Wu of the National Consumer Law Center is the Democratic witness at the hearing tomorrow Thursday, which will also consider several other problematic bills, including one to allow debt collectors to more easily pretend to be law firms to avoid consumer protections of the Fair Debt Collection Practices Act (committee summary of all 6 hearing bills).

Chi Chi Wu is the longtime editor of the authoritative NCLC Fair Credit Reporting Act Manual and will explain the highly-problematic proposals in such a way that it will be very clear that the committee's goal is to serve the credit bureaus, not to improve the "dead-end" marketplace of credit reporting. Why is credit reporting a dead-end marketplace? You cannot vote with your feet and walk away, as you can with your bad bank. You can pick your bank and you can pick your friends, but you are stuck with the credit bureaus, no matter how poorly they work in the marketplace.

Let's Review What We Know About The Reckless Credit Bureaus:

The credit bureaus have been investigated by news outlets ranging from the Columbus Dispatchto CBS 60 Minutes to Last Week Tonight (John Oliver). In 2013, the Federal Trade Commission concluded that up to 1 in 4 of all credit reports contain serious mistakes and 5% of all consumers have reports that contain mistakes that could lead to being denied jobs or paying more for or being denied credit.

The credit bureaus have been sued by numerous state attorneys general: a recent enforcement action by 31 bi-partisan state Attorneys General forcing removal o often-inaccurate public records from reports will result in credit scores for 12 million consumers increasing by 20-40 points. In June, in a lawsuit brought by private attorneys, a jury found the Big 3 credit bureau Transunion guilty of violating the Fai Credit Reporting Act and harming a class of over 8,000 consumers. The jury imposed statutory damages and additional punitive damages (banned by the Loudermilk bill), due to the willful nature of the violation, totaling $60 million. What did Transunion do? It mixed the names of ordinary consumers up with those of terrorists and drug traffickers with similar names on the U.S. Treasury Department's very-scary-to-be-on Office of Foreign Assets Control (OFAC) database. Oops. Worse, it claimed in court it was no big deal and consumers were supposedly not harmed by being called terrorists and drug traffickers, so no damages should be awarded. (True, you do not have to make this stuff up.)

Both the Consumer Financial Protection Bureau and the Federal Trade Commission have also sued one or more of the Big 3 Credit Bureaus for deceptive marketing of credit monitoring and other "credit score improvement" products. In both 2005 and again, when it failed to clean up its act, in 2007, the FTC sued Experian affiliates that took advantage of new actual free credit reports by federal law to deceptively claim their credit monitoring products were free; even though only trial offers were free, and consumers needed to cancel within as little as 3-7 days to avoid payments. In 2017, the CFPB has sued and recovered multi-million dollar penalties from each of the Big 3 bureaus over deceptive practices related to selling of credit score and monitoring products (TransUnion/Equifax and Experian). Each of the largest banks (Bank of America $727 million) has also paid penalties and restitution for deceptive marketing of similar credit-card add-on products.

So What Would The Royce Trojan Horse Credit Repair Bill Do?

Credit monitoring improvement products are a form of credit repair. Previously, the Big 3 credit bureaus had sought more straightforward (but still problematic) legislation to simply exempt them from the Credit Repair Organizations Act (CROA). Perhaps the core provision of that law is that it says any firm offering any credit improvement service cannot collect a fee until a successful service is performed. The CFPB recently sued a pure credit repair doctor under the act.

The new Royce bill makes any of the Big 3 credit bureaus by definition exempt from CROA and instead covered for credit repair and improvement services under a new, less-regulated category of firm it invents -- "credit services providers." The bill also allows other firms to apply to join that lightly-regulated category. Under the bill, if the Federal Trade Commission (FTC) fails to act on review of their applications within 60 days, the application is automatically approved. Expect a massive march by current credit repair doctors to join the fun of facing less regulation while making more deceptive promises. The Royce bill also preempts stronger state CROA protections. It eliminates all consumer remedies (rights to sue "credit services providers") in favor of sole FTC enforcement (it likely also eliminates both CFPB and state Attorney General authority). It purports to give consumers a right to cancel, but doesn't require firms tell consumers about that right; it also allows firms to keep indeterminate "reasonable fees" for services supposedly "already rendered."

Later I will link this blog to longer opposition letters opposing both bills from consumer groups. Chi Chi Wu's testimony will be posted here either late today or when the hearing begins. But the questions remain. Why would some in the Congress seek to make it easier for credit bureaus to ignore the law? Why would the Congress seek to allow credit bureaus to take consumer money for services they do not provide? Why would the Congress reduce the threat of liability for these unaccountable gatekeepers who control access to jobs and credit?

Why wouldn't the Congress, instead, consider real reform legislation such as HR5282, the Comprehensive Consumer Reporting Act of 2016, proposed last year by its ranking member, Maxine Waters (CA), to force the credit bureaus to follow the requirements of the Fair Credit Reporting Act and make the dead-end credit reporting marketplace work better? Go figure.

NACA

National Association of Consumer Advocates

September 6, 2017

Hon. Jeb Hensarling, Chairman
Hon. Maxine Waters, Ranking Member
U.S. House Financial Services Committee
Washington, DC 20515

Re: ***H.R. 2359 to be discussed at the September 7, 2017 Subcommittee on Financial Institutions and Consumer Credit hearing entitled "Legislative Proposals for a More Efficient Federal Financial Regulatory Regime"***

Dear Chairman Hensarling and Ranking Member Waters:

The National Association of Consumer Advocates, a nonprofit association actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means, writes to urge opposition to H.R. 2359, the "FCRA Liability Harmonization Act." The legislation would deprive victims of credit reporting abuses of deserved compensation for their losses and would disrupt the marketplace by diminishing the justice system as a key tool to deter systemic and abusive conduct in the vast and complex credit reporting and information system.

By eliminating punitive damages in individual cases and inserting an arbitrary cap on compensation for harmed consumers who band together in class actions against the same wrongdoers, H.R. 2359 disregards systemic misconduct that plagues the credit reporting industry and its real impact on millions of consumers and the marketplace. In recent cases, entities in the industry rightly have been held accountable for flagrant violations of the Fair Credit Reporting Act (FCRA), including ignoring multiple, years-long requests to correct blatant credit reporting errors; and wrongfully labeling consumers as criminals and terrorists while failing to use reasonable procedures to ensure accuracy of reports, effectively obstructing people's ability to secure jobs, housing, loans, and other services. Many of these problems were not fixed until harmed consumers sued.

The punitive damages remedy specifically permitted under FCRA is a rarely used tool but it is necessary to stop and punish the worst behavior in this sector. In addition, credit reporting practices are often systemic and widespread impacting thousands or millions of consumers. In these cases, where many consumers are affected by the same willful violations, class actions are the most efficient method to resolve these disputes. Imposing a one-size cap on remedies is an apparent attempt to discourage consumers from banding together against bad actors. It is also illogical because class actions involve different violations, losses, and numbers of affected individuals.

Credit bureaus and background check companies have tremendous power over the distribution of consumers' data and information. Their misconduct affects individuals' reputations and financial security, which in turn impacts the economy. When these entities recklessly and willfully fail at their duties, they must be held accountable for the disruption they cause in the marketplace. Diluting consumers' rights and remedies would remove crucial incentives for industry players to comply with the law and would clear the way for bad actors to violate it without fear of recourse.

Finally, as consumer complaints about the credit reporting industry have grown over the years, it is far more appropriate for Congress to consider enhancing FCRA rights and protections than to entertain measures that would undermine and weaken them.

We urge you to abandon this legislation.

Sincerely,

Christine Hines
Legislative Director

September 6, 2017

Hon. Jeb Hensarling, Chairman
Hon. Maxine Waters, Ranking Member
U.S. House Financial Services Committee
Washington, DC 20515

Re: *H.R. 2359 (Rep. Loudermilk), FCRA Liability Harmonization Act (Oppose)*

Dear Chairman Hensarling and Ranking Member Waters:

The undersigned public interest organizations write to urge your opposition to H.R. 2359, titled the "FCRA Liability Harmonization Act." The legislation would restrict remedies for American consumers whose credit reports and background check reports were recklessly distorted and who suffered serious consequences as a result, including losing their ability to access credit such as a mortgage, a car loan, rental housing, or employment. Limiting damages in Fair Credit Reporting Act (FCRA) legal actions, as this bill proposes, would embolden credit reporting and background check agencies to disregard federal protections meant to ensure accurate reporting of credit records and other consumer reports. The bill would allow bad actors in the credit reporting industry to wrongfully label consumers as deadbeats, terrorists, and criminals without fear of meaningful consequences. It also would have a deleterious effect on the marketplace due to the spread of defective data and information on millions of consumers and workers that almost inevitably would result.

H.R. 2359 would restrict Americans' access to justice without sound justification. It would amend the FCRA to eliminate punitive damages awards for individuals when credit reporting and background check agencies willfully break the law, no matter how egregious the industry player's conduct. It also would dictate a one-size-fits-all cap on damages in class actions to $500,000 for groups of consumers who seek accountability against bad actors in the industry, no matter how many thousands or millions of consumers harmed or the extent of their losses caused by the illegal conduct. An arbitrary cap on statutory damages in class actions would deter and practically block the most effective method for harmed consumers to stop systemic willful violations of the FCRA. And without class actions, it is not economically feasible in many cases for consumers to pursue claims on their own.

FCRA violations are far from just "technical" as supporters of this bill suggest. FCRA statutory and punitive remedies are only awarded when a company willfully violates the law. The bill's provisions would restrict damages where harmed consumers already have met the burden of proving that the perpetrator understood the law and violated it anyway. And notably, the three credit reporting agencies consistently are among the top most complained-about companies, with the vast majority of complaints involving incorrect information on consumers' credit reports.[1]

Consumer losses caused by credit reporting malfeasance are all too real. For example, Angela Williams of Cocoa, Florida was rightfully awarded actual and punitive damages by a jury after spending 13 years wrangling with, and submitting multiple disputes to, Equifax to fix her credit report, which had contained at least 25 accounts that did not belong to her. Ms. Williams was wrongfully pursued by creditors and debt collection agencies and repeatedly denied credit due to the company's systemic

[1] Consumer Financial Protection Bureau, *Monthly Complaint Report*, Vol. 20, February 2017, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201702_cfpb_Monthly-Complaint-Report.pdf

failure to fix the errors in her credit report. She suffered an enormous financial and emotional toll from the experience.

Just this year, a California jury awarded statutory and punitive damages to 8,000 consumers in a class action after finding that the credit reporting agency TransUnion violated the FCRA when it willfully misidentified class members as terrorists and criminals in their credit reports, confusing the consumers with similarly named individuals on a government watch list. TransUnion's liability for willfully engaging previously in the exact same conduct had been upheld by an appellate court, but initially declined to implement changes that could have reduced false matches making it a serial willful violator of the FCRA. Trans Union's failure to properly verify affected consumers' information caused them tremendous injury. The lead class member for example alleged that he was prevented from buying a car because TransUnion told lenders he potentially matched two entries on a government watch list. The remedies in these cases were aimed at compensating harmed consumers, deterring similar bad behavior, and protecting the marketplace from future damage.

