

SMALL BUSINESS LENDING FAIRNESS ACT

MARCH 19, 2020.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Ms. WATERS, from the Committee on Financial Services,  
submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 3490]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 3490) to amend the Truth in Lending Act to prohibit certain unfair credit practices, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Small Business Lending Fairness Act”.

**SEC. 2. OBLIGOR TRANSACTIONS.**

(a) IN GENERAL.—Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.) is amended by adding at the end the following:

**“§ 140B. Unfair credit practices**

“(a) IN GENERAL.—In connection with the extension of credit or creation of debt in or affecting commerce, as defined in section 4 of the Federal Trade Commission Act (15 U.S.C. 44), including any advance of funds or sale or assignment of future income or receivables that may or may not be credit, no person may directly or indirectly take or receive from another person an obligation that constitutes or contains a cognovit or confession of judgment (for purposes other than executory process in the State of Louisiana), warrant of attorney, or other waiver of the right to notice and the opportunity to be heard in the event of suit or process thereon.

“(b) EXEMPTION.—The exemption in section 104(1) shall not apply to this section.”.

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) Section 103 of the Truth in Lending Act (15 U.S.C. 1602) is amended by adding at the end the following:

“(ff) The term ‘debt’ means any obligation of a person to pay to another person money—

“(1) regardless of whether such obligation is absolute or contingent if the understanding between the parties is that any part of the money shall be or may be returned;

“(2) that includes the right of the person providing the money to an equitable remedy for breach of performance if the breach gives rise to a right to payment; and

“(3) regardless of whether the obligation or right to an equitable remedy described in paragraph (2) has been reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.”.

(2) Section 130(a) of the Truth in Lending Act (15 U.S.C. 1640) is amended by striking “creditor” each place the term appears and inserting “person”.

(3) The table of sections in chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.) is amended by adding at the end the following:

“140B. Unfair credit practices.”.

## PURPOSE AND SUMMARY

On June 25, 2019, Representative Nydia Velázquez introduced H.R. 3490, the “Small Business Lending Fairness Act,” which amends the Truth in Lending Act (TILA) to restrict the use of confessions of judgment for small business owners.

## BACKGROUND AND NEED FOR LEGISLATION

A “confession of judgment” is defined as “a person’s agreeing to the entry of judgment upon the occurrence or non-occurrence of an event, such as making a payment.” It is essentially an agreement by which a borrower agrees to an eventual judgment of liability against them, without normal due process protections such as notice, a hearing, and judicial review. For instance, merchant cash advance companies may require borrowers to sign a confession of judgment as a condition of receiving the cash advance. These cash advances can often cost the equivalent of 400 percent or more in annualized interest. Once a borrower misses a payment or some other dispute arises between the borrower and lender, the lender sends the signed confession of judgment to a county clerk, who enters judgment against the borrower. The lender then takes the judgment to the local marshal, who demands the money allegedly owed to the lender from the borrower’s bank. The lender then takes

the money from the borrower's bank, with interest and fees added. At this point, a borrower's account will usually be frozen, and in some cases despite a borrower's compliance with daily debt payments.

Some states outlawed these instruments in the middle of the 20th century, and the Federal Trade Commission (FTC) banned them for consumer loans in 1985 as part of a regulation known as the "Credit Practices Rule." However, courts in numerous states, including New York, continue to recognize them for commercial loans. This type of recognition has effectively turned New York into a hub of processing confessions of judgment. In the first five months of 2019, merchant cash advance companies obtained more than 5,500 New York court judgments against borrowers, about the same monthly pace as in 2018.

As discussed at a September 2019 Committee hearing, small business loan borrowers do not enjoy the same protections individual consumers have under federal law. Furthermore, some small business loan terms include a confession of judgment. As a result of these agreements, the debt holder may collect on such a contract, plus damages, immediately after the borrower falls behind in their payments. Confessions of judgment often force a borrower to relinquish defenses that could be used in court, allowing the debt holders to receive a court order to force the financial institution of the debtor to withdraw funds, access the debtor's wages, or seize goods or property, all without the debtor's knowledge or consent.

#### SECTION-BY-SECTION ANALYSIS

##### *Section 1. Short title*

This section provides that H.R. 3490 may be cited as the "Small Business Lending Fairness Act"

##### *Section 2. Consumer protections related to debt collection practices*

Subsection (a) amends Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.) by adding a new section 140B. The new section 140B prohibits any person from directly or indirectly taking or receiving from another person an obligation that constitutes or contains a cognovit or confession of judgment, warrant of attorney, or other waiver of the right to notice and the opportunity to be heard in the event of a lawsuit or judicial process. The new section 140B by its terms excludes the executory process in the State of Louisiana. The new section 140B also provides that the exemption in section 104(1) of the Truth in Lending Act (relating to certain forms of credit transactions including extension of credit primarily for business, commercial or agricultural purposes) shall not apply to this section.

Subsection (b) amends section 103 of the Truth in Lending Act (15 U.S.C. 1602) by clarifying the definition of "debt" as "any obligation of a person to pay to another person money". This definition holds true regardless of whether the obligation is absolute or contingent if the understanding between the parties is that any part of the money shall be or may be returned. The definition includes the right of the person providing the money to an equitable remedy for breach of performance if the breach gives rise to a right to payment. The definition also holds true regardless of whether the obli-

gation or right to an equitable remedy has been reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Subsection (b) also amends section 130(a) of the Truth in Lending Act (15 U.S.C. 1640) by replacing the word “creditor” with “person” and makes other conforming amendments.

