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Testimony before the

U.S. HOUSE COMMITTEE ON FINANCIAL SERVICES SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

regarding

"Use of Credit Information beyond Lending: Issues and Reform Proposals"

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Mr. Chairman, Ranking Member Hensarling, and Members of the Subcommittee, the National Consumer Law Center thanks you for inviting us to testify today regarding the use of credit reports in areas beyond lending, such as employment and insurance. We also thank you for inviting us to speak about the need to fix a scrivener's error in the Fair Credit Reporting Act (FCRA). We offer our testimony here on behalf of our low income clients.[1]

I. CONGRESS SHOULD BAN THE USE OF CREDIT HISTORIES IN EMPLOYMENT WITH LIMITED EXCEPTIONS

We wish to thank Chairman Gutierrez for his introduction of H.R. 3149, the Equal Employment Opportunity for All Act. The use of credit reports in employment is a growing practice that is harmful and unfair to American workers. Despite many good reasons to avoid engaging in this practice, nearly half of employers (47%) do so today.[2] It is because of the harms, as well as the absurdities of this practice, that we strongly support H.R. 3149. This bill would restrict the use of credit reports in employment to only those positions for which it is truly warranted, such as those requiring a national security or FDIC mandated clearance.

We oppose the unfettered use of credit histories and support H.R. 3149, for the following reasons:

- **Credit checks in hiring create a fundamental "Catch-22" for job applicants.**

- **The use of credit in hiring discriminates against African American and Latino job applicants.**

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 inaccurate credit reporting from every part of the nation. It is from this vantage point – many years of observing the problems created by incorrect credit reporting in our communities – that we supply these comments. *Fair Credit Reporting* (6th ed. 2006) is one of the eighteen practice treatises that NCLC publishes and annually supplements. This testimony was written by Chi Chi Wu, with assistance from Nat Lippert of UNITE HERE, Richard Rubin and Leonard Bennett.
2 Statement of Elizabeth Owens Bille, Associate Counsel – Society for Human Resource Management, Presented to the Communications, Financial Services and Interstate Commerce Committee of the National Conference of State Legislatures, Dec. 11, 2009.

- **Credit history does not predict job performance.**

- **Credit reports suffer from unacceptable rates of inaccuracy, especially for a purpose as important as use in employment.**

Fundamentally, the issue at stake is whether workers are fairly judged based on their ability to perform a job or whether they're discriminated against because of their credit history. Eighteen states and the District of Columbia have recently considered legislation to restrict this practice.[3] Despite the lobbying efforts of the credit reporting industry, Oregon recently signed a bill (S.B. 1045) into law and other states are on their way to doing the same.

A. <u>Considering Credit Histories in Hiring Creates an Absurd "Catch-22" for Job Applicants</u>

The first and foremost reason to oppose the use of credit history for job applications is the sheer, profound absurdity of the practice. Using credit history, especially in an economy with such massive numbers of job losses such as the current one, creates a grotesque conundrum. Simply put, a worker who loses her job is likely fall behind on paying her bills due to lack of income. With the increasing use of credit reports, this worker now finds herself shut out of the job market because she's behind on her bills. As one law professor at the University of Illinois puts it "You can't re-establish your credit if you can't get a job, and you can't get a job if you've got bad credit."[4]

Some commentators have even said the use of credit reports to screen job applicants leads to a "financial death spiral: the worse their debts, the harder it is to get a job to pay them off."[5] This phenomenon has created concerns that the unemployed and debt-ridden could form a luckless class. It could affect future generations, as workers with impaired credit continue to struggle financially and cannot build assets to move ahead. These workers move further and further behind, while workers with good credit histories can get the best jobs, the best credit and the best insurance rates. Use of credit reporting in employment could contribute to the widening gap between haves and have-nots.

B. <u>The Use Of Credit History In Hiring Discriminates Against African American And Latino Job Applicants.</u>

There is no question that African American and Latino applicants fare worse than white applicants when credit histories are considered for job applications. For one thing,

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3 For a useful listing of state legislation on this issue, please visit the website set up by the National Conference of State Legislatures: <http://www.ncsl.org/IssuesResearch/BankingInsuranceFinancialServices/UseofCreditInformationinEmployment2010Legis/tabid/19825/Default.aspx>
4 Jonathan D. Glater, *Another Hurdle for the Jobless: Credit Inquiries*, New York Times, Aug. 6, 2009, available at http://www.nytimes.com/2009/08/07/business/07credit.html?pagewanted=all (quoting Professor Matthew W. Finkin).
5 *Id.*

these groups are already disproportionately affected by predatory credit practices, such as the marketing of subprime mortgages and overpriced auto loans targeted at these populations.[6] As a result, these groups have suffered higher foreclosure rates.[7] African Americans and Latinos also suffer from disparities in health outcomes, and as discussed in Section III of this testimony, health care bills are another source of black marks on credit reports.