Under H.R. 2359, a company that willfully violates the law would escape punitive damages meant to punish and deter wrongdoing, and consumers would be denied justice for the losses caused by poor credit reporting and data practices. As demonstrated, careless and inaccurate credit reporting and data collection can devastate a consumer's well-being and financial health, including his or her pursuit of employment and access to credit. Liability for wrongful acts is a powerful incentive for companies to comply with the law. By removing key tools to hold industry players accountable, the bill would weaken incentives to act properly and would exacerbate misconduct in this sector, injuring more consumers and ultimately the marketplace.

The Committee should reject this harmful proposal.

Sincerely,

A New Way of Life Re-Entry Project
Allied Progress
American Association for Justice
Americans for Financial Reform
Baltimore Neighborhoods, Inc.
Center for Digital Democracy
Center for Justice & Democracy
Center for Responsible Lending
Community Justice Project
Community Service Society of New York
Connecticut Legal Services, Inc.
Consumer Action
Consumers for Auto Reliability and Safety
D.C. Consumer Rights Coalition
Demos
East Bay Community Law Center
Florida Alliance for Consumer Protection
Georgia Watch
Greater Hartford Legal Aid, Inc.
Homeowners Against Deficient Dwellings
The Impact Fund
Legal Action Center
NAACP
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low -income clients)
National Workrights Institute
Ohio Justice & Policy Center
Public Citizen
Public Justice
Public Justice Center
Social Justice Law Project
Texas Watch
U.S. PIRG
Virginia Poverty Law Center
Workplace Fairness
Youth Represent

H.R. 10:

The *Financial CHOICE Act*: Raising the Cost of Real Estate Settlements One Referral at a Time

National Association of Independent Land Title Agents

May 22, 2017

Washington, D.C.

Introduction:

The *Financial CHOICE Act,* known as H.R. 10, is billed as an alternative to the Dodd-Frank Wall Street Reform and Consumer Protection Act or Dodd-Frank Act. One of the main objectives of the bill is to reform the Consumer Financial Protection Bureau (CFPB). However, H.R. 10, through incorporation of language contained in the *Mortgage Choice Act*, also focuses on the dichotomy between affiliated and independent real estate settlement service providers in ways that prove problematic for members of the National Association of Independent Land Title Agents (NAILTA) and American real estate consumers.

The real estate settlement services industry is made up of a host of separate but uniquely related service providers. Among the various service providers are land title insurance agents. NAILTA represents "independent" land title agents from within the title insurance industry, which is a subset of the group that represent the insured interests of American real estate consumers at the closing table.

Title insurance agents are typically divided between "affiliated" and "independent" service providers. Independent land title agents are those who ***do not*** share common ownership or controlled interest with a referral source such as a lender, real estate firm, mortgage company, etc, to obtain business. Affiliated land title agents are those who ***do*** share common ownership or control with their referral sources. **The fundamental business model difference between "affiliates" and "independents" is that affiliated land title agents pay their business referral sources for business, whereas independent land title agents do not.**

Title insurance agents issue title insurance policies on behalf of title insurance underwriters who then insure lenders, borrowers and homeowners through a contract of indemnity. Roughly 60% of all title insurance business in the United States is issued through land title insurance agents, whether affiliated or independent agents. The remander of title insurance business is issued directly by the title insurance underwriter without the assistance of land title insurance agents.

Being involved in an affiliate relationship with a referral source, such as a lender, real estate firm or mortgage company, can be extremely profitable for the participants. The relationship affords direct client contact from mortgage loan origination or property listing all the way to closing. It eliminates the need for marketing expense for the title agent, since those resources are simply paid to the referral source for business. It also assures substantially all of the referrals from a particular referral source.

The Real Estate Settlement Procedures Act (RESPA) Section 8 generally prohibits an ordinary kickback or "thing of value" given or received pursuant to an agreement to refer settlement service business. Affiliated businesses are an exception to the kickback prohibition, but only under very specific circumstances. Having been permitted by federal law in the 1980's, affiliated business arrangements have flourished in the United States.

Why Do Affiliated Providers Want H.R. 10 to Pass?

In one word, the answer is the "money".

The relationship between a referral source such as a lender or real estate firm and an affiliate title agency is of great financial benefit to the referring party because the referring party gets paid or otherwise compensated, whether through profits or revenues, from the affiliate title agency. This compensation allows the referral source to offset declining or to enhance increasing profit margins from their traditional business resources.

If a lender can only make 3% on "points and fees" when lending on a Qualified Mortgage (QM), having an affiliate title company who can make additional fees on the same deal increases the profitability of the transaction. The same is true for a real estate firm affiliation or a mortgage company affiliation. The more controlled interest, the more money there is to produce. Multiplied by hundreds, if not thousands, of transactions per month, these affiliations begin churning huge sums of money for their participants.

All of this effort is given with no benefit to the consumer who receives **no pricing advantage** on the insurance or closing and **no greater product** than what an independent provider may have already allowed. Affiliation is not about consumer value. It is solely about paying for referral business using monies that could have benefitted the consumer to pay for it.

To support affiliated referrals, the *Financial CHOICE Act* modifies the existing "points and fees" definition of the Dodd-Frank Act to except affiliated fees charged by lenders when making residential mortgage loans. The bill permits lenders to use their closely-held real estate settlement service provider affiliates, such as affiliated title insurance agencies, who charge fees to real estate consumers and then, once obtained, share those fee-generated revenues with the very same lenders, real estate firms and mortgage companies who provide the referral.

Supporters of H.R. 10, and specifically the *Mortgage Choice Act*, tout the supposed value of "one-stop" shopping as their altruistic reason for preferring affiliated providers over their independent counterparts. In truth, real estate consumers have little financial incentive to use the affiliated providers. Affiliated entities typically charge the same fees as independent settlement providers. Instead, the real reason these referrals to affiliates are made is because they directly compensate the referring parties, such as lenders, real estate firms and mortgage companies for the referral. Consumers rely upon lenders, real estate firms and mortgage companies to make these referrals not fully realizing that the referral is made not to benefit the consumer, but to financially benefit the referring party itself.

Under the Dodd-Frank Act, the fees charged by affiliates currently count against the 3% cap on "points and fees" for a QM. Under H.R. 10, those fees would no longer be counted and affiliated companies would continue paying referral bounties to those referral sources (i.e. lenders, real estate firms and mortgage companies) who provide them.

H.R. 10 Further Restricts Competition in the Title Industry:

According to the U.S. Department of Justice, the title insurance industry is one of the least competitive industries in the United States.

The lack of competition is primarily caused by the fact that products and services in title insurance are marketed through relationships the title insurance industry has with its referral sources, not to its end-users. This troubling feature is called "reverse competition".

Rather than "normal" competition that might help drive down the cost of title insurance for consumers, "reverse" competition causes the opposite effect. Because title insurance professionals market to their referral sources and, in the case of affiliation, pay for their business, the only price impulse for the cost of title insurance is for it to increase. After all, the higher the price for title insurance, the more lucrative the referral payment. The more lucrative the referral payment, the more affiliations persist and grow.

Affiliation is a direct result of reverse competition and affiliation is what prevents the industry from remaining truly competitive. Proponents of affiliation argue otherwise, but it is a hollow claim. Proponents argue that title insurance rates are the same and vary only by state, thus, because there is no price fluctation, affiliation does not impact competition or pricing. While it is true that state departments of insurance approve rate filings and most insurers charge the same risk rate within their jurisdictional footprint, risk rates are rising.

There are a few competing phenomena, such as the rebound from the Great Recession of 2008 and historically low mortgage interest rates, that obscure the anti-competitive nature of affiliations but it is important to remember some basic truths still prevalent in the title insurance industry regarding the harms of reverse competition.

- First, again, title insurance risk rates – the set pricing that title insurers agree to charge consumers for title insurance – are rising.
- Second, affiliated providers are growing more prominent and grabbing larger shares of the overall business.
- Third, there are fewer independent land title agents doing business today.

If the title insurance industry marketed directly to American real estate consumers, lower prices would make affiliations untenable. Consumers could comparison shop on price and service without affiliations. They have little incentive to do so now. H.R. 10 helps amplify this disparity and continues the "reverse competition" patronage that keeps title insurance risk rates artificially high.

H.R. 10 Permits Unethical Conflicts of Interest in the Title Industry:

When a consumer originates a loan with a lender or lists a home with a real estate agent who is part of an affiliated business arrangement, they are supposed to be provided with a federally-required affiliated business arrangement disclosure that outlines the fact that the referral source will receive a financial benefit for referring, that the consumer is not required to use the provider and the estimated range of pricing for services rendered. The representation of a consumer, whether in real estate or elsewhere, is one in which a professional undertakes a duty to act in the best interests of that client/consumer.

A conflict of interest is said to exist, "if there is a substantial risk that the professional's representation of the client would be materially and adversely affected by the professional's duties to another current client, a former client or a third person." The key is whether independent professional judgment is likely to be unduly influenced by other interests. When a conflict arises, it may be waived by informed consent. The federally-required affiliated business arrangement disclosure falls short of a waiver of informed consent and merely *discloses* the existence of the conflict. This shortcoming persists in H.R. 10.

When a lender or real estate professional is paid to refer business to an affiliated settlement service provider, there is created an inherent conflict of interest between the professional and their client-consumer. No longer is the professional acting solely in the best interests of the client-consumer, but is now impacted by the payment of referral fees or other compensation in return for the referral of business.

Moreover, disclosing the existence of the conflict of interest is not the same as seeking an informed waiver of consent to the conflict. The former only identifies the conflict. It does not waive or seek informed consent to it. Thus, it is NAILTA's position that the current system of affiliated business arrangement disclosure patronized by H.R. 10 is inadequate to waive or otherwise obtain informed consent to the conflict of interest that exists in the transaction.

An ethically motivated land title insurance agent should never close a real estate transaction in which they have not obtained a proper waiver of any apparent conflicts of interest, such as those present in affiliated business arrangements, from the consumer. Again, disclosure is not synonymous with informed waiver. The latter is required for ethical conduct.

H.R. 10 makes it clear that not only is ethical conduct in the title industry not preferred, it is under direct attack.

H.R. 10 Jeopardizes a Consumer's Right to Choose Their Provider

Throughout the history of RESPA, one of the stated purposes of the statute has remained the same:

> "To eliminate kickbacks and unearned fees that may unnecessarily increase the costs of certain settlement services."

RESPA does not regulate fees for settlement services. Instead, the intent is to create an "informed" consumer. One of the key principles of the *Financial CHOICE Act* states as follows:

> "Consumers must be vigorously protected from fraud and deception as well as the loss of economic liberty."

