September 7, 2017

Financial Services Financial Institutions and Consumer Credit Subcommittee: Legislative Proposals for a More Efficient Federal Financial Regulatory Regime

The Financial Services Financial Institutions and Consumer Credit Subcommittee held a hearing today to examine six legislative proposals:

H.R. 1849 (Rep. Trott), the "Practice of Law Technical Clarification Act of 2017"

H.R. 2359 (Rep. Loudermilk), the "FCRA Liability Harmonization Act"

H.R. 3312 (Rep. Luetkemeyer), the "Systemic Risk Designation Improvement Act of 2017"

H.R. ____ (Rep. Royce), the "Facilitating Access to Credit Act"

H.R. ____ (Rep. Tenney), the "Community Institution Mortgage Relief Act of 2017"

H.R. ____ (Rep. Hill), the "TRID Improvement Act of 2017"

Four witnesses offered testimony:

- Ms. Anne Fortney, Partner Emerita, Hudson Cook, LLP
- Mr. Charles Tuggle, Executive Vice President and General Counsel, First Horizon National Corporation
- Mr. Thomas Quaadman, Executive Vice President, Center for Capital Markets Competitiveness
- Ms. Chi Chi Wu, Staff Attorney, National Consumer Law Center

Opening Statements

Chairman Blaine Luetkemeyer (R-MO) called the hearing to order, stating that the proposed bills will better allow financial companies to serve their customers. These bills will streamline regulatory requirements and eliminate inefficiencies. H.R. 3312 aims to improve the manner in which financial institutions are regulated by more closely tying SIFI designation to actual risk in the financial system, replacing the $50 billion threshold with a series of standards, including institution size, interconnectedness, substitutability, and complexity.

Ranking Member Lacy Clay (D-MO) recalled that Dodd Frank was crafted to ensure that our country never faces another financial crisis like that of 2008. Regulatory improvements can always be made, but efficiency should not be defined simply as less or no regulation. Laws and regulations should support a strong financial services sector, but they should also protect consumers and promote economic growth. Many of the proposals today would modify or gut some key existing consumer protection laws, such as the Fair Credit Reporting Act and the Truth in Lending Act. Strong regulatory standards help maintain the safety and soundness of our financial system.

Rep. Ed Royce (R-CA) discussed his draft, the Credit Services Protection Act, which will improve consumer access to credit monitoring and education services. Preventing fraudulent credit repair should remain the focus of CROA, but the law has since outgrown Congressional intent. The draft bill allows provisions of education services and financial literacy, rather than hindering these services.

Rep. Dave Trott (R-MI) discussed H.R. 1849, which clarifies that attorneys engaged in litigation should not be subject to interference by federal agencies. The bill ensures that all Americans can receive justice, and protects against attempts to interfere with our independent judiciary.

Witness Statements

Ms. Anne Fortney tailored her comments toward the credit services protection act draft bill, H.R. 1849 (the Practice of Law Technical Clarification Act of 2017), and H.R. 2359, the FCRA Liability Harmonization Act. Each of these bills involve laws enacted to address industry practices that cause distress to consumers. There is universal support for these laws and their essential consumer protections; by and large, these laws have achieved their aim. However, there have been some incidences in which courts interpret these laws outside of Congressional intent. For example, credit repair services in CROA have been defined so broadly as to include credit monitoring and identity protection services. This interpretation has hurt the development of new and innovative products. Fortney advocated for Royce's bill, which leaves intact CROA's protections against credit repair, while allowing for credit education and identity protection under the watchful eye of the FTC. Likewise, the Practice of Law Technical Clarification Act of 2017 would create a narrow exemption for attorneys through the extent that they are practicing law and litigating on behalf of a client. Finally, H.R. 2359 places a cap on class action awards and eliminates punitive damages.