Furthermore, African Americans and Latinos have markedly higher rates of unemployment. While the unemployment rate for whites was 9% in April 2010, it was 16.5% for African Americans and 12.5% for Latinos.[8] As discussed above, the simple fact of being unemployed is likely to harm an applicant's credit history because of the loss of income with which to pay bills.

In addition, numerous studies have documented how, as a group, African Americans and Latinos have lower credit scores than whites. If credit scores are supposed to be an accurate translation of a consumer's credit report and creditworthiness, that means these groups will fare worse when credit history is considered in employment. Studies showing racial disparities in credit scoring include:

- A 2007 Federal Reserve Board report to Congress on credit scoring and racial disparities, which was mandated by the 2003 Fair and Accurate Credit Transactions Act of 2003 (FACTA), amending the Fair Credit Reporting Act (FCRA).[9] This study analyzed 300,000 credit files matched with Social Security records to provide racial and demographic information. While the Federal Reserve's ultimate conclusion was to support credit scoring, its study found significant racial disparities. In one of the two models used by the Federal Reserve, the mean score of African Americans was approximately half that of white non-Hispanics (54.0 out of 100 for white non-Hispanics versus 25.6 for African Americans) with Hispanics fairing only slightly better (38.2).[10]

- A 2007 study by the Federal Trade Commission on racial disparities in the use of credit scores for auto insurance, also mandated by the 2003 FACTA amendments.[11] The FTC study found substantial racial disparities, with African Americans and Hispanics strongly over-represented in the lowest scoring categories.[12]

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6 *See* National Consumer Law Center, Credit Discrimination, §§ 1.1.1 and 8.4.2 (5th ed. 2009) (summarizing studies).
7 United for a Fair Economy, *Foreclosed: State of the Dream 20008* (January 2008).
8 Bureau of Labor Statistics, *Employment Situation Summary*, USDL-10-0589, May 7, 2010, *available at* http://www.bls.gov/news.release/empsit.nr0.htm.
9 Pub. L. No. 108-159, § 215 (2003).
10 Board of Governors of the Federal Reserve System, *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit* 80-81 (Aug. 2007).
11 Pub. L. No. 108-159, § 215 (2003).
12 Federal Trade Commission, *Credit-Based Insurance Scores: Impacts on Consumers of Automobile Insurance* 3 (July 2007).

- A 2006 study from the Brookings Institution which found that counties with high minority populations are more likely to have lower average credit scores than predominately white counties.[13] In the counties with a very low typical score (scores of 560 to 619), Brookings found that about 19% of the population is Hispanic and another 28% is African American. On the other hand, the counties that have higher typical credit scores tend to be essentially all-white counties.

- A 2004 study by Federal Reserve researchers finding that fewer than 40% of consumers who lived in high-minority neighborhoods had credit scores over 701, while nearly 70% of consumers who lived in mostly white neighborhoods had scores over 701.[14]

- A 2004 study published by Harvard's Joint Center for Housing Studies finding that the median credit score for whites in 2001 was 738, but the median credit score for African Americans was 676 and for Hispanics was 670.[15]

- A 2004 study conducted by the Texas Department of Insurance on insurance scoring finding that African-American and Hispanic consumers constituted over 60% of the consumers having the worst credit scores but less than 10% of the consumers having the best scores.[16]

- A 1997 analysis by Fair Isaac itself showing that consumers living in minority neighborhoods had lower overall credit scores.[17]

- A 1996 Freddie Mac study which found that African-Americans were three times as likely to have FICO scores below 620 as whites. The same study showed that Hispanics are twice as likely as whites to have FICO scores under 620.[18]

Based on this disparity, the Equal Employment Opportunity Commission has repeatedly expressed concern that the use of credit histories in the hiring process violates Title VII of the Civil Rights Act.[19] The EEOC has recently sued one company over its use of credit checks[20] and has suggested that it may issue formal guidance on the practice.