#### HEARINGS

For the purposes of section 103(i) of H. Res. 6 for the 116th Congress, on September 26, 2019, the Committee on Financial Services held a hearing entitled, “Examining Legislation to Protect Consumers and Small Business Owners from Abusive Debt Collection Practices” to discuss three bills and seven discussion drafts, and a discussion draft of H.R. 3490, the “Small Business Lending Fairness Act”, was considered. This single-panel hearing consisted of witnesses from the Federal Trade Commission, consumer advocates, consumer law centers, and debt collection attorneys. The hearing allowed members to hear from witnesses about predatory debt collection practices.

#### COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on November 13, 2019, and ordered H.R. 3490 to be reported favorably to the House as amended in the nature of a substitute by a recorded vote of 31 yeas and 23 nays, a quorum being present.

#### COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee’s consideration of H.R. 3490:

Present	Representatives	Ayes	Nays
	Ms. Waters, <i>Chairwoman</i>	X	
	Mrs. Maloney	X	
	Ms. Velázquez	X	
	Mr. Sherman	X	
	Mr. Meeks	X	
	Mr. Clay	X	
	Mr. Scott	X	
	Mr. Green	X	
	Mr. Cleaver	X	
	Mr. Perlmutter	X	
	Mr. Himes	X	
	Mr. Foster	X	
	Mrs. Beatty	X	
	Mr. Heck	X	
	Mr. Vargas	X	
	Mr. Gottheimer	X	
	Mr. Gonzalez (TX)	X	
	Mr. Lawson	X	
	Mr. San Nicolas		
	Ms. Tlaib	X	
	Ms. Porter	X	
	Ms. Axne	X	
	Mr. Casten	X	
	Ms. Pressley	X	
	Mr. McAdams	X	
	Ms. Ocasio-Cortez		
	Ms. Wexton	X	
	Mr. Lynch	X	
	Ms. Gabbard		
	Ms. Adams	X	
	Ms. Dean	X	
	Mr. Garcia (IL)	X	
	Ms. Garcia (TX)	X	
	Mr. Phillips	X	
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	Mr. McHenry, <i>Ranking Member</i>		X
	Mrs. Wagner		X
	Mr. King		
	Mr. Lucas		
	Mr. Posey		X
	Mr. Luetkemeyer		X
	Mr. Huizenga		X
	Mr. Stivers		X
	Mr. Barr		X
	Mr. Tipton		X
	Mr. Williams		X
	Mr. Hill		X
	Mr. Emmer		X
	Mr. Zeldin		X
	Mr. Loudermilk		X
	Mr. Mooney		X
	Mr. Davidson		X
	Mr. Budd		X
	Mr. Kustoff		X
	Mr. Hollingsworth		X
	Mr. Gonzalez (OH)		X
	Mr. Rose		X
	Mr. Steil		X
	Mr. Gooden		X
	Mr. Riggleman		X
	Mr. Timmons		
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**Committee on Financial Services**  
Full Committee  
116th Congress (2nd Session)

Date: 11/13/2019

Measure \_ H.R. 3490 (Final Passage)

Amendment No. \_\_\_\_\_

Offered by: \_\_\_\_\_ Ms. Velazquez

Agreed To	Yes	No	Prsnt	Wdm
Voice Vote	Ayes		Nays	

Record Vote	FC
	31 Ayes- 23 Noes

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS  
OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause (3)(c) of rule XIII of the Rules of the House of Representatives, the goals of H.R. 3490 are to ensure that government employees, contractors, and other consumers affected by a Federal government shutdown.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

Pursuant to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the *Congressional Budget Act of 1974*, and pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the *Congressional Budget Act of 1974*, the Committee has received the following estimate for H.R. 3490 from the Director of the Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, March 3, 2020.*

Hon. MAXINE WATERS,  
*Chairwoman, Committee on Financial Services,  
House of Representatives, Washington, DC.*

DEAR MADAM CHAIRWOMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3490, the Small Business Lending Fairness Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is David Hughes.

Sincerely,

PHILLIP L. SWAGEL,  
*Director.*

Enclosure.

<b>H.R. 3490, Small Business Lending Fairness Act</b>			
As ordered reported by the House Committee on Financial Services on November 14, 2019			
By Fiscal Year, Millions of Dollars	2020	2020-2025	2020-2030
Direct Spending (Outlays)	*	*	*
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	*	*	*
Spending Subject to Appropriation (Outlays)	0	0	0
Statutory pay-as-you-go procedures apply?	Yes	<b>Mandate Effects</b>	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2031?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	Yes, Cannot Determine Costs
* = between zero and \$500,000.			

H.R. 3490 would prohibit creditors and debtors from entering into contracts that contain confessions of judgement, or similar legal mechanisms in which a debtor waives their right to mount a legal defense in the event of a breach of contract.

CBO assumes that the bill will be enacted in fiscal year 2020. Using information from the Consumer Financial Protection Bureau (CFPB), CBO estimates that it would cost the bureau less than \$500,000 to amend regulations to implement the bill. The CFPB has permanent authority, not subject to annual appropriation, to spend amounts transferred from the Federal Reserve.