Mr. Charles Tuggle acknowledged that regulations have overshot their mark, imposing unintended costs on businesses, consumers, and the economy. He expressed his support for H.R. 3312, which would eliminate the arbitrary dollar threshold for SIFI designation, instead establishing a process for regulating based on the nature of the business. The arbitrary size threshold has needlessly trapped many banks, without providing benefit to the system. The draft bill would tailor and focus supervisory oversight to promote safe and sound banking, protecting against systemic risk. ABA also supports the Community Institution Mortgage Relief Act, which would provide relief for servicers and lenders with regard to escrow practices. Currently, escrow mandates result in higher costs for smaller lenders; Ms. Tenney's draft bill seeks to simplify the currently regime. Finally, Tuggle expressed ABA's support for Rep. Hill's TRID Improvement Act, which attempts to address the many questions about liability and compliance under TRID. Without clarity on liability, lenders and investors will avoid exposure, which reduces product choice and increases borrower costs.

Mr. Thomas Quaadman described how small business liquidity has dried up and the cost of capital has increased; small businesses have struggled under changes designed to solve a global crisis. A survey of 500 small businesses found that a majority felt that access to capital has not improved over the last year; 50% believe regulations are inhibiting lending. Fed and FDIC studies found that small business lending and demand has not rebounded since the financial crisis. Quaadman focused on Luetkemeyer's SIFI Designation Improvement Act, which uses existing Federal Reserve standards on interconnectedness, substitutability, complexity, etc. SIFI banks will be regulated in a smart and appropriate manner, and will allow regional and community banks to deploy capital in a productive

manner. Likewise, Quaadman noted support for Reps. Royce and Loudermilk's bills. Hill's TRID Improvement Act will create certainty in the marketplace, and will make the mortgage process more efficient.

Ms. Chi Chi Wu stated that each bill under discussion would harm the interests of American consumers. H.R. 2359 would drastically reduce accountability for violations of the FCRA. She described consumers who have had their credit shredded due to credit reporting errors. For example, consumers in 49 out of 50 states were misidentified as terrorists or drug dealers in their credit reports because TransUnion misidentified them as similarly named individuals. Supporters of the bill suggest that the changes are merely "technical," though Wu stated that it would deny consumers the ability to seek full accountability and punitive damages for FCRA violations. It would limit class action recovery for statutory and actual damages to $500,000.00, no matter how many thousands or millions of consumers were harmed, or the extent of the consequences. The three major credit bureaus are among the three top most complained about companies to the CFPB each month, with the majority of complaints about inaccurate information on credit reports. Wu also stated opposition against the Credit Services Protection Act of 2017, which would exempt the three major credit bureaus from CROA. The exemption removes consumer protections when the bureaus sell credit monitoring, protection, and other products of questionable value. These products were the subject of a CFPB enforcement action just this year for deceptive marketing in which Equifax and TransUnion were ordered to pay refunds of $17.6 million plus a fine of $5.5 million.

General Questions

Rep. Robert Pittenger (R-NC) noted that consumers on average win more through arbitration than class action, as was found in the CFPB's own study. Mr. Quaadman agreed that arbitration has yielded consumers roughly $5000 in compensation, vs rewards of $30 for individual class action. Arbitration is a firm way of resolving consumer complaints. Arbitration also provides benefit to consumers while alleviating strain on the court system. Turning to credit worthiness, Pittenger agreed that CROA protects consumers from the claims of certain bad actors. He asked Ms. Fortney to elaborate on the Facilitating Access to Credit Act. She replied that the draft will not impede access to credit information; amending CROA will not in any way jeopardize the ability of the CFPB or FTC to pursue companies that engage in unfair or deceptive practices or service offerings. The draft creates a new framework under which companies can offer individualized consumer education services without the fear that a court would define these serves as "credit repair."

Ranking Member Lacy Clay (D-MO) described another scenario of consumers harmed by wrongful conduct from credit reporting agencies. A consumer with the same name and similar SSN as another consumer with poor credit was misidentified; despite CRA inquiries, failure to correct this mistake caused the consumer to be rejected for loans. Clay read from the decision at the time that awarded the consumer punitive damages from Equifax. Clay asked whether punitive damages were entitled in this case, or to describe why consumers should not be entitled to punitive damages. Ms. Fortney noted that she was an expert witness in this case, and allowed that the individual was entitled to damages to the extent that she could show actual harm. She expressed concern, though, about the attitude that we must "send a message" to companies that attempt to comply with the law and make mistakes. The risk of punitive damages will make companies less efficient and less able to deliver products to consumers.