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13 Matt Fellowes, Brookings Inst., *Credit Scores, Reports, and Getting Ahead in America* 9-10 (May 2006).
14 Robert B. Avery, Paul S. Calem, & Glenn B. Canner, *Credit Report Accuracy and Access to Credit,* Federal Reserve Bulletin (Summer 2004).
15 Raphael W. Bostic, Paul S. Calem, & Susan M. Wachter, Joint Ctr. for Hous. Studies of Harvard Univ., *Hitting the Wall: Credit As an Impediment to Homeownership* (Feb. 2004).
16 Tex. Dep't of Ins., *Report to the 79th Legislature--Use of Credit Information by Insurers in Texas* (Dec. 30, 2004).
17 Fair, Isaac & Co., *The Effectiveness of Scoring on Low-to-Moderate Income and High-Minority Area Populations* 22, Fig. 9 (Aug. 1997).
18 *See* Freddie Mac, *Automated Underwriting: Making Mortgage Lending Simpler and Fairer for America's Families* (Sept. 1996), *available at* www.freddiemac.com/corporate/reports/moseley/mosehome.htm.
19 *See* Dianna B. Johnston, Assistant Legal Counsel, EEOC Informal Discussion Letter re Title VII: Employer Use of Credit Checks, Mar. 9, 2010, *available at* http://www.eeoc.gov/eeoc/foia/letters/2010/titlevii-employer-creditck.html. *See also* EEOC, Pre-

C. Credit History is Not a Valid Predictor of Job Performance

Credit reports were designed to predict the likelihood that a consumer will make payments on a loan, not whether he would steal or behave irresponsibly in the workplace. There is no evidence showing that people with weak credit are more likely to be bad employees or to steal from their bosses. The sole study on this issue, presented to the American Psychological Association in 2003, concluded there is no correlation between credit history and an employee's job performance.[21]

Regulators agree with this assessment. Dianna Johnston, assistant legal counsel to the Equal Employment Opportunity Commission, has stated: "Employers seem to be assuming that somebody with a poor credit history is more likely to steal, and I don't think there's any kind of evidence that supports that.[22]

Even TransUnion's representative on this issue, Eric Rosenberg, admitted at a recent legislative hearing in Oregon: "At this point we don't have any research to show any statistical correlation between what's in somebody's credit report and their job performance or their likelihood to commit fraud."[23] This is significant, as TransUnion has been the credit bureau that has led efforts against legislation restricting the use of credit reports in a number of states.

Unfortunately, proponents of using credit reports for employment use a "sloppy credit, sloppy person" hypothesis, arguing that a financial history is a good measure of an applicant's organization and responsibility. As one executive at an employment firm argued "[i]f you cannot organize your finances, how are you going to responsibly organize yourself for a company?"[24] The flaw in this hypothesis is that many people end up with a negative credit history for reasons they can't control. A consumer's financial problems reflected on a credit report may stem from, not irresponsibility, but because of a layoff, divorce, identity theft, or as discussed below, medical bills. A well-known Harvard study found that medical reasons cause about half of all bankruptcies in the U.S.[25] Many hard-working Americans live just one paycheck away from financial disaster.

Employment Inquiries and Credit Rating or Economic Status, undated, *available at* http://www.eeoc.gov/laws/practices/inquiries_credit.cfm; EEOC, *E-RACE Goals and Objectives*, at http://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm.

20 Complaint, EEOC v. Freeman, Case No.8:09-cv-02573-RWT (D. Md. Sept. 30, 2009).

21 Palmer, Jerry K. and Laura L. Koppes. *Further Investigation of Credit History as a Predictor of Employee Turnover*. Presentation to the American Psychological Society, 2003.

22 Ben Arnoldy, *The Spread of Credit Checks as a Civil Rights Issue*, Christian Science Monitor. January 18, 2007.

23 Andrew Martin, *As a Hiring Filter, Credit Checks Draw Questions*, New York Times, April 9, 2010, *available at* http://www.nytimes.com/2010/04/10/business/10credit.html.

24 Diane E. Lewis, *Qualification: Must Have a Good Credit History*, Boston Globe, September 5, 2006, at E1.

25 David U. Himmelstein, Elizabeth Warren, Deborah Thorne, & Steffie Woolhandler, *Illness and Injury as Contributors to Bankruptcy, Health Affairs--Web Exclusive*, Feb. 2, 2005, *available at* http://content.healthaffairs.org/cgi/reprint/hlthaff.w5.63v1.