The bill contains private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA), but CBO cannot determine whether the aggregate cost of the mandates would exceed the threshold established in UMRA (\$168 million in 2020, adjusted annually for inflation).

Although H.R. 3490 would prohibit creditors and debtors from using confessions of judgment and similar tools when extending credit or creating debt in commercial settings, the bill would not prohibit other litigation practices to collect outstanding debt. The cost of the mandate, then, would be the difference in debt collections using methods that would be prohibited under the bill compared to other litigation practices allowed under the bill.

The bill also would exempt private and public entities from civil liability in instances when consumer credit information has been disclosed, thus removing a private right of action. The cost of the mandate would be the foregone net value of awards and settlements that would have been granted for such claims in the absence of the bill.

CBO cannot estimate the number of claims or lawsuits that would have been successful in the absence of the bill, or the value of collections or court awards stemming from those claims that would be forgone. Therefore, we cannot determine the cost of the private-sector mandates in the bill.

H.R. 3490 contains no intergovernmental mandates as defined in UMRA.

The CBO staff contacts for this estimate are David Hughes (for federal costs) and Rachel Austin (for mandates). The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

#### COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 3490. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the *Congressional Budget Act*, which is attached.

#### UNFUNDED MANDATE STATEMENT

Pursuant to Section 423 of the *Congressional Budget and Impoundment Control Act* (as amended) The Committee adopts as its own the estimate of federal mandates regarding H.R. 3490, as amended, prepared by the Director of the Congressional Budget Office.

#### ADVISORY COMMITTEE

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

#### APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Pursuant to section 102(b)(3) of the *Congressional Accountability Act*, Pub. L. No. 104–1 H.R. 3490, as amended, does not apply to terms and conditions of employment or to access to public services or accommodations within the legislative branch.

#### EARMARK STATEMENT

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3490 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as described in clauses 9(e), 9(f), and 9(g) of rule XXI.

#### DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee states that no provision of H.R. 3490 establishes or reauthorizes a program of the Federal Government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, H.R. 3490, as reported, are shown as follows:

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

**TRUTH IN LENDING ACT**

\* \* \* \* \*

**TITLE I—CONSUMER CREDIT COST  
DISCLOSURE**

\* \* \* \* \*

**CHAPTER 1—GENERAL PROVISIONS**

\* \* \* \* \*

**§ 103. Definitions and rules of construction**

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this title.

(b) BUREAU.—The term “Bureau” means the Bureau of Consumer Financial Protection.

(c) The term “Bureau” refers to the Bureau of Governors of the Federal Reserve System.

(d) The term “organization” means a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(e) The term “person” means a natural person or an organization.

(f) The term “credit” means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(g) The term “creditor” refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement. Notwithstanding the preceding sentence, in the case of an open-end credit plan involving a credit card, the card issuer and any person who honors the credit card and offers a discount which is a finance charge are creditors. For the purpose of the requirements imposed under chapter 4 and sections 127(a)(5), 127(a)(6), 127(a)(7), 127(b)(1), 127(b)(2), 127(b)(3), 127(b)(8), and 127(b)(10) of chapter 2 of this title, the term “creditor” shall also include card issuers whether or not the amount due is payable by agreement in more than four installments or the payment of a finance charge is or may be required, and the Bureau shall, by regulation, apply these requirements to such card issuers, to the extent appropriate, even though the requirements are by their terms applicable only to

creditors offering open-end credit plans. Any person who originates 2 or more mortgages referred to in subsection (aa) in any 12-month period or any person who originates 1 or more such mortgages through a mortgage broker shall be considered to be a creditor for purposes of this title. The term “creditor” includes a private educational lender (as that term is defined in section 140) for purposes of this title.

(h) The term “credit sale” refers to any sale in which the seller is a creditor. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

(i) The adjective “consumer”, used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes.

(j) The terms “open end credit plan” and “open end consumer credit plan” mean a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance. A credit plan or open end consumer credit plan which is an open end credit plan or open end consumer credit plan within the meaning of the preceding sentence is an open end credit plan or open end consumer credit plan even if credit information is verified from time to time.

(k) The term “adequate notice”, as used in section 133, means a printed notice to a cardholder which sets forth the pertinent facts clearly and conspicuously so that a person against whom it is to operate could reasonably be expected to have noticed it and understood its meaning. Such notice may be given to a cardholder by printing the notice on any credit card, or on each periodic statement of account, issued to the cardholder, or by any other means reasonably assuring the receipt thereof by the cardholder.

(l) The term “credit card” means any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(m) The term “accepted credit card” means any credit card which the cardholder has requested and received or has signed or has used, or authorized another to use, for the purpose of obtaining money, property, labor, or services on credit.

(n) The term “cardholder” means any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person.

(o) The term “card issuer” means any person who issues a credit card, or the agent of such person with respect to such card.

(p) The term “unauthorized use”, as used in section 133, means a use of a credit card by a person other than the cardholder who

does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.

(q) The term “discount” as used in section 167 means a reduction made from the regular price. The term “discount” as used in section 167 shall not mean a surcharge.

(r) The term “surcharge” as used in section 103 and section 167 means any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means.

(s) The term “State” refers to any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(t) The term “agricultural purposes” includes the production, harvest, exhibition, marketing, transportation, processing, or manufacture of agricultural products by a natural person who cultivates, plants, propagates, or nurtures those agricultural products, including but not limited to the acquisition of farmland, real property with a farm residence, and personal property and services used primarily in farming.