Matching this key priniciple is that contained in President Donald Trump's executive order instructing the Secretary of the Treasury to consult with member agencies of the Financial Stability Oversight Counsel (FSOC) and to provide a report concerning current financial regulations, including RESPA. In judging financial regulations, the Trump Administration wishes to:

> "Empower Americans to make independent financial decisions and informed choices in the marketplace... ."

It is impossible to see how H.R. 10 accomplishes its own manifest goals, let alone the goals stated by President Trump' executive order.

H.R. 10 allows lenders to incentivize the use of their own closely-held settlement provider affiliates in such a way that consumers will assuredly be steered to use the affiliate by the lender, rather than through the exercise of their own choice.

How do we know this with certainty? Because when lenders such as Quicken Loans testified to the House Financial Services Committee (HFSC) in 2014 concerning the *Mortgage Choice Act* they admitted referring over 95% of all title and settlement consumers to their own closely-held affiliate, TitleSource. And, this makes perfect business sense for them. The parent of Quicken Loans and TitleSource makes more money when Quicken Loans steers consumers to TitleSource. Moreover, it defies logic to think that 95% of the thousands of consumers who closed with Quicken Loans in 2014 also randomly and independently chose TitleSource as their settlement service provider.

H.R. 10 restricts independence and encourages deceptive referral practices. If the goal of H.R. 10 and RESPA is to create "well-informed" consumers, the pratice of treating affiliates as separate from the referring parent obscures the true nature of these transactions. Consumers are steered to the affiliates. RESPA provides a clear and unequivocal right for consumers to choose their own provider. Allowing referring parties to limit that right cuts against the basic premise of RESPA's protections. Enacting H.R. 10 would "walk back" consumer protections at a time when we can ill afford to do so.

http://mnbenchbar.com/2017/08/title-company-kickbacks/

Are Title Company Kickbacks Harming Your Clients?

Posted Aug 3 2017 by DOUGLAS R. MILLER in Articles, Current Issue with 1 Comment

Cozy relationships between title companies and brokers create problems for consumers

Recent enforcement actions by the Minnesota Department of Commerce have underscored both the prevalence of real estate title insurance kickbacks and the inadequacy of the available enforcement mechanisms. In this article, the author explores the problem and suggests that litigation over breach of fiduciary duty could help to stem self-dealing in the industry.

The Minnesota Department of Commerce (DOC) has become the national pacesetter for Real Estate Settlement and Procedures Act (RESPA) kickback enforcement actions. And they are doing it in a regulatory arena that few consumers, let alone attorneys, understand: title insurance. The misunderstood importance of the title insurance industry to residential real estate transactions has made title company referrals very profitable for those who are willing to break the law. The DOC and the Consumer Finance Protection Bureau (CFPB) have been investigating these activities with limited enforcement penalties that provide little deterrence.

While some in the industry denounce the recent Minnesota DOC's actions as over-reaching and unfair, their complaints are unfounded. In fact, the enforcement actions are minimal in comparison to the massive amount of money involved and the violations that continue to plague unwitting consumers. RESPA is a minimum standard with a meager one-year statute of limitations. It wasn't designed to handle the far more severe conduct of self-dealing and predatory fiduciaries.

There is a massive amount of uninvestigated civil liability when it comes to how fiduciaries routinely manipulate clients into title firms that provide financial benefits to the fiduciary. And it's not just realtors, lenders, and title firms who should be worried. Attorneys who sell title insurance to their clients are juggling a time bomb that could put their careers at risk.

No one at the closing table should be related to the title company

Title insurance companies provide some of the most important services to the residential real estate transaction. They investigate and examine title and make important insurability and closing decisions. Their impartiality isn't just desirable; it's imperative to the integrity of the transaction. Unfortunately, most transactions that close in the Twin Cities metro area are confounded by conflicts of interests in both the title company selection process and the title process itself. Title companies are owned by realtors, lenders, and construction firms, and many independent title firms have cozy financial arrangements with real estate professionals who refer them business. These arrangements stifle competition, increase prices, and threaten the integrity of the transaction itself.

In 2006, I spoke before Congress about the predatory methods being employed to steer clients into over-priced title firms.[1] At the time, I was owner and president of a Minnesota title firm and had found that we weren't just competing with other title firms for business; we were competing with realtors. Realtors would exert such control over their clients' title business that instead of looking out for their clients' interests, they would conceal our offers of discounts (many times with savings in excess of $600). When we were hired for one side of the closing and contacted the other side's realtor with a discount offer, not only were our offers not communicated to their clients, we were often threatened with boycotts if we told their clients about the savings. When it came time to close their own personal transactions, we would often find these same realtors saving money by using our title firm. Although I no longer own that firm, it was a success story and had grown to be one of the largest title firms in Minnesota through service excellence, technology, and price. But our firm paid no kickbacks.

I remember watching helplessly as a substantial amount of our business was lost to over-priced, realtor-owned title firms engaged in providing fiduciary services that measured success in how well they "captured" their clients' title business. We lost business to firms that set up alleged sham title companies with realtors, loan officers, builders, and developers[2] to funnel "profits" (which the DOC termed kickbacks) to those referral partners. We also lost business to firms blatantly paying kickbacks. Today, the methods are stealthier and leave fewer paper trails.

In 2007, the GAO published a report[3] about title insurance that stated, "Certain factors raise questions about the extent of competition and the reasonableness of prices that consumers pay for title insurance. Consumers find it difficult to comparison shop for title insurance because it is an unfamiliar and small part of a larger transaction that most consumers do not want to disrupt or delay for comparatively small potential savings. In addition, because consumers generally do not pick their title agent or insurer, title agents do not market to them but to the real estate and mortgage professionals who generally make the decision. This can create conflicts of interest if those making the referrals have a financial interest in the agent.... Furthermore, recent investigations... have identified instances of alleged illegal activities within the title industry that appeared to take advantage of consumers' vulnerability by compensating realtors, builders, and others for consumer referrals.... Given consumers' weak position in the title insurance market, regulatory efforts to ensure reasonable prices and deter illegal marketing activities are critical."

No free lunch under RESPA

There are many other serious conflicts that make title company relationships with realtors and other service providers inappropriate. Real estate brokers often have extremely large commissions riding on the deal closing, and it is not hard to imagine how that might influence the title exam and closing decision process at an in-house title firm. Is a realtor-owned firm more likely to facilitate illegal side agreements between buyers and sellers that might constitute mortgage fraud? Consider the builder-owned title company closing on a transaction with mechanic's liens, tax liens, and underlying blanket mortgages that would terminate the closing at any other firm, but could also represent the builder's last hope of obtaining much-needed cash. There are endless situations that create the appearance of impropriety or the financial motivation to commit mortgage fraud through control of the title company.

It is this type of logic that provided the basis for a zero-tolerance policy toward any form of quid pro quo for referrals. The doctrine is strict when it comes to section 8(a) of RESPA: "No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." There is no "de minimis" amount and there is no mythical exemption for gifts under $25. Put simply, there is no free lunch under RESPA. But offering free lunches and a lot more is a big problem in Minnesota. Offering kickbacks intended to influence fiduciaries' advice (the very definition of commercial bribery[4]) is rampant in Minnesota.

Those who pay kickbacks can reap huge financial rewards. On April 30, the Star Tribune ran a story about kickback enforcement actions against Liberty Title and other firms.[5] The Star Tribune reported that between 2013 and 2015, Liberty Title "spent more than $170,000 to wine and dine local real estate agents and other players in the industry, according to records Liberty Title provided to the Commerce Department. The company hosted more than 100 events per year, ranging from intimate lunches to parties that drew hundreds of real estate professionals."

The story continued, "Jeff Zweifel, vice president and co-owner of Liberty Title, said the company's spending was critical in turning it into one of the Twin Cities' top title firms. Since 2011, closing volume has tripled, with revenue reaching $8.5 million last year." The DOC fined them only $45,000 for paying kickbacks. In seeming defiance of their recent enforcement action, the Star Tribune reported that Liberty Title will cut their marketing budget—noting, however, that "Free lunches will be greatly reduced but not eliminated."

TitleSmart is another local firm fined $45,000 that was alleged to have benefitted from paying kickbacks. In a Star Tribune article,[6] Cindy Koebele, the president and owner of TitleSmart, exemplified the industry's attitude about kickbacks by characterizing her dinner cruises as "routine networking opportunities" and noting that many businesses in real estate host similar events: "Whether it be a boat ride on the river or Lake Minnetonka, golf outing, baseball game... there are an endless number of networking events where the venue and food are paid for by a hosting company."

Kickback arrangements are often extremely complex and difficult to track. Consider the loan officer who offices in a realty firm's office and as a quid pro quo for mortgage leads sends his refinance customers to the realtor's title firm. Often the realty firm's title company goes by an unrelated name and the consumer is oblivious that they were referred to an over-priced title firm as a means to keep mortgage referrals flowing to the loan officer. The examples of problems in Minnesota are too numerous to detail in this article, but it is likely that your clients and possibly even you have been a victim of some iteration of this conduct and that you will likely never know the full extent of the damage.

Kickbacks do a lot of damage to both the marketplace and consumers. They create a "pay to play" environment with one of the most important safeguard services in the entire real estate transaction. When it comes to kickbacks, CFPB Director Richard Cordray has said, "Kickbacks harm consumers by hampering fair market competition and by unnecessarily increasing the costs of getting a mortgage.... The CFPB will continue to take action against schemes designed to let service providers profit through unscrupulous and illegal business practices." Unfortunately, the DOC fines are hardly a deterrent and barely constitute a cost of doing business.

Why kickbacks?

Perhaps the driving force behind the willingness of some to violate the prohibition against kickbacks is the inherent marketplace unfairness that was created after the real estate industry successfully lobbied for a giant exemption from the kickback law. That exemption carved out preferential treatment for in-house firms originally called "controlled business arrangements."[7] This exception made kickbacks legal for some, but not others.

At many in-house firms, there are huge incentives for the brokers and their office managers to capture as much of their clients' ancillary business as possible. There are also many illegal and almost untraceable inducements at these firms. Many agents who refer title business are known to get paid faster and receive other benefits such as better commission splits, more floor time, and referrals. Worse, brokers charged with statutory supervisory duties routinely use their authority to discourage agents from engaging in due-diligence title company comparisons—and to encourage agents to use their fiduciary capacity to "advise" clients to use the in-house firm through hard-sell strategies and scripted conversations to address objections. In a fiduciary relationship, this is called self-dealing.