D. Credit Reports Suffer from Rates of Inaccuracy that are Unacceptable for Use in Employment.

As NCLC and many other consumer advocates have testified before, the consumer reporting system suffers from high rates of inaccuracy. In addition, growing numbers of Americans have their credit reports horribly damaged from identity theft, predatory loans, or other abusive practices. Credit reports should be considered too unreliable to use as a critical (and sometimes determining) factor in whether a worker is able to obtain employment, especially in an environment where joblessness is so high and jobs are so scare. A consumer who has an error in her credit report might be able to later fix it[26] and reapply for credit, but if she loses a good job opportunity, it could doom her financially for months, harm her for years, or even affect her permanently. Very few employers will voluntarily hold up a hiring process for one or more months to allow an applicant to correct an error in a credit report.

In the hearings that led to the 2003 FACTA Amendments, Congress was presented study after study documenting errors in credit reports. For example, a study by the Consumer Federation of America and National Credit Reporting Association documented numerous serious errors and inconsistencies, such as the fact that 29% of credit files had a difference of 50 points or more between the highest and lowest scores from the three nationwide credit reporting agencies (i.e., Equifax, Experian and TransUnion).[27] Members of Congress cited studies from U.S PIRG showing errors in 70% of credit reports, of which 25% were serious enough to cause a denial of credit.[28]

This level of inaccuracy continues after the 2003 FACTA amendments. An on-line survey by Zogby Interactive found that 37% of consumers who ordered their credit report discovered an error, and 50% of those were not easily able to correct the error.[29] A subsequent 2004 study by U.S. PIRG showed no improvement, finding that 25% of credit reports studied still contained serious errors.[30] Even the Consumer Data Industry Association (CDIA) has admitted that, out of 57.4 million consumers who ordered their own credit reports in 2003, 12.5 million (or 21.8%) filed a dispute that resulted in an investigation.[31]

26 Even the ability of consumers to fix errors in their credit reports is questionable, given the automated and perfunctory nature of the credit bureaus' dispute resolutions systems. See Chi Chi Wu, National Consumer Law Center, *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports,* January 2009.
27 *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs*, 108th Cong. 381 (2003)(statement of Stephen Brobeck, Executive Director, Consumer Federation of America).
28 *Id.* at 351 (statement of Senator Paul S. Sarbanes).
29 Zogby Interactive, *Most Americans Fear Identity Theft*, Zogby's American Consumer, April 2007, at 3.
30 Nat'l Ass'n of State PIRGs, *Mistakes Do Happen: A Look at Errors in Consumer Credit Reports* 11 (2004).
31 Federal Trade Commission and Federal Reserve Board, *Report to Congress on the Fair Credit Reporting Act Dispute Process* (Aug. 2006), at 12.

As a result of the FACTA debates, the FTC was required to undertake a comprehensive study of errors in credit reports. The FTC is in the midst of this study. In the pilot phase of the study, 53% (16 out of 30) of consumers found an error in their credit reports. Sixteen percent of the consumers found errors that either would have likely had a material effect on their credit score (3 out of 30), or the effect was uncertain (2 out of 30).[32] In the second phase of the study, 31% of participants (40 of 128) found errors in the credit reports, and 12% (15 of 128) found errors that would have a material effect on their credit scores.[33] Note that the FTC has admitted that both of these studies were significantly skewed toward consumers with higher scores, who are less likely to have errors in their credit reports. For example, half of those consumers with a credit score under 610 had a material error but no consumer with a credit score over 790 had a material error. The study was also skewed to consumers with higher income households (with 34% having incomes over $100,000) and college graduates (66%).

The industry has attempted to rebut these statistics by claiming that fewer than 3% of credit reports are inaccurate; however, it reached this statistic by counting only those credit reports in which the consumer: (1) was denied credit; (2) requested a copy of their credit report; (3) filed a dispute; and (4) the dispute resulted in a reversal of the original decision to deny credit.[34] Thus, the industry's statistic did not include inaccuracies in the credit reports of consumers who did not apply for or were denied credit, had not filed a dispute, or who did not seek a reversal of the original denial of credit.

Error rates of 12% to 37% are simply too high to allow use of credit reports as a screening tool. Americans should not be put at risk of being shut out of the job market by a system that is flawed enough to harm as many as 1 in 3 workers. Even if one were to use the industry's highly questionable statistic of 3%, that leaves over 6 million American workers in jeopardy of being denied employment on the basis of an inaccurate credit report. American workers deserve better.