(u) The term “agricultural products” includes agricultural, horticultural, viticultural, and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured products thereof.

(v) The term “material disclosures” means the disclosure, as required by this title, of the annual percentage rate, the method of determining the finance charge and the balance upon which a finance charge will be imposed, the amount of the finance charge, the amount to be financed, the total of payments, the number and amount of payments, the due dates or periods of payments scheduled to repay the indebtedness, and the disclosures required by section 129(a).

(w) The term “dwelling” means a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives.

(x) The term “residential mortgage transaction” means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer’s dwelling to finance the acquisition or initial construction of such dwelling.

(y) As used in this section and section 167, the term “regular price” means the tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of an open-end credit plan or a credit card if either (1) no price is tagged or posted, or (2) two prices are tagged or posted, one of which is charged when payment is made by use of an open-end credit plan or a credit card and the other when payment is made by use of cash, check, or similar means. For purposes of this definition, payment by check, draft, or other negotiable instrument which may result in the debiting of an open-end credit plan or a credit cardholder’s open-end account shall not be considered payment made by use of the plan or the account.

(z) Any reference to any requirement imposed under this title or any provision thereof includes reference to the regulations of the Bureau under this title or the provision thereof in question.

(aa) The disclosure of an amount or percentage which is greater than the amount or percentage required to be disclosed under this title does not in itself constitute a violation of this title.

(bb) HIGH-COST MORTGAGE.—

(1) DEFINITION.—

(A) IN GENERAL.—The term “high-cost mortgage”, and a mortgage referred to in this subsection, means a consumer credit transaction that is secured by the consumer’s principal dwelling, other than a reverse mortgage transaction, if—

(i) in the case of a credit transaction secured—

(I) by a first mortgage on the consumer’s principal dwelling, the annual percentage rate at consummation of the transaction will exceed by more than 6.5 percentage points (8.5 percentage points, if the dwelling is personal property and the transaction is for less than \$50,000) the average prime offer rate, as defined in section 129C(b)(2)(B), for a comparable transaction; or

(II) by a subordinate or junior mortgage on the consumer’s principal dwelling, the annual percentage rate at consummation of the transaction will exceed by more than 8.5 percentage points the average prime offer rate, as defined in section 129C(b)(2)(B), for a comparable transaction;

(ii) the total points and fees payable in connection with the transaction, other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or mortgage originator, exceed—

(I) in the case of a transaction for \$20,000 or more, 5 percent of the total transaction amount; or

(II) in the case of a transaction for less than \$20,000, the lesser of 8 percent of the total transaction amount or \$1,000 (or such other dollar amount as the Bureau shall prescribe by regulation); or

(iii) the credit transaction documents permit the creditor to charge or collect prepayment fees or penalties more than 36 months after the transaction closing or such fees or penalties exceed, in the aggregate, more than 2 percent of the amount prepaid.

(B) INTRODUCTORY RATES TAKEN INTO ACCOUNT.—For purposes of subparagraph (A)(i), the annual percentage rate of interest shall be determined based on the following interest rate:

(i) In the case of a fixed-rate transaction in which the annual percentage rate will not vary during the term of the loan, the interest rate in effect on the date of consummation of the transaction.

(ii) In the case of a transaction in which the rate of interest varies solely in accordance with an index, the interest rate determined by adding the index rate in effect on the date of consummation of the transaction to the maximum margin permitted at any time during the loan agreement.

(iii) In the case of any other transaction in which the rate may vary at any time during the term of the loan for any reason, the interest charged on the transaction at the maximum rate that may be charged during the term of the loan.

(C) MORTGAGE INSURANCE.—For the purposes of computing the total points and fees under paragraph (4), the total points and fees shall exclude—

(i) any premium provided by an agency of the Federal Government or an agency of a State;

(ii) any amount that is not in excess of the amount payable under policies in effect at the time of origination under section 203(c)(2)(A) of the National Housing Act (12 U.S.C. 1709(c)(2)(A)), provided that the premium, charge, or fee is required to be refundable on a pro-rated basis and the refund is automatically issued upon notification of the satisfaction of the underlying mortgage loan; and

(iii) any premium paid by the consumer after closing.

(2)(A) After the 2-year period beginning on the effective date of the regulations promulgated under section 155 of the Riegle Community Development and Regulatory Improvement Act of 1994, and no more frequently than biennially after the first increase or decrease under this subparagraph, the Bureau may by regulation increase or decrease the number of percentage points specified in paragraph (1)(A), if the Bureau determines that the increase or decrease is—

(i) consistent with the consumer protections against abusive lending provided by the amendments made by subtitle B of title I of the Riegle Community Development and Regulatory Improvement Act of 1994; and

(ii) warranted by the need for credit.

(B) An increase or decrease under subparagraph (A)—

(i) may not result in the number of percentage points referred to in paragraph (1)(A)(i)(I) being less than 6 percentage points or greater than 10 percentage points; and

(ii) may not result in the number of percentage points referred to in paragraph (1)(A)(i)(II) being less than 8 percentage points or greater than 12 percentage points.

(C) In determining whether to increase or decrease the number of percentage points referred to in subparagraph (A), the Bureau shall consult with representatives of consumers, including low-income consumers, and lenders.