The RESPA exemption created a huge advantage for brokers with in-house firms to control their clients' title company selection process and capture their clients' title business. Many firms instituted processes to automatically place clients' title business with their in-house firms on almost every transaction. This instantly created an imbalanced marketplace that allowed in-house title firms to charge almost any amount they wanted and still be guaranteed question-free referrals. For independent title firms that refused to even buy a realtor or loan officer a cup of coffee for fear of violating RESPA, it created an impossible situation. Independent firms that competed on service, price, and product and didn't pay kickbacks lost much of their business or went out of business. Marketing materials were automatically thrown out by the front desk of in-house brokerage firms and only in-house title firms were allowed free access to market to the agents. Independents were forced to choose between paying illegal kickbacks or losing market share. While many firms lost market share, others got rich paying kickbacks.

Fallout

Client trust has become a currency that has resulted in many problems for consumers, not the least of which is pricing. And not just at the title company level. Underwriters who set their premiums high see title agents flock to them. It is as if the title agents (who often receive 75 percent or more in commission on premiums) are setting the premium pricing, not the underwriters. It wasn't long before most underwriters had homogenized their pricing, and reissue[8] discounts were deleted from their rate filings and replaced with so-called discount rate filings that cost more. Instead of relying upon actuarial tables to determine premiums, underwriters succumbed to demand from their title agents to raise their prices so that their title agents could be paid more. These anticompetitive practices harmed title firms that price-shopped underwriters and drastically limited their pool of underwriter choices. Today I am aware of only one underwriter that still competes on price and pays out large reissue discounts to consumers (Westcor Land Title Insurance).

My organization, CAARE, has documented other pricing problems as well. In 2010, the Minnesota Association of Realtors forms committee met with representatives from a large in-house title firm and then agreed to change their purchase agreement form in a way that we believe caused buyers' closing costs to increase by approximately $500 each[9] and cumulatively may have cost Minnesota consumers more than $100 million.

The real estate industry promotes these conflictive relationships with marketing spin designed to disarm their clients, such as proclaiming the arrangement "One Stop Shopping" and touting its questionable advantages. Clients are exposed to unnecessary conflicts of interest, worsened service, higher prices, and other economic consequences that often arise in markets where firms don't have to compete for business. The real advantages are to the brokers—who can capture their clients' ancillary business, ensure the transaction closes to protect their commissions, and charge higher fees for this "service." Builders have spoken to Congress about how these relationships allow them to do speedier closings, which really translates into less diligence and riskier transactions. The money at stake is enormous and the violations are rampant. No enforcement actions shy of license forfeitures will solve the problem.

This industry is ripe for litigation, and these recent enforcement actions only provide a small peek into the level of corruption and exploitation of fiduciary relationships.

Causes for action

So far, the DOC has only used a handful of the tools available to it to stop the predatory title company referral practices that plague the Minnesota marketplace. While licensing law does not provide a private cause of action, these laws do set a standard of conduct, and enforcement actions yield a wealth of often-actionable evidence available to anyone who files a Data Practices Request with the Minnesota DOC.

There are other bodies of law, instances of actionable conduct, and penalties to be considered. And the industry has actively ignored these other areas of liability, making them a prime target for litigation. In Minnesota, there have been at least three attempts to bring class actions against firms for breaches of fiduciary duty for allegedly illegally steering clients for kickbacks. All three cases[10] failed to obtain class certification, and as a result no decisions were made on the merits. There likely exists a treasure trove of data for the attorneys who are successful in unsealing those matters.

The RESPA anti-kickback provision is a minimum standard. More restrictive state laws trump RESPA.[11] A perfect example is fiduciary law. Real estate brokers and salespersons are statutory and common law fiduciaries and are held to much higher standards when it comes to due diligence and self-dealing (often construed to be theft by swindle in a fiduciary setting). Brokers who abuse their statutory supervisory privileges to encourage licensees to actively steer clients to in-house services are likely violating the most serious of all the fiduciary duties—the duty of loyalty. Apply the plethora of estate, corporate, and non-profit common law regarding self-dealing to the described conduct, and you will see the liability exposure.

Realtors owe their clients a lot of the same duties attorneys owe their clients. Consumers have every right to rely upon their agents' advice as being conflict-free and the result of due diligence.

However, consumers rarely get the benefit of either when it comes to title companies. Instead, consumers are not just vulnerable to being steered by fiduciaries into in-house title firms and firms that pay kickbacks; they are often ambushed. The licensing statute and realtor fee agreements provide consumers with two choices: Let the broker pick the title company or go find your own. Few consumers are savvy enough to find their own title company and don't understand that there used to be a third choice that is rarely disclosed: The realtor will recommend three title companies with which he or she has no financial ties. Ironically, that was considered the best practice for realtors 20 years ago.

Most brokerage firms only attempt to comply with RESPA when referring clients to in-house or inducement-paying title firms while failing to look at the much broader and more serious implications of fiduciary law. Even though a broker may have clients sign a RESPA-compliant Affiliated Business Arrangement disclosure form, that form does not come close to complying with fiduciary law.

A few basic principles immediately come to mind: the duty of loyalty to avoid conflicts of interest and the strict prohibition on self-dealing. The duty of due diligence and full disclosure of all material facts and ramifications of the conflicts that could affect the client as well as the necessity of obtaining the clients' informed consent. This could be a heyday for consumer lawyers: Serious fiduciary breaches can sometimes shift the burden of proof, provide for the payment of attorney's fees, and make the award of damages automatic. Disgorgement of fees earned is a common remedy for breaches to the duty of loyalty. While a long shot, punitive damages and even rescission could be deemed appropriate given the seriousness of the predatory fiduciary practices.

And it's not just realtor-owned and kickback-paying title firms that are at risk. There are attorneys issuing title insurance to their own clients, and that's a hazard complete with all kinds of additional conflicts that are rarely disclosed and almost certainly not consented to in a meaningful way. How are attorneys' decision-making processes compromised when they have a substantial title insurance commission contingent upon the client's transaction closing? Are they going to negotiate with themselves to obtain their client better coverage and possibly expose themselves to additional liability? At what point do attorneys stop representing the client and start representing their underwriter's interests? There is a very good chance these attorneys could be in violation of the Rules of Professional Conduct,[12] yet this is big business in Minnesota and other states. Some of those same attorneys obtain their client referrals from realtors and rarely call attention to the realtor malfeasance that exists in so many transactions. If you thought predatory lending was bad, wait until consumer lawyers crack the predatory fiduciary practices that occur in residential real estate.

Solutions

While a regulatory solution to stop kickbacks is desirable, the reality is that the DOC doesn't have the resources to investigate every title firm and realtor involved in complex kickback arrangements. And unlike other state regulatory departments, the DOC is unwilling to send out bulletins to guide the industries it regulates. If the DOC were to get serious about stopping kickbacks they would go after the source of the problem, realtors who demand kickbacks and their brokers who know or should know that their agents are receiving them. In both the Liberty

Title and TitleSmart actions, the DOC was aware of potentially over a thousand individual instances of kickbacks but chose to fine only one realtor and both title firms nominal amounts. While the Minnesota DOC may be leading the way in state enforcement actions, Minnesota may also be leading the nation in kickback activity.

Consumer litigation may be the best solution. Considering the severity of the fiduciary breaches taking place, this is an area that should interest consumer and malpractice lawyers. If precedents are set awarding attorney's fees in these matters, the floodgates could be opened nationwide as even single cases could then become financially feasible.

In the meantime, counsel your clients about this important matter. Perhaps the best way to solve this problem is to have attorneys more involved in the title company selection process and challenge fiduciaries who abuse their clients' trust for profit. Advise your clients to shop and compare title firms (google "compare Minnesota title fees") or use a title fee comparison tool by a local title firm.[13] Tell your clients to leave the title company selection section blank on their realtor fee agreements and ask their realtors to help them make informed and unconflicted choices that do not involve using the in-house firm. Do this with refinance transactions as well. Research title companies for DOC enforcement actions, check rating and review sites (like BBB and Yelp), and verify that they are licensed. Avoid firms that pay kickbacks, are involved in Marketing Service Agreements[14] with other settlement service providers, are affiliated with any service provider, or are in the same office space as the broker, lender, or builder. Refer your clients to real estate attorneys, but only if they are truly unconflicted and don't also represent brokers or get most of their referrals from them. Compare prices, policy coverage, and ask for reissue credits (find a Westcor agent). Low-cost providers may not be such a bad thing in a marketplace that lacks competition. Kickbacks cost money and firms that don't pay them may be able to charge less. Safe title practices can help save Minnesota consumers millions of dollars and help institute much-needed change.

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Notes

[1] Congressional Testimony of Douglas R. Miller:
http://archives.financialservices.house.gov/media/pdf/042606dm.pdf and video here:
https://www.c-span.org/video/?c4515209/testimony-douglas-r-miller

[2] Minnesota Commissioner of Commerce and U.S. Dept. of HUD In the Matter of First American Title Insurance Company. 2007

[3] GAO Report, "Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers"

[4] MINN. STAT. 609.86

[5] *http://www.startribune.com/state-crackdown-on-gifts-is-unsettling-title-industry/420820833/*

[6] Star Tribune article on CAARE's website:
http://www.caare.org/documents/FirstAmericanFined.pdf

[7] The real estate industry lobbied to have the term, "controlled business arrangements" changed to "affiliated business arrangements" to avoid the "negative connotations" of the prior term.

[8] Reissue credits provide a discount up to 60% on the title insurance premiums. All that is needed to qualify for this discount is the home seller's prior owner's title insurance policy.

9 *http://www.caare.org/115MillionPriceFixingDetail*

[10] Grady v. Burnet Realty Inc., Larpenteur v. Burnet Realty, Inc., and Burnet Title, Inc. Gardner v. First American Title, Universal Title, Universal Partnerships. Washington Post story:
http://www.washingtonpost.com/wp-dyn/content/article/2007/03/02/AR2007030200581.html

[11] 12 C.F.R. §1024.5(c)(1) ...State laws that give greater protection to consumers are not inconsistent with and are not preempted by RESPA or Regulation X....

[12] "Avoiding conflicts in the sale of title insurance to clients" – Patrick R. Burns, Minnesota Office of Lawyers Professional Responsibility 2008:
http://lprb.mncourts.gov/articles/Articles/Avoiding%20Conflicts%20in%20the%20Sale%20of%20Title%20Insurance%20to%20Clients.pdf

[13] *www.CalcuRater.com* compares 20 metro area title companies. Disclosure: I used to own this firm.

[14] Marketing Service Agreements are shared advertising programs between realtors, title and mortgage firms, and often disguise profitable referral arrangements. CFPB warning:
https://www.consumerfinance.gov/about-us/newsroom/cfpb-provides-guidance-about-marketing-services-agreements/

Wells Fargo now accused of unfair home-mortgage rate hikes

By Kevin Dugan New York Post

http://nypost.com/2017/09/05/wells-fargo-now-accused-of-unfair-home-mortgage-rate-hikes/

September 5, 2017 | 12:53am |

Wells Fargo apparently had more than one way to cheat customers who were refinancing their homes.

The scandal-plagued bank's Beverly Hills, Calif. branch routinely talked clients into paying higher interest rates in order to avoid fees for delays in processing mortgage-refinancing deals, a whistleblower told The Post.