Mr. Quaadman added that the draft bill seeks to harmonize the FCRA with all the other credit reporting bills.

Chairman Blaine Luetkemeyer (R-MO) turned to his bill, asking about the $50 billion SIFI designation threshold. Mr. Tuggle stated that his bank is approaching the $50 billion threshold, but it is better to remain below that threshold from the perspective of costs and regulation. Luetkemeyer noted that growth from $49 to $51 billion does not change the structure of the bank, leading one to conclude that the dollar amount is arbitrary. Mr. Tuggle described his bank as essentially a community bank in terms of the services it offers; consequences to growth would be seen in hesitation toward extending credit. Mr. Quaadman agreed that the enhanced regulations at the $50 billion threshold makes small business loans unattractive, even though regional banks have knowledge of their customers. Thus, it is the compliance officer, rather than the loan offer, deciding to whom they should make loans.

Rep. David Scott (D-GA) turned to the value class action lawsuits provide, noting that every day we hear stories of abuses by financial institutions. Mr. Loudermilk's bill seeks to disrupt a delicate balance that allows for consumers to obtain class action with a fair balance of a $500,000 cap. Scott also commented on his bill with Mr. Luetkemeyer, stating that the 5-point criteria for SIFI determinations removes arbitrariness from the designation process. It is the job of the Committee to put out laws that are fair; our regional banks should not be put into the same class as Goldman Sachs and Bank of America. These banks have a global impact and deal in immensely complex issues; the same standards should not be applied uniformly. Scott asked how, if Mr. Loudermilk's bill becomes law, consumers could take action if they allege a violation of the law. Ms. Fortney replied that consumers could still act under FCRA, sue for damages, and engage in class action. However, we would no longer see ridiculous awards for technical or dubious FCRA violations.

Rep. Keith Rothfus (R-PA) returned to Mr. Tuggle's comments that crossing the $50 billion threshold would create more expense and resource drain, asking if he can quantify it further. Mr. Tuggle replied that he has not put specific numbers to this, but noted that RBC Capital's study estimates that the one-time cost of crossing from $50 to $51 billion is $40-60 million dollars. SIFIs are subject to LCR rules, and Tuggle believes this rule alone would cost the bank $15-20 million a year. He posited that his bank might pass on a small acquisition that would tip the bank over the threshold.

Rep. Carolyn Maloney (D-NY) recalled the effects of Dodd-Frank, noting that since its passage our business lending has increased 75%, banks large and small a re continuing to post record profits, and credit unions are expanding their membership. She questioned attempts to reduce consumer protections. Turning to Ms. Wu, Maloney noted that the CFPB does not currently enforce CFOA, asking whether the proposed bill changes this in any way. Ms. Wu replied that the bill says FTC is the only entity that can enforce CROA with respect to credit bureaus and service bureaus, and can be seen as limiting the CFPB's UDAAP authority. She advocated for credit freezes as the best way to lock down credit and preventing further damage, as opposed to credit monitoring products.

Rep. Ed Royce (R-CA) followed on Maloney's questions about UDAAP. Ms. Fortney replied that the Royce bill does not interfere with the CFPB's UDAAP authority, but allows the FTC and consumers to pursue the rights and protections of consumers under CROA. Royce clarified that he proposes leaving CROA in place for credit repair, while changing the regulatory regime for credit education. He has tried to strike a balance between providing a clear path for improving consumer financial literacy, while leaving the FTC and CFPB's ability to pursue bad actors intact. Ms. Fortney added that the FTC has

developed standards for authorized service providers; companies wanting to be counted as such would have to go under close scrutiny. She believes the bill would enhance the process for determining service providers. Royce asked what access to credit education means for consumers; Mr. Quaadman replied that consumers need to be aware of factors that impact their financial situation. To the extent that consumers can understand what affects their score, they can be better consumers and participants in the financial system.