(3) The amount specified in paragraph (1)(B)(ii) shall be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index, as reported on June 1 of the year preceding such adjustment.

(4) For purposes of paragraph (1)(B), points and fees shall include—

(A) all items included in the finance charge, except interest or the time-price differential;

(B) all compensation paid directly or indirectly by a consumer or creditor to a mortgage originator from any source, including a mortgage originator that is also the creditor in a table-funded transaction;

(C) each of the charges listed in section 106(e) (except an escrow for future payment of taxes), unless—

(i) the charge is reasonable;

(ii) the creditor receives no direct or indirect compensation; and

(iii) the charge is paid to a third party unaffiliated with the creditor; and

(D) premiums or other charges payable at or before closing for any credit life, credit disability, credit unemployment, or credit property insurance, or any other accident, loss-of-income, life or health insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract, except that insurance premiums or debt cancellation or suspension fees calculated and paid in full on a monthly basis shall not be considered financed by the creditor;

(E) the maximum prepayment fees and penalties which may be charged or collected under the terms of the credit transaction;

(F) all prepayment fees or penalties that are incurred by the consumer if the loan refinances a previous loan made or currently held by the same creditor or an affiliate of the creditor; and

(G) such other charges as the Bureau determines to be appropriate.

(5) CALCULATION OF POINTS AND FEES FOR OPEN-END CONSUMER CREDIT PLANS.—In the case of open-end consumer credit plans, points and fees shall be calculated, for purposes of this section and section 129, by adding the total points and fees known at or before closing, including the maximum prepayment penalties which may be charged or collected under the terms of the credit transaction, plus the minimum additional fees the consumer would be required to pay to draw down an amount equal to the total credit line.

(6) This subsection shall not be construed to limit the rate of interest or the finance charge that a person may charge a consumer for any extension of credit.

(cc) The term “reverse mortgage transaction” means a non-recourse transaction in which a mortgage, deed of trust, or equivalent consensual security interest is created against the consumer’s principal dwelling—

(1) securing one or more advances; and

(2) with respect to which the payment of any principal, interest, and shared appreciation or equity is due and payable (other than in the case of default) only after—

(A) the transfer of the dwelling;

(B) the consumer ceases to occupy the dwelling as a principal dwelling; or

(C) the death of the consumer.

(dd) DEFINITIONS RELATING TO MORTGAGE ORIGINATION AND RESIDENTIAL MORTGAGE LOANS.—

(1) COMMISSION.—Unless otherwise specified, the term “Commission” means the Federal Trade Commission.

(2) MORTGAGE ORIGINATOR.—The term “mortgage originator”—

(A) means any person who, for direct or indirect compensation or gain, or in the expectation of direct or indirect compensation or gain—

- (i) takes a residential mortgage loan application;
- (ii) assists a consumer in obtaining or applying to obtain a residential mortgage loan; or
- (iii) offers or negotiates terms of a residential mortgage loan;

(B) includes any person who represents to the public, through advertising or other means of communicating or providing information (including the use of business cards, stationery, brochures, signs, rate lists, or other promotional items), that such person can or will provide any of the services or perform any of the activities described in subparagraph (A);

(C) does not include any person who is—

- (i) not otherwise described in subparagraph (A) or (B) and who performs purely administrative or clerical tasks on behalf of a person who is described in any such subparagraph; or
- (ii) a retailer of manufactured or modular homes or an employee of the retailer if the retailer or employee, as applicable—

(I) does not receive compensation or gain for engaging in activities described in subparagraph (A) that is in excess of any compensation or gain received in a comparable cash transaction;

(II) discloses to the consumer—

- (aa) in writing any corporate affiliation with any creditor; and
- (bb) if the retailer has a corporate affiliation with any creditor, at least 1 unaffiliated creditor; and

(III) does not directly negotiate with the consumer or lender on loan terms (including rates, fees, and other costs).

(D) does not include a person or entity that only performs real estate brokerage activities and is licensed or registered in accordance with applicable State law, unless such person or entity is compensated by a lender, a mortgage broker, or other mortgage originator or by any agent of such lender, mortgage broker, or other mortgage originator;

(E) does not include, with respect to a residential mortgage loan, a person, estate, or trust that provides mortgage financing for the sale of 3 properties in any 12-month period to purchasers of such properties, each of which is

owned by such person, estate, or trust and serves as security for the loan, provided that such loan—

(i) is not made by a person, estate, or trust that has constructed, or acted as a contractor for the construction of, a residence on the property in the ordinary course of business of such person, estate, or trust;

(ii) is fully amortizing;

(iii) is with respect to a sale for which the seller determines in good faith and documents that the buyer has a reasonable ability to repay the loan;

(iv) has a fixed rate or an adjustable rate that is adjustable after 5 or more years, subject to reasonable annual and lifetime limitations on interest rate increases; and

(v) meets any other criteria the Bureau may prescribe;

(F) does not include the creditor (except the creditor in a table-funded transaction) under paragraph (1), (2), or (4) of section 129B(c); and

(G) does not include a servicer or servicer employees, agents and contractors, including but not limited to those who offer or negotiate terms of a residential mortgage loan for purposes of renegotiating, modifying, replacing and subordinating principal of existing mortgages where borrowers are behind in their payments, in default or have a reasonable likelihood of being in default or falling behind.