That's despite the fact that Wells Fargo's understaffed team of loan officers at the Beverly Hills office were usually responsible for the processing delays, according to Frank Chavez, a former loan officer who has blown the whistle on other questionable tactics at the nation's third-biggest bank.

The latest accusation comes to light less than a week after a federal class-action suit accused the beleaguered bank of delaying mortgage loans and refinancings — and then tricking customers into paying extension, or "rate lock," fees in order to keep their agreed-upon interest rate.

As an alternative to those fees, which could easily surpass $1,000 for a $400,000 home, loan officers frequently suggested bumping up the mortgage rate by as much as a quarter of a percentage point — a hike which, over the long run, could cost customers far more.

"It sucked for everybody except the managers, who were looking good because they were keeping their expenses down," Chavez told The Post.

"That was the real motivation behind it," he added. "The regional manager wanted to make the expenses as small as possible."

The scheme was widespread until late 2015, when it was being used for "the vast majority of these loans," Chavez said. The tactics were unlikely to have been isolated to the busy office, which could clear over $1 billion a year in new mortgages, he added.

The accusations, which haven't been previously reported, are the latest revelation that the San Francisco-based lender, now led by CEO Tim Sloan, went to extraordinary lengths, including angering some of its wealthiest customers, to pad its bottom line.

When clients confronted with fees complained that they weren't at fault for a delayed refi, loan officers typically went to their managers for permission to cover the cost of extending a rate lock — and were typically denied.

Instead, Wells loan officers were given permission to strike another deal: charge a slightly higher interest rate in exchange for a "credit" to cover the rate-lock extension fee.

"Whatever credit they're giving you would be less than what the person was paying in interest on the life of the loan," Chavez said.

Often, the size of the rate hike was based on the size of the loan. Jumbo mortgage larger than $417,000 would see an increase by an eighth of a point, or $125 for every $100,000. Those who borrowed less would get hit with a higher rate: as much as 0.25 percent, or $250 for every $100,000.

"You'd make the borrower suck it up," Chavez said, noting that customers who refused were typically faced with another home appraisal that could cost $500 alone. "It's either that or walk, and borrowers don't want to go through with this all over again at Bank of America."

While it was most often used during the refinancing process, the tactic was also used on home loan originations for people who were self-employed, since it took longer for underwriters to review and approve their financial information.

"It is common practice across the industry for customers to select—at application or later in the process—some combination of interest rate and points based on their individual circumstances and preferences," Tom Goyda, a bank spokesman, told The Post.

"We continue to work through a comprehensive review of our past practices regarding rate-lock extensions and will address additional steps for our customers as appropriate," he said.

https://mobile.nytimes.com/2017/09/08/technology/seriously-equifax-why-the-credit-agencys-breach-means-regulation-is-needed.html?referer=https://t.co/xLvHWwhrgZ?amp=1

Seriously, Equifax? This Is a Breach No One Should Get Away With

The New York Times

September 8, 2017

Equifax, you had one job. Your only purpose as a corporation, the reason you were created and remain a going concern, is to collect and maintain people's most private financial data.

Now you have fallen down on your only job — and spectacularly so. Hackers penetrated the spectral gauze of security surrounding your website, and over the course of nearly two months, they made away with the personal information of as many as 143 million Americans. It is the most important financial data available on any of us — our names, birth dates, Social Security numbers, home addresses and in some instances a lot more — and it was just sitting there on your site, all but wrapped up in a red bow.

So, Equifax, I have to ask: Now that you have failed at your one job, why should you be allowed to keep doing it?

If a bank lost everyone's money, regulators might try to shut down the bank. If an accounting firm kept shoddy books, its licenses to practice accounting could be revoked. (See how Texas pulled Arthur Andersen's license after the Enron debacle.)

So if a data-storage credit agency loses pretty much everyone's data, why should it be allowed to store anyone's data any longer?

Here's one troubling reason: Because even after one of the gravest breaches in history, no one is really in a position to stop Equifax from continuing to do business as usual. And the problem is bigger than Equifax: We really have no good way, in public policy, to exact some existential punishment on companies that fail to safeguard our data. There will be hacks — and afterward, there will be more.

Experts said it was highly unlikely that any regulatory body would shut Equifax down over this breach. As one of the nation's three major credit-reporting agencies, which store and analyze consumers' financial history for credit decisions, it is likely to be considered too central to the American financial system; Equifax's demise would both reduce competition in the industry and make each of the two survivors a bigger target. Raj Joshi, an analyst at Moody's, said in a note to investors that Equifax was likely to be fine, as "the impact of the security breach will only modestly erode its solid credit metrics and liquidity."

The two regulators that do have jurisdiction over Equifax, the Federal Trade Commission and the Consumer Financial Protection Bureau, declined to comment on any potential punishments over the credit agency's breach.

Consumers also have piddling rights over how Equifax may continue to use their credit data. "There's nothing in any statute or anything else that allows you to ask Equifax to remove your data or have all your data disappear if you say you no longer trust it," said John Ulzheimer, a consumer credit expert who worked at Equifax in the 1990s.

But wait, it gets worse. You also can't prevent Equifax from getting any more of your data.

"You might be able to casually say to your bank that you don't want them to give information to Equifax anymore, but I don't know that's going to have an effect on anything," Mr. Ulzheimer said. "You don't control the rules of engagement."

This isn't just about Equifax. We live in the age of Big Data. We have allowed, mostly passively, the emergence of huge and exquisitely detailed databases full of information about all of us. Financial companies, technology companies, medical organizations, advertisers, insurers, retailers and the government — thanks to technology, they can all now maintain massive warehouses of information on just about everyone alive.

Yet in many cases these data stores are only lightly regulated, and compared with the scale of the data compromised, the punishment for breaches is close to nonexistent. There is no federally sanctioned insurance or audit system for data storage, the way the Federal Deposit Insurance Corporation provides insurance and a wind-down process for banks after losses. For many types of data, there are few licensure requirements on organizations seeking to house personally identifiable information.

In many cases, terms-of-service documents indemnify companies against legal consequences for breaches. In fact, according to the Consumer Financial Protection Bureau, the credit-reporting service that Equifax is offering customers affected by this breach requires people to waive their legal rights to sign up.

"It is troubling that Equifax is forcing people to waive legal rights in order to receive fraud monitoring after the company's breach put their personal information at risk," Samuel Gilford, a bureau spokesman, said in a statement.

With all these ways of mitigating fallout from attacks, breaches keep happening — and in almost all cases, even when the data concerns tens or hundreds of millions of people, the companies that were hacked continue to operate anyway. See Yahoo, for instance, which hackers hit for 500 million accounts, and then again for one billion accounts — but which is still in business.

You might argue that not every data hack deserves a corporate death penalty. That's reasonable. Neither Target nor Home Depot, for instance, is primarily in the business of storing your data.

Both were hit in hacks for millions of people's credit-card data, but after they offered some penance and promised to fix their systems, it's not unreasonable that you would continue to shop at their stores.

And you might argue that hacking is impossible to avoid no matter how many security measures companies take. Unforeseen calamities happen in complex systems — banks are robbed, airliners crash, car engines blow up.

But the Equifax case is troubling because neither of these arguments applies.

"If it fails at its one job, it really is quite hard to justify using it again," said Steven S. Rubin, a lawyer who specializes in cybersecurity law at the firm Moritt Hock & Hamroff.

And if it really is impossible to safeguard against hacking, Equifax's continued existence becomes even more untenable. On its website, Equifax boasts that it "organizes, assimilates and analyzes data on more than 820 million consumers and more than 91 million businesses worldwide, and its database includes employee data contributed from more than 7,100 employers."

But if we are now conceding that hacks just happen and no one can stop them — well, here's a crazy thought: Maybe let's not allow any company to house all this data. I contacted Equifax to ask about this, but did not hear back.

What is likely to happen is just the opposite of a harsh punishment. The more data a company has on us, the less likely it is that a breach will put the company in any real danger, because its very size protects it.

"Smaller companies have more of an existential concern," Mr. Rubin said. "When a small law firm or accounting firm loses people's data, they're going to be in big trouble, because you can go down the street and find someone else."

But Equifax? It has more of your data than just about anyone else. So even after losing it, it will probably keep just getting more.

Written Questions for Ms. Chi Chi Wu, Staff Attorney, with the National Consumer Law Center, following the Financial Institutions and Consumer Credit Subcommittee hearing entitled "Legislative Proposals for a More Efficient Federal Financial Regulatory Regime" Thursday, September 7, 2017

Submitted by The Honorable Maxine Waters, Ranking Member

1. *How would H.R. 1849 affect the Consumer Financial Protection Bureau's ability to address abuses by collection lawyers in bringing lawsuits? Do you know of any debt collection abuses specifically involving lawsuits or litigation tactics?*

H.R. 1849: Practice of Law Technical Clarification Act of 2017 (Trott), would exempt attorneys and law firms engaged in litigation from the Fair Debt Collection Practices Act (FDCPA). It would also eliminate Consumer Financial Protection Bureau (Consumer Bureau) authority over them.

1(a). *How would H.R. 1849 affect the Consumer Financial Protection Bureau's ability to address abuses by collection lawyers in bringing lawsuits?*

The Consumer Bureau has special insights into abusive collection practices through extensive national data from consumer complaints and information gleaned from debt collection industry supervision and enforcement. As a result, it is uniquely positioned to learn of and respond to abusive litigation practices by attorneys and law firms. For example, previous Consumer Bureau enforcement actions against collection law firms have focused on law firms operating large debt collection "mills" churning through a high volume of lawsuits with minimal attorney oversight,[1] problems that the Bureau was able to identify and respond to as a result of its unique industry insights.

Many law firms engage in traditional dunning activities such as communicating with consumers and collecting payments in addition to engaging in litigation. Under H.R. 1849, these activities would remain subject to Consumer Bureau supervision and enforcement, but the same law firm would be exempt for its litigation-related activities. As a result, if the Consumer Bureau observed abusive litigation practices by attorneys or other law firm employees during supervision or enforcement activities of the law firm's non-litigation activities, it would not be able to address the abusive litigation practices.

Most importantly, the fact that H.R. 1849 would exempt lawyers and law firms from the Consumer Bureau's supervisory and enforcement authority would encourage collection attorneys to collect debts primarily by filing suit to minimize the portion of their activities that are subject to Consumer Bureau oversight and private FDCPA actions for abusive activities. This would drive a huge increase in collection lawsuits filed in state courts, further clogging the already overburdened trial courts.

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[1] Consent Order, In the Matter of Pressler & Pressler, LLP, Sheldon H. Pressler, and Gerald J. Felt ¶ 39 (Apr. 25, 2016); Consumer Fin. Protection Bureau v.Frederick J. Hanna & Assoc., Stipulated Final Judgment and Order, 14-cv-02211-AT, at ¶¶ 10-11 (D.Ga. 2015).