E. Congress Should Pass H.R. 3149

TransUnion recently stated in a legislative hearing that credit reports are the "de facto economic passport for every individual in this country, whether you like it or not."[35] Workers across the board have suffered wage cuts, layoffs and foreclosures during this economic crisis, all of which have impacted their credit history. As we work to rebuild our economy, we believe that hard work and dedication, not discriminatory and

32 Federal Trade Commission, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003* (December 2006), Appendix at 15..
33 Federal Trade Commission, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transaction Act of 2003* (December 2008).
34 Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (Dec. 2004), at 25, *available at* http://www.ftc.gov/reports/facta/041209factarpt.pdf (citing an Arthur Andersen study commissioned by the credit bureaus).
35 Statement of TransUnion Director of State Government Relations Eric Rosenberg before the Oregon Senate Commerce and Workforce Development Committee, February 8, 2010.

unreliable hiring tools such as credit reports, should be the economic passport for workers in the United States. Congress should act quickly to pass H.R. 3149, Equal Employment for All Act.

II. **CONGRESS MUST ACT TO CORRECT AN INJUSTICE RESULTING FROM A SCRIVENER'S ERROR IN THE FCRA.**

The FACTA amendments of 2003 may have inadvertently deprived consumers of a 30 year-old pre-existing right they had to enforce the FCRA requirement that users of credit reports disclose to consumers when an "adverse action" is taken, *i.e.*, credit or insurance is denied or provided on less favorable terms, on the basis of an unfavorable credit report. 15 U.S.C. § 1681m. Congress can easily fix this scrivener's error and should do so, as it was never part of the legislative bargain struck by FACTA.

- **The adverse action disclosure is fundamental to ensuring the effectiveness of the FCRA's accuracy protections. The ability for consumers to seek redress for an adverse action disclosure violation has been key to its enforcement for over 30 years.**

- **FACTA's legislative history clearly indicates that Congress had absolutely no intention of abolishing the consumer's right to seek redress of this important right. Current provisions of the FCRA, which exempt another subsection of section 1681m from private enforcement, make no sense and indicate that Congress did not intend to abolish consumer remedies for all of section 1681m.**

- **Even after FACTA's enactment, the credit industry did not claim to have eliminated the consumer remedy for the adverse action disclosure, with the *American Banker* only noting that FACTA "*perhaps inadvertently* eliminates the existing right of consumers and state officials to sue for any violations of the adverse-action provisions of the FCRA."**

- **Despite Congress's expressed intent in FACTA to preserve all then pre-existing rights of action in the FCRA, several dozen court decisions have held that FACTA abolished consumer remedies for adverse action disclosure violations, depriving hundreds of consumers of their rights.**

A. <u>Importance of the Adverse Action Disclosure Requirement and its Enforceability by Consumers</u>

When Congress enacted the FCRA, in addition to regulating credit reporting agencies, it imposed significant disclosure requirements on those who obtain and use consumer reports ("users"). Pub. L. No. 91-508, Title VI, 84 Stat. 1127 (1970) Section 615 of the Act, codified as 15 U.S.C. § 1681m, mandated that lenders, insurers, employers, and others using consumer reports disclose to a consumer whenever they use the consumer's report to make a decision adverse to the consumer's interests.

In the original FCRA and for over 30 years, adverse action disclosure by users of credit reports has been fundamental to the consumer protection structure Congress established in the FCRA. Adverse action disclosure is the linchpin of a three-part scheme. The user's disclosure of adverse action alerts the consumer to the presence of negative information in a credit report. After receiving this disclosure, the consumer has a statutory right to obtain a free copy of the report containing the negative information. 15 U.S.C. § 1681j. As the final element of this three-part self-help system, Congress created a formal dispute process by which the consumer could obtain correction of inaccurate information in the report that led to the adverse action. 15 U.S.C. § 1681i. The adverse action disclosure is thus the direct link to the dispute process through which consumers may seek correction of inaccuracies in their credit reports.

In 1970, Congress recognized that no one has a bigger stake in the accuracy of a credit report than the consumer whose name is on it. By establishing the right of consumers to seek private redress under sections 1681n and 1681o, Congress assigned the primary enforcement role to those with the greatest interest in accomplishing such a task – the individuals whose peace of mind and material wellbeing are directly impaired by inaccurate credit reports. In section 1681o, Congress gave consumers the right to recover actual and punitive damages against "[a]ny consumer reporting agency or *user* of information which willfully fails to comply with any requirement" of the Act. (Emphasis added.) Section 1681n in parallel fashion authorized the recovery of actual damages for any negligent violation of the Act. In the 1970 legislation, there were no exceptions to this private enforcement scheme.