(3) **NATIONWIDE MORTGAGE LICENSING SYSTEM AND REGISTRY.**—The term “Nationwide Mortgage Licensing System and Registry” has the same meaning as in the Secure and Fair Enforcement for Mortgage Licensing Act of 2008.

(4) **OTHER DEFINITIONS RELATING TO MORTGAGE ORIGINATOR.**—For purposes of this subsection, a person “assists a consumer in obtaining or applying to obtain a residential mortgage loan” by, among other things, advising on residential mortgage loan terms (including rates, fees, and other costs), preparing residential mortgage loan packages, or collecting information on behalf of the consumer with regard to a residential mortgage loan.

(5) **RESIDENTIAL MORTGAGE LOAN.**—The term “residential mortgage loan” means any consumer credit transaction that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or on residential real property that includes a dwelling, other than a consumer credit transaction under an open end credit plan or, for purposes of sections 129B and 129C and section 128(a) (16), (17), (18), and (19), and sections 128(f) and 130(k), and any regulations promulgated thereunder, an extension of credit relating to a plan described in section 101(53D) of title 11, United States Code.

(6) **SECRETARY.**—The term “Secretary”, when used in connection with any transaction or person involved with a residential mortgage loan, means the Secretary of Housing and Urban Development.

(7) **SERVICER.**—The term “servicer” has the same meaning as in section 6(i)(2) of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2605(i)(2)).

(ee) BONA FIDE DISCOUNT POINTS AND PREPAYMENT PENALTIES.— For the purposes of determining the amount of points and fees for purposes of subsection (aa), either the amounts described in paragraph (1) or (2) of the following paragraphs, but not both, shall be excluded:

(1) Up to and including 2 bona fide discount points payable by the consumer in connection with the mortgage, but only if the interest rate from which the mortgage’s interest rate will be discounted does not exceed by more than 1 percentage point—

(A) the average prime offer rate, as defined in section 129C; or

(B) if secured by a personal property loan, the average rate on a loan in connection with which insurance is provided under title I of the National Housing Act (12 U.S.C. 1702 et seq.).

(2) Unless 2 bona fide discount points have been excluded under paragraph (1), up to and including 1 bona fide discount point payable by the consumer in connection with the mortgage, but only if the interest rate from which the mortgage’s interest rate will be discounted does not exceed by more than 2 percentage points—

(A) the average prime offer rate, as defined in section 129C; or

(B) if secured by a personal property loan, the average rate on a loan in connection with which insurance is provided under title I of the National Housing Act (12 U.S.C. 1702 et seq.).

(3) For purposes of paragraph (1), the term “bona fide discount points” means loan discount points which are knowingly paid by the consumer for the purpose of reducing, and which in fact result in a bona fide reduction of, the interest rate or time-price differential applicable to the mortgage.

(4) Paragraphs (1) and (2) shall not apply to discount points used to purchase an interest rate reduction unless the amount of the interest rate reduction purchased is reasonably consistent with established industry norms and practices for secondary mortgage market transactions.

(ff) *The term “debt” means any obligation of a person to pay to another person money—*

*(1) regardless of whether such obligation is absolute or contingent if the understanding between the parties is that any part of the money shall be or may be returned;*

*(2) that includes the right of the person providing the money to an equitable remedy for breach of performance if the breach gives rise to a right to payment; and*

*(3) regardless of whether the obligation or right to an equitable remedy described in paragraph (2) has been reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.*

\* \* \* \* \*

**CHAPTER 2—CREDIT TRANSACTIONS**

Sec.

121. General requirement of disclosure.

\* \* \* \* \*

140B. Unfair credit practices.

\* \* \* \* \*

**§ 130. Civil liability**

(a) Except as otherwise provided in this section, any **[creditor]** *person* who fails to comply with any requirement imposed under this chapter, including any requirement under section 125, subsection (f) or (g) of section 131, or chapter 4 or 5 of this title with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under chapter 5 of this title, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than \$200 nor greater than \$2,000, (iii) in the case of an individual action relating to an open end consumer credit plan that is not secured by real property or a dwelling, twice the amount of any finance charge in connection with the transaction, with a minimum of \$500 and a maximum of \$5,000, or such higher amount as may be appropriate in the case of an established pattern or practice of such failures; or (iv) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than \$400 or greater than \$4,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same **[creditor]** *person* shall not be more than the lesser of \$1,000,000 or 1 per centum of the net worth of the **[creditor]** *person*;

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 125 or 128(e)(7), the costs of the action, together with a reasonable attorney’s fee as determined by the court; and