Rep. Nydia Velazquez (D-NY) turned to the Systemic Risk Designation Improvement Act, noting that it replaces the dollar threshold with an indicator-based approach. Regional banks are the primary lenders to small- and medium-sized businesses; she stated her concern about access to capital for small businesses. She recalled Mr. Tuggle's comments that compliance costs increase costs for access to capital for businesses, asking what steps he will be taking to improve access to capital. Tuggle described plans to lend more, stating that he is comfortable with his commitment to small businesses. Velazquez asked how his lending figures would change, should the bank cross the SIFI threshold. Tuggle replied that he could not give an exact number, though he has focused closely on CRA in recent years to increase lending.

Rep. Scott Tipton (R-CO) asked how the broad range of businesses subject to FCRA widens the statute's scope beyond simply credit bureaus. Ms. Fortney noted that the statute is applies to credit reporting companies that are not bureaus, as well as users of credit reports such as creditors, retailers, and employers. Quaadman agreed that employers use credit reporting in the hiring process; any violation in this scenario would be highly technical. Even these highly technical individual problems would be addressed under the draft bill, but as an individual rather than class issue. Mr. Tipton asked whether the changes in the bill would impair consumers' ability to protect themselves. Ms. Fortney replied that they would not be impaired in any way; the act has many protections for consumers, and consumers will continue to have the right to sue for violations of the act. However, the risk of draconian civil penalties for technical violations will be removed.

Rep. Roger Williams (R-TX) expressed concern that unnecessary regulations threaten the ability of consumers to fulfill their dreams. He spoke to his work in the last Congress to improve access to credit education service, and asked how lifting the three-day waiting period to access such services could improve consumer education. Mr. Quaadman replied that CROA protections will remain in place for predatory organizations. The three-day cooling off period inhibits the receipt of education through today's modern technology. Williams then asked whether there is evidence that consumers will benefit from innovative and individualized credit education products. Ms. Fortney replied that there is evidence that consumers want and will benefit from these services through a better understanding of their credit score, how to use it, and how to improve it.

Rep. Keith Ellison (D-MN) asked about the TRID Improvement Act, wondering whether there are examples of homebuyers paying strange and unexpected fees as part of their closing costs. Ms. Wu agreed that this certainly happens, as do kickbacks for referrals to specific agents or service providers. If homeowners find out about such schemes, Ellison wondered what action would be required by law. Ms. Wu replied that consumers may be entitled to refunds, actual damages, or in some cases, no remedy. In the case of accounting errors, creditors have 60 days to fix mistakes without liability. Ellison asked whether we should keep the pressure on lenders to regularly review their work for errors; Ms. Wu

emphatically agreed. Extending the review period, as proposed, removes pressure on lenders to examine their work and get things right.

Rep. Dave Trott (R-MI) turned to H.R. 1849, referencing Ms. Wu's testimony that the bill would eradicate protections against deceptive practices. Trott ran through a series of scenarios during which the Fair Debt Collection Practices Act applies, illustrating the consumer protections that remain intact. Claims that 1849 will hurt consumers, such as that of Ms. Wu, in which she alleged that the bill turns back the clock and allows litigators to hide behind attorney client privilege, are complete mischaracterizations of what the law does. Ms. Fortney agreed, and stated that this also mischaracterizes the FTC's comments on the issue, as well.

Rep. Barry Loudermilk (R-GA) praised the committee for bringing forward this packet of bills that fairly benefit everyone. He spoke to his bill, stating that it seeks to strike a fair balance that is consistent with ever other financial services consumer protection act we have on the books. He criticized the examples Ms. Wu brought forth, saying that they were all examples of individual lawsuits; his bill addresses only class action lawsuits and therefore would not have hindered the ability of any of those mentioned by Ms. Wu to receive full damages. Turning to CFPB complaints, he noted that complaints against credit bureaus are larger simpler because of the volume of people the bureaus serve. He rejected characterizations of his bill as a "credit bureau protection act" and illustrated the vast support for his bill across a wide variety of actors and sectors.