1(b). *Do you know of any debt collection abuses specifically involving lawsuits or litigation tactics?*

Congress[2] and the courts[3] have recognized for decades that consumers must be protected from false, deceptive, misleading, and unfair practices by lawyers collecting debts in courts. This bill attempts to turn back the clock, and would allow collection attorneys to engage in egregious practices such as:

- Filing lawsuits in courts hundreds of miles away from the consumers' homes,[4] making it nearly impossible for most consumers to appear in court to defend themselves against the collection lawsuit.[5]
- Filing lawsuits on time-barred debt after the statute of limitations has expired,[6] so that consumers who have paid their debts are less likely to have critical records to be able to prove their payments.
- Misusing state garnishment proceedings,[7] such as by knowingly garnishing income or property that is exempt from collection.

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[2] In 1986, as the result of clear findings of abuses by debt collection attorneys, Congress amended the FDCPA to ensure that attorneys who meet the statutory definition of debt collector must comply with all of the provisions of the law. Pub. L. No. 99-361, 100 Stat. 768 (effective July 9, 1986). In the process of adopting the 1986 amendment, Congress considered but rejected "language designed to keep litigation activities outside the Act's scope." Heintz v. Jenkins, 514 U.S. 291, 298 (1995).

[3] *See, e.g.*, Heintz v. Jenkins, 514 U.S. 291 (1995).

[4] The FDCPA limits where collection lawsuits can be filed. 15 U.S.C. § 1692i. *See, e.g.*, Lyons v. Michael & Assocs., 824 F.3d 1169, 1171 (9th Cir. 2016) ("Lyons alleges that Michael & Associates violated the FDCPA by filing a collection lawsuit against her in Monterey County, a location where she neither lived nor 'signed the contract sued upon.'").

[5] *See, e.g.*, Harold v. Steel, 773 F.3d 884, 886 (7th Cir. 2014) ("If a debt collector violates [15 U.S.C. § 1692i], it inflicts an injury measured by the costs of travelling or sending a lawyer to the remote court and moving for a change of venue, no matter how the suit comes out."); S.Rep. No. 95–382, at 5 (1977), 1977 U.S.C.C.A.N. 1695, 1969 ("This legislation also addresses the problem of 'forum abuse,' an unfair practice in which debt collectors file suit against consumers in courts which are so distant or inconvenient that consumers are unable to appear. As a result, the debt collector obtains a default judgment and the consumer is denied his day in court.").

[6] Courts have held that filing lawsuits on time-barred debts violates 15 U.S.C. § 1692e (prohibiting a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt") or 15 U.S.C. § 1692f (prohibiting a debt collector from using "unfair or unconscionable means to collect or attempt to collect any debt"). National Consumer Law Center, Fair Debt Collection, §§ 5.5.2.13.3.1, 5.6.2 (8th ed. 2014). *See, e.g.*, McCollough v. Johnson, Rodenburg & Lauinger, LLC, 637 F.3d 939 (9th Cir. 2011) (lawyers filed lawsuit against consumer despite evidence that the debt was beyond the statute of limitations).

[7] Abusive garnishment practices may violate 15 U.S.C. §§ 1692e or 1692f. *See, e.g.*, Waitkus v. Pressler & Pressler, L.L.P., 2012 WL 686025 (D.N.J. Mar. 2, 2012) (allegations that the collection attorneys obtained 100% of the consumer's earnings violating state procedures to execute on wages and federal and state exemptions of 75% and 90% of earnings stated a claim for violation of § 1692f); Bray v. Cadle Co., 2010 WL 4053794 (S.D. Tex. Oct. 14, 2010) (plaintiff stated a claim that the defendants engaged in

- Proceeding to trial without any witnesses or admissible evidence, relying on court rules to award them judgment if the consumer does not appear or asking the court to continue or dismiss the case if the consumer does appear.[8]
- Routinely filing court documents without confirming the accuracy of that information,[9] often resulting in default judgments based on inaccurate information.
- Seeking fees or costs that are not legally allowable,[10] adding to the amount of judgments against unsophisticated consumers who often do not have the means to challenge these additional and illegal charges.

To date, neither the courts nor bar associations have been effective in policing litigation abuses by collection attorneys.[11] There is no reason to believe that these agencies will suddenly step up now if FDCPA sanctions against collection attorneys for litigation abuses are eliminated. Indeed, the collection law firms currently argue that their abusive litigation practices do not, in fact, violate those same ethical rules.[12]

"unfair or unconscionable means to collect" the debt by alleging that: "1) his bank account was exempt by law from garnishment by the Social Security Act; and 2) the defendants garnished the bank account, despite knowing or having reason to know that it contained Social Security funds and despite having failed to conduct pre-garnishment discovery").

[8] Demarais v. Gurstel Chargo, P.A., 869 F.3d 685, 689-90 (8th Cir. 2017).

[9] Statements made without meaningful attorney review may be false or misleading in violation of 15 U.S.C. § 1692e. *See, e.g.*, Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs., P.C., 114 F. Supp. 3d 1342 (N.D. Ga.) (denying motion to dismiss § 1692e claims where "the few attorneys on staff were allegedly left to essentially skim and sign the prepared pleadings" taking "less than a minute to approve each suit"); Bock v. Pressler & Pressler, LLP, 30 F. Supp. 3d 283, 290 (D.N.J. 2014) (finding a violation of § 1692e where "neither [reviewing attorney] nor any other member of Pressler's staff reviewed, or otherwise had knowledge of, the contract between Bock and the bank, including any choice of law, choice of venue, or dispute resolution clause governing disputes between Bock and his creditor . . . Nor did [reviewing attorney] or anyone else at Pressler review the agreement by which Bock's original creditor allegedly assigned this debt to Pressler's client, Midland.").

[10] "The false representation of . . . the character, amount, or legal status of any debt," 15 U.S.C. § 1692e(2)(A), and "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law," 15 U.S.C. § 1692f(1) both violate the FDCPA. *See, e.g.*, Kaymark v. Bank of Am., N.A., 783 F.3d 168 (3d Cir. 2015) (listing fees not yet incurred in the foreclosure complaint stated a claim against law firm under the FDCPA); McDermott v. Marcus, Errico, Emmer & Brooks, P.C., 911 F. Supp. 2d 1, 60 (D. Mass. 2012) (law firm violated the FDCPA by overstating the amount of attorney's fees owed in a collection letter).

[11] *See, e.g.,* Chris Albin-Lackey, Human Rights Watch, Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor (Jan. 2016); Paul Kiel, So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine, ProPublica (May 5, 2016); Federal Trade Commission, Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration (July 2010).

[12] Bock v. Pressler & Pressler, L.L.P., 2017 WL 4711472, at *7 (D.N.J. Oct. 19, 2017) (law firm hired a law professor to provide expert opinion that its litigation conduct did not violate the state rules of professional conduct).

2. *Please discuss whether the proposal entitled the "Credit Services Protection Act of 2017," which would amend the Credit Repair Organizations Act, could impede efforts to provide credit education.*

Proponents of the Credit Services Protection Act have asserted that the bill is necessary because the Credit Repair Organizations Act (CROA) impedes efforts to provide credit education to consumers. This is simply untrue. CROA provides vital consumer protections when business sell products or services that they claim will improve a consumer's credit record. These protections include prohibiting advance payments for such services, providing a 3-day right to cancel, requiring a written contract, and mandating certain disclosures. There is no barrier in CROA to businesses providing credit education, or even charging for such education, so long as they do not charge *in advance* for any product that they claim will improve a consumer's credit record and follow these other requirements.

Note that many entities, such as nonprofit credit counselors and financial education websites, provide credit education (including education on how to improve a credit record) without charging consumers any fee. Consumers have many options for credit education, and CROA in no way impedes or lessens those options.

3. *How, and to what extent, do credit and consumer reporting abuses impact consumers' access to credit, employment, insurance, or housing?*

Credit scores determine a consumer's access to credit and insurance. They are also used by landlords for rental housing and even for cell phone service. The vast majority of employers use criminal background check reports and about half even use credit reports for some of their hiring. Inaccurate information on consumers' credit reports and the resulting impact on their credit scores can result in being shut out of credit, insurance, and housing, which are critical to a consumer's financial well-being. It can affect their employment prospects, as can inaccurate criminal background check reports.

Despite the important role that credit reports play, credit reporting agencies have error rates that are unacceptable. The definitive FTC study on credit reporting errors found that 1 in 5 consumers have verified errors in their credit reports, and 1 in 20 consumers have errors so serious they would be denied credit or need to pay more for it.[13] It is no surprise then that the three credit reporting agencies are often the top three most complained-about companies to the Consumer Bureau.[14]

The document entitled "Consumers Wrongfully Labeled by Credit Reporting and Background Check Agencies Must Have Full Access to Remedies" was previously submitted as Attachment A to my written testimony to the House Financial Services Committee for the September 7, 2017

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[13] Federal Trade Comm'n Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (Dec. 2012).

[14] *See, e.g.*, Consumer Financial Protection Bureau, Monthly Complaint Report, Vol. 21, March 2017, *available at* https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201703_cfpb_Monthly-Complaint-Report.pdf.

hearing. This document contains several examples of consumers who were not only mistreated by credit reporting agencies, but also were denied credit, employment, or other essential items due to reporting abuses.

4. *Please respond to statements that class actions under the Fair Credit Reporting Act involve mostly "technical" violations.*

Proponents of H.R. 2359, the, have suggested that the bill is merely intended to curb "frivolous" class actions. Its lead sponsor claimed that it "is aimed at curbing frivolous class action lawsuits against businesses"[15]

Yet nothing could be further from the truth. Many class actions under the FCRA are brought to address real and meaningful harm to consumers who have suffered from abuses by credit bureaus and other consumer reporting agencies. For example, just this past June, a California jury rendered a $60 million verdict -- $7,337 for each of 8,185 class members -- in a class action after finding that TransUnion violated the FCRA when it misidentified these 8,185 consumers as terrorists and criminals in their credit reports, confusing the consumers with similarly named individuals on a government watch list.

Furthermore, H.R. 2359 doesn't just cap class action damages. The lead sponsor's claim that "my bill does not address individual lawsuits whatsoever"[16] is simply false. HR 2359 entirely eliminates punitive damages in FCRA lawsuits, include those limited to *individual* claims only. These individual lawsuits including the most horrifying and worst kind of abuses against consumers -- "mixed file" cases where an innocent consumer's credit report or background check is mixed up with someone else who has bad credit or a criminal history. For example, the bill would have denied punitive damages to Angela Williams of Cocoa, Fla., who was awarded such damages after spending 13 years trying to fix her credit report because it contained at least 25 negative accounts that belonged to another woman, who had a similar name and identifiers. Equifax's reckless failure to fix Angela William's reports caused her credit score to drop and she was denied credit repeatedly. She was even told to leave a store after an employee viewed her credit report.