(4) in the case of a failure to comply with any requirement under section 129, paragraph (1) or (2) of section 129B(c), or section 129C(a), an amount equal to the sum of all finance charges and fees paid by the consumer, unless the **[creditor]** *person* demonstrates that the failure to comply is not material.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the **[creditor]** *person*, the resources of the **[creditor]** *person*, the number of persons adversely affected, and the extent to which the creditor’s failure of compliance was intentional. In connection with the disclosures referred to in subsections (a) and (b)

of section 127, a **【creditor】** *person* shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 125, 127(a), or any of paragraphs (4) through (13) of section 127(b), or for failing to comply with disclosure requirements under State law for any term or item that the Bureau has determined to be substantially the same in meaning under section 111(a)(2) as any of the terms or items referred to in section 127(a), or any of paragraphs (4) through (13) of section 127(b). In connection with the disclosures referred to in subsection (c) or (d) of section 127, a card issuer shall have a liability under this section only to a cardholder who pays a fee described in section 127(c)(1)(A)(ii)(I) or section 127(c)(4)(A)(i) or who uses the credit card or charge card. In connection with the disclosures referred to in section 128, a **【creditor】** *person* shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 125, of paragraph (2) (insofar as it requires a disclosure of the “amount financed”), (3), (4), (5), (6), or (9) of section 128(a), or section 128(b)(2)(C)(ii), of subparagraphs (A), (B), (D), (F), or (J) of section 128(e)(2) (for purposes of paragraph (2) or (4) of section 128(e)), or paragraph (4)(C), (6), (7), or (8) of section 128(e), or for failing to comply with disclosure requirements under State law for any term which the Bureau has determined to be substantially the same in meaning under section 111(a)(2) as any of the terms referred to in any of those paragraphs of section 128(a) or section 128(b)(2)(C)(ii). With respect to any failure to make disclosures required under this chapter or chapter 4 or 5 of this title, liability shall be imposed only upon the **【creditor】** *person* required to make disclosure, except as provided in section 131.

(b) A creditor or assignee has no liability under this section or section 108 or section 112 for any failure to comply with any requirement imposed under this chapter or chapter 5, if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 108(e)(1) or through the creditor’s or assignee’s own procedures, and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

(c) A creditor or assignee may not be held liable in any action brought under this section or section 125 for a violation of this title if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, and printing errors, except that an error of legal judgment with respect to a person’s obligations under this title is not a bona fide error.

(d) When there are multiple obligors in a consumer credit transaction or consumer lease, there shall be no more than one recovery of damages under subsection (a)(2) for a violation of this title.

(e) Except as provided in the subsequent sentence, any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation or, in the case of a violation involving a private education loan (as that term is defined in section 140(a)), 1 year from the date on which the first regular payment of principal is due under the loan. Any action under this section with respect to any violation of section 129, 129B, or 129C may be brought in any United States district court, or in any other court of competent jurisdiction, before the end of the 3-year period beginning on the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this title in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law. An action to enforce a violation of section 129, 129B, 129C, 129D, 129E, 129F, 129G, or 129H of this Act may also be brought by the appropriate State attorney general in any appropriate United States district court, or any other court of competent jurisdiction, not later than 3 years after the date on which the violation occurs. The State attorney general shall provide prior written notice of any such civil action to the Federal agency responsible for enforcement under section 108 and shall provide the agency with a copy of the complaint. If prior notice is not feasible, the State attorney general shall provide notice to such agency immediately upon instituting the action. The Federal agency may—

- (1) intervene in the action;
- (2) upon intervening—
  - (A) remove the action to the appropriate United States district court, if it was not originally brought there; and
  - (B) be heard on all matters arising in the action; and
- (3) file a petition for appeal.

(f) No provision of this section, section 108(b), section 108(c), section 108(e), or section 112 imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Bureau or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Bureau to issue such interpretations or approvals under such procedures as the Bureau may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(g) The multiple failure to disclose to any person any information required under this chapter or chapter 4 or 5 of this title to be disclosed in connection with a single account under an open end consumer credit plan, other single consumer credit sale, consumer loan, consumer lease, or other extension of consumer credit, shall entitle the person to a single recovery under this section but continued failure to disclose after a recovery has been granted shall give rise to rights to additional recoveries. This subsection does not bar any remedy permitted by section 125.

(h) A person may not take any action to offset any amount for which a creditor or assignee is potentially liable to such person

under subsection (a)(2) against any amount owed by such person, unless the amount of the creditor's or assignee's liability under this title has been determined by judgment of a court of competent jurisdiction in an action of which such person was a party. This subsection does not bar a consumer then in default on the obligation from asserting a violation of this title as an original action, or as a defense or counterclaim to an action to collect amounts owed by the consumer brought by a person liable under this title.

(i) CLASS ACTION MORATORIUM.—

(1) IN GENERAL.—During the period beginning on the date of the enactment of the Truth in Lending Class Action Relief Act of 1995 and ending on October 1, 1995, no court may enter any order certifying any class in any action under this title—

(A) which is brought in connection with any credit transaction not under an open end credit plan which is secured by a first lien on real property or a dwelling and constitutes a refinancing or consolidation of an existing extension of credit; and

(B) which is based on the alleged failure of a creditor—

(i) to include a charge actually incurred (in connection with the transaction) in the finance charge disclosed pursuant to section 128;

(ii) to properly make any other disclosure required under section 128 as a result of the failure described in clause (i); or

(iii) to provide proper notice of rescission rights under section 125(a) due to the selection by the creditor of the incorrect form from among the model forms prescribed by the Bureau or from among forms based on such model forms.

(2) EXCEPTIONS FOR CERTAIN ALLEGED VIOLATIONS.—Paragraph (1) shall not apply with respect to any action—

(A) described in clause (i) or (ii) of paragraph (1)(B), if the amount disclosed as the finance charge results in an annual percentage rate that exceeds the tolerance provided in section 107(c); or

(B) described in paragraph (1)(B)(iii), if—

(i) no notice relating to rescission rights under section 125(a) was provided in any form; or

(ii) proper notice was not provided for any reason other than the reason described in such paragraph.