Rep. David Kustoff (R-TN) returned to the issue of decreased lending. Mr. Quaadman characterized the issue as circular, stating that businesses facing higher compliance costs are more averse to making loans. Meanwhile, small businesses seeking money are less likely to apply for credit, knowing that decreased lending has made it more difficult to obtain capital. These two issues combined create a significant drag on economic growth. When banks get close to the $50 billion level, many stop growing and decrease lending. Pushing past that threshold causes business cash deposits to be counted against LCR, making banks averse to even taking cash deposits. Turning to Mr. Tuggle, Mr. Kustoff asked how a SIFI designation would affect consumers in the rural area Mr. Tuggle's bank serves. Mr. Tuggle replied that increased expense incurred at the bank would lead to reduced credit and less investment in services and technology that allow for delivery to rural areas. Banks must invest in technology to remain competitive, he added.

Rep. Mia Love (R-UT) continued discussing H.R. 3312, addressing SIFI designations. She spoke to a Utah bank that is among the smallest SIFI-designated banks, stating that it had to move resources away from consumer services and lending to accommodate higher compliance costs. Compliance cost increases are always passed on to consumers, she added. Turning to Mr. Tuggle, Love noted that his bank seems to be going down a similar path. She asked about what Mr. Tuggle's bank does, whether it has an international presence or engages in complex trading.   Tuggle described his bank as a "bread and butter" lender, providing loans, credit, and various services to his community. In terms of risk, his bank is not dramatically different from a $5 billion or $10 billion bank. Love reiterated that the bills are not targeted at saving banks, but rather at providing consumers with the products they deserve.

Rep. Claudia Tenney (R-NY) addressed the draught in de novo banks, stating that today, there are fewer than 6,000 banks and credit unions serving consumers in the U.S.—a 100-year low.   Her Community Institution Mortgage Relief Act would provide relief for small institutions in our current regulatory environment. The bill would exempt small institutions from mandatory escrow requirements, as well as

new regulations. She asked Mr. Tuggle to highlight his suggestions for improving the bill. Mr. Tuggle replied that one of the exemptions is tied back to the $50 billion number; he feels this is arbitrary and doesn't reflect reality. Tenney asked what would be a determining factor to make the law more flexible and able to address community banks. Tuggle recommended measuring the number of loans made as indicative of small lenders who are unable to manage such expenses.

Rep. French Hill (R-AR) noted that the 2015 TRID rules had so many issues that the House overwhelmingly passed legislation to delay liability and attempt to address some of the problems. The CFPB itself recognized problems with the rules, and took in hundreds of comments in an attempt to tackle the inherent challenges. Hill's bill tries to ensure that we provide accurate information around title costs, though this can be very confusing. The rule attempts to make a marginal cost analysis based on the "actually charged amount;" he asked Mr. Quaadman for his opinion on this part of the bill's change. Mr. Quaadamn agreed that the rule itself does not convey appropriate information to consumers. Dodd-Frank required consolidation and streamlining of loan documents, but we still have much to do. This bill is an attempt to do that. Addressing concerns about extending the period for addressing errors from 60 to 210 days, Hill noted that this number is not arbitrary, but actually is an attempt to align the error discovery process with QM deadlines in Dodd-Frank.

Rep. Kyrsten Sinema (D-AZ) noted that not all prudential standards may be required for banks below the $50 billion threshold, but wondered, should the Federal Reserve choose to place some of these standards on some institutions based on their activities, whether it would be able to do so under the proposed legislation. Mr. Quaadman replied that the Fed would be able to do so, stating that they would still have some enhanced regulation. The draft allows the Fed to tailor a regulatory scheme to the bank to ensure that it fits the profile appropriately. Turning to Mr. Tuggle, Sinema asked what a smarter and better tailored regulatory regime's impact would be on big banks. Mr. Tuggle noted that regulations focused on specific risks are better than regulations across the board. Specifically, Tuggle noted that this applies with the Volcker Rule, stating that his bank is subject to the rule, though it did nothing to improve security.

Chairman Luetkemeyer reiterated that number thresholds are "get out of jail free cards" for some that allow regulators to avoid doing their jobs. He thanked the witnesses for their participation and adjourned the hearing.