Being falsely labeled a terrorist or criminal, like the consumers misidentified by TransUnion, or a deadbeat for 13 years, like Angela Williams, cannot be characterized as "technical" under any stretch of the imagination. These are enormous, and terrible, violations of the FCRA that resulted in real and deep harm to abused consumers. HR 2359 would strip these victimized consumers of their ability to obtain meaningful relief under the FCRA.

5. *The Consumer Financial Protection Bureau released an extensive study on the use of pre-dispute binding arbitration clauses in the use of consumer contracts for consumer financial services and products, and released a final rule, based on this research, this year that would ban these provisions. Statistically, does a consumer have better access to remedies, and appropriate redress, in class actions or in individual pre-dispute arbitration? How would the Consumer*

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[15] Press Releases, Rep. Loudermilk: Equifax Must Be Held Accountable, September 15, 2017, *available at* https://loudermilk.house.gov/news/documentsingle.aspx?DocumentID=1185.
[16] Transcript of September 7 hearing, page 81, line 1840-1841.

Financial Protection Bureau's forced, pre-dispute arbitration final rule affect victims of credit reporting abuses?

Unfortunately, the U.S. Congress has passed, and the President has signed, a resolution nullifying the Consumer Bureau's arbitration rule. In doing so, Congress and the President stripped a critical legal remedy from consumers, and sided with wealthy Wall Street interests over ordinary Americans. The resolution permits fine print contracts to take away our constitutional rights and put justice in the hands of Wall Street banks, credit reporting companies, and predatory lenders.

The Consumer Bureau's arbitration rule would have greatly benefitted consumers, because a consumer has better access to remedies in class actions than in individual arbitration.[17] According to the Consumer Bureau's comprehensive study on forced arbitration, at least 6.8 million consumers get cash relief in class actions in an average year—compared with just 16 consumers who receive cash relief in arbitration. Consumers recover at least $440 million in class actions in an average year, after deducting all attorneys' fees and court costs.[18] Few cases involving small claims can go forward in individual arbitration. The CFPB found that only about 25 cases per year involving an affirmative claim of $1,000 or less went forward in arbitration.

The last statistic is particularly alarming because overwhelmingly, financial services claims involve systemic practices related to disputed small amounts such as illegal or fraudulent fees, charges, and interest rates impacting large groups of customers. When consumers are prohibited from participating in class actions for similar, small-dollar claims, it is not economically feasible for them to pursue those claims in individual arbitration. The Consumer Bureau's data demonstrates how few people can go forward in individual arbitration to pursue their claims. Consequently, forced arbitration clauses and class action bans allow financial institutions to profit illicitly from small-dollar unlawful charges on large numbers of their customers.

6. *Please respond to statements made during the hearing asserting that H.R. 2359 would "harmonize" the Fair Credit Reporting Act with other consumer protection statutes, such as the Fair Debt Collection Practices Act.*

H.R. 2359 would dramatically reduce penalties under the Fair Credit Reporting Act. The argument of industry representatives that it would harmonize the FCRA with other consumer protection statutes is misleading and wrong. The goals and protections for each statute are different. The FCRA is distinct in several ways from the Fair Debt Collection Practices Act, the Truth in Lending Act, and other consumer protection statutes. While it does not have a cap for class actions, the FCRA's statutory damages provision has a stricter threshold those other statutes. The drafters struck a balance between stronger remedies on the one hand, and making those remedies harder to obtain on the other hand.

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[17] Consumer Financial Protection Bureau, *Arbitration Study Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, March 2015, http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

[18] *See also* Heidi Shierholz, *Correcting the record, Consumers fare better under class actions than arbitration*, ECONOMIC POLICY INSTITUTE, August 1, 2017 http://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/

First, the FCRA requires consumers to prove that a company "willfully" violated the Act in order to obtain statutory and punitive damages.[19] The Act requires consumers to prove that the company either knew it was violating the law or acted with reckless disregard of the law.[20] This standard does not exist in the FDCPA or TILA. Those statutes permit a consumer to obtain statutory damages upon proof of a violation, without a showing of misconduct that is knowing or in reckless disregard of the law. This distinction demonstrates that the H.R. 2359 is not "harmonizing" the consumer laws.

Second, the argument that H.R. 2359 merely "harmonizes" the FCRA with other consumer protection statutes is also wrong because the FCRA is unique among consumer laws in that it supplants common law claims such as defamation and slander. These common law torts traditionally have allowed for punitive damages. As part of the legislative bargain for the FCRA's protections, common law claims are severely restricted against reporting agencies and other industry actors.[21] Thus, without strong remedies under the FCRA, consumers are left powerless to combat and deter false claims that ruin their financial reputations.

Furthermore, H.R. 2359 goes beyond other consumer protection statutes because it caps actual damages in a class action. The FDCPA[22] and other consumer protection laws[23] do not cap the amount of actual damages that a class action can recover for class members. Thus, H.R. 2359 does not "harmonize" the FCRA with other consumer protection laws, but reduces its remedies to less than exist in those other laws.

7. *H.R. 2359 was described in the hearing as a "fair balance" for consumers and industry. Does the bill balance the interests of consumers, industry, and the marketplace?*

H.R. 2359 would substantially reduce penalties for industry misconduct by eliminating punitive damages under the FCRA and imposing a $500,000 limit on statutory damages and on actual damages in class actions. The bill does not offer a benefit for consumers who are victims of abuses by credit reporting and background check agencies. Based on a plain reading of the bill, it only would reduce penalties for credit reporting agencies and other entities that willfully violate the FCRA. The damages caps would deprive harmed consumers of adequate compensation, despite the extent of the misconduct or harm shown. Ending punitive damages will further harm consumers and the marketplace.

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[19] 15 U.S.C. 1681n(a).
[20] This standard was established by the U.S. Supreme Court in *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 127 S. Ct. 2201 (2007).
[21] *See* 15 U.S.C. § 1681h(e) ("no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency,...except as to false information furnished with malice or willful intent to injure such consumer").
[22] 15 U.S.C. § 1692k(a)(1).
[23] *See, e.g.*, Truth in Lending Act, 15 U.S.C. § 1640(a); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(a).

Arkansas

Here is how the rule works when applied to a transaction
where the sales price is $200,000 and there is a $190,000 loan:

The Rule	vs.	Reality
OTP on Closing Disclosure = $177.50 (OTP Premium) $525.00 (LTP Simultaneous Premium) + $35.00 (Full LTP Premium) – $382.50		**OTP Actually Charged = $525.00** (OTP Premium)
LTP on Closing Disclosure =$382.50 (Full LTP Premium, with no discounts for Simultaneous Issue)		**LTP Actually Charged = $35.00** (LTP Simultaneous Premium)

Terminology Key:
OTP: Owner's Title Insurance Policy
LTP: Lender's Title Insurance Policy

LTP Simultaneous Premium: a discounted lender's title insurance premium that is issued in accordance to promulgated state rates or insurance company filed rates when both a lender's and owner's title insurance policies are simultaneously issued

Credit Union National Association
CUNA

Jim Nussle
President & CEO

Phone: 202-508-6745
jnussle@cuna.coop

601 Pennsylvania Avenue NW
South Building, Suite 600
Washington, D.C. 20004-2601

May 5, 2017

The Honorable Barry Loudermilk
U.S. House of Representatives
329 Cannon House Office Building
Washington, DC 20515

Dear Representative Loudermilk:

On behalf of the Credit Union National Association (CUNA), I am writing in support of H.R 2359, the Fair Credit Reporting Act (FCRA) Liability Harmonization Act. CUNA represents America's credit unions and their 110 million members.

As one of the only consumer-owned cooperatives in the financial marketplace, credit unions have a tradition of protecting their members' interests, and in most instances, can amicably resolve any disputes or discrepancies that arise. However, in certain instances they have been forced to settle frivolous FCRA class action litigation, and in other instances members have been harmed when an exorbitant amount of resources have been depleted because of the lack of a cap on statutory damages. Accordingly, credit unions support your legislations' goal of aligning FCRA damages with many other financial consumer protection laws, by capping the amount of statutory damages.

Particularly for credit unions it is difficult to imagine a case in which class action litigation would be a reasonable course of action for its members since it would put them in a position of essentially suing themselves, as they are member-owners of the credit union. As member-owners credit unions have different recourses for resolving disputes than other financial service providers. However, because of the opportunity for attorneys' fees and excessive damages, the FCRA currently invites frivolous class action litigation based on technical violations. While attorneys certainly benefit from this type of litigation, there are quite arguably more reasonable ways to address members concerns.

The FCRA Liability Harmonization Act would create a more appropriate balance that still protects consumers but is less likely to attract frivolous FCRA class action litigation. Consumers would continue to have important consumer protections and opportunities for relief under the FCRA. As such, we support your efforts to create a better, and more equitable system, for those seeking to be made whole.

On behalf of America's credit unions and their 110 million members, we appreciate your leadership on this issue, support your legislation and look forward to working with you on this matter.

Sincerely,

Jim Nussle
President & CEO

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Statement of the Electronic Transactions Association

United States House of Representatives

Committee on Financial Services

Subcommittee on Financial Institutions and Consumer Credit

"Legislative Proposals for a More Efficient Federal Financial Regulatory Regime."

Thursday, September 7, 2017

The Electronic Transactions Association (ETA) submits the following statement for the House Committee on Financial Services Subcommittee on Financial Institutions and Consumer Credit hearing on September 7, 2017. ETA is the leading trade association for the payments industry; its membership spans the breadth of the payments industry to include independent sales organizations, payments networks, financial institutions, transaction processors, mobile payments products and services, payments technologies, equipment suppliers, and online small business lenders.

As part of today's hearing, the subcommittee is expected to discuss H.R. 2359, the FRCA Liability and Harmonization Act, authored by Rep. Barry Loudermilk. ETA supports H.R. 2359 and encourages the committee to move forward with its consideration.

H.R. 2359 would align the Fair Credit Reporting Act (FCRA) with other financial consumer protection laws such as the Electronic Funds Transfer Act, Fair Debt Collection Practices Act, Expedited Funds Availability Act, Homeowner's Protection Act, and Truth in Lending Act by capping the amount of statutory damages allowed in class action lawsuits and eliminating the possibility of punitive damages. ETA believes harmonization of these federal laws is important to decrease the number of frivolous class action lawsuits against businesses where consumer harm is not at issue.

Further, harmonization of FCRA with other financial consumer protection laws would set an example for modernization of other similar consumer protection laws such as the Telephone Consumer Protection Act (TCPA) which has also encountered litigation abuse.

In recent years, class action litigation filed under FRCA and TCPA has skyrocketed, with data demonstrating the consumers in the lawsuits may not reap the reward.