(j) PRIVATE EDUCATIONAL LENDER.—A private educational lender (as that term is defined in section 140(a)) has no liability under this section for failure to comply with section 128(e)(3).

(k) DEFENSE TO FORECLOSURE.—

(1) IN GENERAL.—Notwithstanding any other provision of law, when a creditor, assignee, or other holder of a residential mortgage loan or anyone acting on behalf of such creditor, assignee, or holder, initiates a judicial or nonjudicial foreclosure of the residential mortgage loan, or any other action to collect the debt in connection with such loan, a consumer may assert a violation by a creditor of paragraph (1) or (2) of section 129B(c), or of section 129C(a), as a matter of defense by recoupment or set off without regard for the time limit on a private action for damages under subsection (e).

(2) AMOUNT OF RECOUPMENT OR SETOFF.—

(A) IN GENERAL.—The amount of recoupment or set-off under paragraph (1) shall equal the amount to which the consumer would be entitled under subsection (a) for damages for a valid claim brought in an original action against the creditor, plus the costs to the consumer of the action, including a reasonable attorney’s fee.

(B) SPECIAL RULE.—Where such judgment is rendered after the expiration of the applicable time limit on a private action for damages under subsection (e), the amount of recoupment or set-off under paragraph (1) derived from damages under subsection (a)(4) shall not exceed the amount to which the consumer would have been entitled under subsection (a)(4) for damages computed up to the day preceding the expiration of the applicable time limit.

(1) EXEMPTION FROM LIABILITY AND RESCISSION IN CASE OF BORROWER FRAUD OR DECEPTION.—In addition to any other remedy available by law or contract, no creditor or assignee shall be liable to an obligor under this section, if such obligor, or co-obligor has been convicted of obtaining by actual fraud such residential mortgage loan.

\* \* \* \* \*

**§ 140B. Unfair credit practices**

(a) IN GENERAL.—*In connection with the extension of credit or creation of debt in or affecting commerce, as defined in section 4 of the Federal Trade Commission Act (15 U.S.C. 44), including any advance of funds or sale or assignment of future income or receivables that may or may not be credit, no person may directly or indirectly take or receive from another person an obligation that constitutes or contains a cognovit or confession of judgment (for purposes other than executory process in the State of Louisiana), warrant of attorney, or other waiver of the right to notice and the opportunity to be heard in the event of suit or process thereon.*

(b) EXEMPTION.—*The exemption in section 104(1) shall not apply to this section.*

\* \* \* \* \*

## MINORITY VIEWS

Committee Republicans believe lenders should be transparent with respect to the terms and conditions associated with extending credit to small businesses. Unfortunately, House Democrats are passing a sweeping prohibition that could yield unintended consequences and put small businesses and lenders at risk. H.R. 3490 would prohibit the use of confessions of judgment provisions in all loan contracts including all extensions of credit, regardless of the nature of the loan or borrower.

Recouping a monetary debt is necessary for a credit-based economy to function, and confessions of judgment are a tool available to lenders and debt collectors to collect from delinquent borrowers. Many community banks include confessions of judgment as a contract term in a commercial loan, but rarely enforce the provision. Additionally, federal government agencies, including the Department of Justice (DOJ) and the Environmental Protection Agency (EPA), use confessions of judgment in contracts. For example, the DOJ enforced a confession of judgment to retrieve assets from Bernie Madoff.

Committee Republicans believe borrowers deserve more clarity and disclosure relating to the use of confessions of judgment. Rep. Warren Davidson (R-OH) offered a substitute amendment that would have required lenders to provide a separate disclosure describing the confession of judgment included in the loan contract. Democrats rejected the amendment on a party line vote of 31–23. Rep. Ted Budd (R-NC) also offered an amendment that would have required lenders to obtain a written affidavit from the borrower containing the date and nature of a borrower’s default in order to execute a confession of judgment. The Budd amendment was also rejected by a party line vote of 31–23.

Committee Republicans believe the blanket prohibition contained in H.R. 3490 will limit borrowing options. By removing a critical option for lenders to recover money owed, if enacted, the bill may ultimately drive up the cost of credit for the smallest businesses. Committee Republicans support protecting small businesses and ensuring transparency in the lending process, but this bill does not achieve this goal. Intended or not this bill jeopardizes access to credit for millions of qualified small businesses, which could slow economic growth and job creation. For these reasons, Committee Republicans oppose H.R. 3490.

ALEXANDER X. MOONEY.  
DAVID KUSTOFF.  
LANCE GOODEN.  
WILLIAM R. TIMMONS, IV.  
TED BUDD.  
J. FRENCH HILL.  
JOHN W. ROSE.

ANTHONY GONZALEZ.  
ANDY BARR.  
ANN WAGNER.  
BLAINE LUETKEMEYER.  
STEVE STIVERS.  
PATRICK T. MCHENRY.  
WARREN DAVIDSON.  
BARRY LOUDERMILK.  
TOM EMMER.  
SCOTT R. TIPTON.  
ROGER WILLIAMS.  
BRYAN STEIL.  
TREY HOLLINGSWORTH.  
DENVER RIGGLEMAN.  
LEE M. ZELDIN.  
FRANK D. LUCAS.  
BILL HUIZENGA.  
BILL POSEY.