Although statutory changes to TCPA may be outside the jurisdiction of this committee, ETA thanks the subcommittee for holding this hearing to facilitate the discussion of potential abuse in class action litigation more broadly. We look forward to working with the subcommittee to assist in its efforts and to encourage similar actions by other committees.

napbs
National Association of
Professional Background Screeners
The Voice of Screening Professionals

September 6, 2017

The Honorable Blaine Luetkemeyer
Chairman
Subcommittee on Financial Institutions
and Consumer Credit
Committee on Financial Services
U.S. House of Representatives
2129 Rayburn House Office Building
Washington, DC 20515

The Honorable William Lacy Clay
Ranking Member
Subcommittee on Financial Institutions
and Consumer Credit
Committee on Financial Services
U.S. House of Representatives
2129 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Luetkemeyer and Congressman Clay:

On behalf of the National Association of Professional Background Screeners, I would like to thank you for advancing *The FCRA Liability Harmonization Act* (H.R. 2359) and conducting a hearing before the Subcommittee to examine the bill on September 7.

As a nonprofit organization consisting of over 850 small and large companies engaged in the background screening profession, NAPBS has been dedicated to providing the public with safe places to live and work since 2003. NAPBS member companies range from Fortune 100 companies to small, local businesses, and conduct millions of employment-related background checks each year. Professional Background Screeners are heavily regulated by the Fair Credit Reporting Act as well as state and local privacy and consumer protection laws. The profession employs thousands of people and invests countless dollars dedicated to ensuring that employers and volunteer groups have a full picture of those that enter workplaces and care for vulnerable populations, while protecting the rights of applicants and clearing them for employment, promotions, or volunteering.

The NAPBS supports H.R. 2359 because it will stop unscrupulous attorneys from using the FCRA to target our industry and our customers, while continuing to allow individuals who have been injured to receive fair compensation. The Act will cap class actions damages at the lesser of $500,000 or 1% of the defendant's net worth while preserving the right of consumers who suffer harm to be appropriately compensated for any injury. This is consistent with other major consumer-protection laws, such as the Electronic Funds Transfer Act, the Fair Debt Collection Practices Act, the Equal Credit Opportunity Act, the Expedited Funds Availability Act, and the Homeowner's Protection Act, all of which have caps at this level. Additionally, the measure strikes an appropriate balance as it preserves an individual's right to recover any actual damages incurred for a violation of the FCRA.

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National Association of
Professional Background Screeners
The Voice of Screening Professionals

Settlements for alleged FCRA violations are a target for trial lawyers due to the excessive amount of damages allowed under current law. A settlement allows defendants to avoid the risk of devastating awards by limiting the award to an amount within the limits of insurance coverage. Under FCRA, the maximum statutory damages ($1,000 per violation) may be multiplied by the number of people in the class, so a class claim can be enormous and yield prohibitive damages. Settlements and attorneys' fees are highly dependent on numbers in a class (i.e. $2.5 million for 45,000 potential class members and over $760,000 in attorney fees and $5.9 million for 150,000 potential class members and over $1.1 million in attorney fees) and the defendant's insurance limits (which must be disclosed). Defendants usually have no choice but to settle the claim, no matter what their culpability, and even if losing is very unlikely to avoid these prohibitive damages, in addition to the court costs associated with a lengthy legal battle.

Employers and Professional Background Screeners are targeted for technical violations even where there is no harm to individuals seeking employment. In *Ernst v. Dish Network*, Dish Network's installation contractors obtained background checks on their employees. The consumer reporting agency then provided Dish Network a summary of the background check. The allegation in the case was that Dish Network violated the FCRA by not providing its own FCRA disclosure to the installation contractors' employees to obtain that summary, even though the installation contractors had already provided an FCRA disclosure. There was no allegation that the employees were unaware that a background check was being conducted. Dish Network settled the suit for $1.75 million for about 47,000 plaintiffs. Attorneys received one third of the settlement (Over $583,000 in attorneys' fees with an award of only about $24 for each plaintiff).

Even if a Professional Background Screening Company is never named as a defendant, large damage awards are increasing the cost of insurance and for doing business. These increased costs are prohibitive, undermine small businesses trying to enter or continue to operate in a competitive marketplace, and stop the expansion of screening companies, who could invest in their employees and dedicate additional resources to training and service.

Small businesses are particularly challenged to afford liability insurance, especially because many customers, other small entities and non-profits, ask the Professional Background Screener to indemnify them against liability. In some cases, insurance is not available to cover these claims. For both large and small companies, resources are used to ensure technical compliance rather than meeting the spirit of the law and helping job applicants understand their rights and find employment.

napbs.
National Association of
Professional Background Screeners
The Voice of Screening Professionals

I hope the Committee will move quickly to enact this legislation so that our industry and our customers are no longer burdened by the threat of frivolous lawsuits. By enacting this legislation, you will allow NAPBS members to refocus on the core missions of protecting the rights of job applicants and providing employers and employees with safe and secure work places.

Again, thank you for your support for this important legislation.

Sincerely,

Melissa Sorenson
Executive Director

cc: The Honorable Jeb Hensarling, Chairman
The Honorable Maxine Waters, Ranking Member
Members of the House Committee on Financial Services

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Phone: 919.459.2082 • Fax: 919.459.2075 • Email: info@napbs.com

May 4, 2017

The Honorable Barry Loudermilk
U.S. House of Representatives
Washington, DC 20515

Dear Representative Loudermilk:

The undersigned organizations commend you for your leadership on the FCRA Liability Harmonization Act. The bill would align the Fair Credit Reporting Act (FCRA) with other financial consumer protection laws by capping the amount of statutory damages allowed in class action lawsuits and eliminating the availability of punitive damages.

In contrast to other consumer financial protection statutes, the FCRA does not impose a cap on recovery in class action lawsuits. Therefore, under current law, plaintiffs in a FCRA class action lawsuit may pursue unlimited damages including punitive damages and attorneys' fees. The Electronic Fund Transfer Act (EFTA), Fair Debt Collection Practices Act (FDCPA), Equal Credit Opportunity Act (ECOA), and Truth in Lending Act (TILA) establish parameters of economic liability in class action litigation.

This imbalanced structure invites class action lawsuits alleging technical violations of the FCRA with large putative classes to generate payouts for attorneys. For many businesses, the risk of uncapped liability effectively forces them into settling even the most speculative claims. These lawsuits leave businesses with fewer resources to invest in jobs and growth, ultimately leading to higher costs for consumers.

The FCRA Liability Harmonization Act promotes fairness in FCRA class action litigation and establishes reasonable limits on liability while maintaining the protections afforded to consumers under the FCRA. The FCRA would continue to ensure that individual consumers who are harmed are appropriately compensated for their injuries. With the passage of this bill, consumers may continue to bring individual or class action lawsuits and recover attorneys' fees and the costs of litigation.

Passing the FCRA Liability Harmonization Act is an important action Congress can take to rein in abusive litigation practices while sustaining consumer protections.

Sincerely,

American Bankers Association
American Financial Services Association
Consumer Bankers Association
Consumer Data Industry Association
Electronic Funds Transfer Association
Electronic Transactions Association

Financial Services Roundtable
International Franchise Association
National Association of Professional Background Screeners
National Automobile Dealers Association
Retail Industry Leaders Association
Society for Human Resource Management
The Software & Information Industry Association
U.S. Chamber Institute for Legal Reform
U.S. Chamber of Commerce

Preserving State Court Regulation of the Legal Profession

Defending Liberty
Pursuing Justice

ABA Supports H.R. 1849, the "Practice of Law Technical Clarification Act of 2017"

For centuries, lawyers have been regulated primarily by the state supreme courts that license them, not Congress or federal agencies. Consistent with this principle, the Fair Debt Collection Practices Act (FDCPA) originally contained a complete exemption for lawyers collecting debts on behalf of their clients. In 1986, Congress voted to eliminate the lawyer exemption, based on its belief that the revised Act would only allow regulation of lawyers' non-litigation collection activities. Despite Congress' intent, however, the courts have applied the FDCPA to creditor lawyers even when they are engaged in litigation. In 2010, Congress passed the Dodd-Frank Act (DFA), which granted the new Consumer Financial Protection Bureau (CFPB) broad authority to regulate debt collectors and to enforce the FDCPA. Although Section 1027(e) of the DFA exempts most consumer lawyers from the CFPB's authority, it does not apply to creditor lawyers. On April 3, 2017, Rep. Dave Trott (R-MI) introduced H.R. 1849, the "Practice of Law Technical Clarification Act," which would clarify that the FDCPA does not apply to creditor lawyers engaged in litigation activities and expand Section 1027(e) to cover both consumer and creditor lawyers.

The ABA urges Congress to pass H.R. 1849 as soon as possible because:

- **State courts, not the CFPB or other agencies, are in the best position to regulate lawyers engaged in the practice of law.** Lawyers practicing law have long been regulated primarily by the highest court of the state in which the lawyer is licensed, not federal agencies or Congress. Over time, an extensive and effective system of judicial regulation of lawyers has developed—including admission requirements, ethical codes and disciplinary rules—which govern virtually every aspect of a lawyer's professional life. As "officers of the court," lawyers are subject to strict ethical rules and disciplinary action for any misconduct, including potential suspension or disbarment. Therefore, further regulation by the CFPB, other agencies, or Congress is unnecessary and is likely to conflict with regulation and oversight by the judicial branch of government.

- **The legislation is consistent with Congress' original intent not to regulate lawyers engaged in the practice of law.** When Congress amended the FDCPA in 1986 to remove the original lawyer exemption, the bill's sponsor, Rep. Frank Annunzio (D-IL), explained that the purpose of the change was to regulate only lawyers' non-litigation collection activities. Despite the sponsor's clear intent, courts have applied the FDCPA to creditor lawyers even when they are engaged in litigation activities. As a result, many creditor lawyers pursuing legitimate collection actions for clients in state court are routinely sued in federal court for technical violations of the FDCPA, resulting in harsh statutory penalties and attorney fees. H.R. 1849 would restore Congress' intent by clarifying that lawyers engaged in litigation are not covered by the strict requirements of the FDCPA, though they are still subject to extensive judicial oversight and discipline.

- **The scope of the legislation is narrowly tailored and would only exempt creditor lawyers engaged in litigation activities; it would not create a broad exemption for lawyers' non-litigation debt collection activities.** H.R. 1849 would clarify that while the FDCPA does not apply to lawyers' filing of lawsuits and other litigation activities already subject to judicial oversight, the Act would still apply to lawyers' extrajudicial collection activities, such as demand letters and phone calls to debtors. Similarly, while the bill would expand the current exemption in Section 1027(e) of the DFA to include both creditor and consumer lawyers, the CFPB would retain its existing authority over lawyers and others engaged in non-litigation collection activities.

- **For years, the Federal Trade Commission also recommended that the FDCPA be clarified to exempt creditor lawyers engaged in litigation.** In each annual report on the FDCPA from 1998 through 2006, the FTC urged Congress to reexamine and amend the definition of "debt collector" to exclude such lawyers from the Act.

September 2017

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