Thus, since 1970, consumers have had the right to seek redress for violations of the adverse action disclosure requirement. And for over 30 years, private litigants provided the most significant enforcement of section 1681m's user disclosure requirements. A Westlaw search for reported Fair Credit Reporting Act cases in which section 1681m has been cited together with either section 1681n or 1681o yields 292 hits.

In contrast, there was been much less enforcement by federal regulators. According to the FTC, as of 2004, it brought twenty-nine enforcement actions involving the adverse action disclosure requirements.[36] A search of the FTC's website reveals only two more such since 2004.

In 1996, Congress made its first major revision to the FCRA after 25 years of experience under the original statutory regime. Congress substantially amended the FCRA in the Consumer Credit Reporting Reform Act of 1996 ("1996 Amendments"). Pub. L. No. 104-208, 110 Stat. 3009 (1996). These Amendments left the central core of section 1681m intact, and thus reaffirmed the adverse action disclosure requirement.

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36 Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (Dec. 2004), at 18-19, nn. 61-64, *available at* http://www.ftc.gov/reports/facta/041209factarpt.pdf

These amendments also left untouched sections 1681n and 1681o, confirming the primacy of private enforcement. During the 1996 amendment process, the FTC acknowledged that the FCRA "was designed to be largely self-enforcing" and expressed its position directly to Congress that any amendments maintain "the capacity of consumers to bring private actions to enforce their rights under the statute." S. Rep. 103-209, at 6 (1996).

B. Congress Did Not Intend FACTA to Abolish the Consumer's Right to Seek Redress for Violation of the Adverse Action Disclosure Requirements of the FCRA

The legislative history can be no clearer than Congress did not intend to abolish private enforcement of the FCRA's adverse action disclosure requirements when it enacted FACTA in 2003. At that time, credit reporting came to the legislative fore due to the imminent sunset of several provisions in the 1996 amendments that preempted state law. Competing House and Senate credit reporting bills worked their way through Congress during the fall of that year.

1. *The House Bill*

On September 10, 2003, the House passed House Bill No. 2622, entitled the "Fair and Accurate Credit Transactions Act of 2003." 149 Cong. Rec. H8167 (2003). The House Bill did not propose any amendments to the adverse action disclosure requirements under subsections (a) and (b) of section 1681m. H.R. Rep No. 108-396 (2003). The bill proposed only two amendments to section 1681m: (i) section 403 of the bill proposed a new subsection (e) to section 1681m to require debt collectors to provide information to identity theft victims under certain circumstances; and (ii) section 503 of the bill made some modifications to subsection (d) of section 1681m. The bill did not propose any limitations on the application of the FCRA's private enforcement provisions.

2. *The Senate Bill*

Senate Bill No. 1756, entitled the "National Consumer Credit Reporting System Improvement Act of 2003," proposed adding five new subsections to section 1681m. 149 Cong Rec. S13912 (2003), available at http://www.gpoaccess.gov/crecord/retrieve.html.:

- Section 114(a) proposed a new subsection (e) to section 1681m, requiring federal agencies to promulgate "Red Flag Guidelines and Regulations" to protect against identity theft.
- Section 154(b) proposed adding subsection (g) to prohibit the sale of debt known to be the result of identity theft.
- Section 155 proposed the addition of subsection (h) requiring debt collectors to provide information to identity theft victims.
- Section 212(b) proposed a new subsection (i), requiring users to disclose extensive credit scoring information in consumer mortgage transactions.

- Finally, section 311(a) proposed a new subsection (j), requiring users to make detailed disclosures to consumers in risk-based pricing credit transactions ("risk based-pricing notice").

The Senate Bill also explicitly addressed — and thus confirmed — the continued vitality of private enforcement of the existing subsections of section 1681m. Section 312(c) of the bill proposed to restrict private rights of action under FCRA only as to violations of proposed new subsections "(e) and (f)" of section 1681m. Subsection "(e)" referred to the newly proposed Red Flag Guidelines and Regulations; the reference to subsection "(f)" appears to be a drafting error because no such subsection existed, and the bill didn't propose one. A parallel provision limited enforcement of these same subsections (e) and (f) to federal and state regulatory agencies.

Section 312 of the Senate Bill also contained a clause prohibiting any interpretation of the bill that would limit private enforcement under sections 1681n and 1681o based on violations of any of the then existing FCRA provisions. Section 312(d) stated:

> Rule of Construction.--Nothing in this section, the amendments made by this section, or any other provision of this Act shall be construed to affect any liability under section 616 or 617 of the Fair Credit Reporting Act (15 U.S.C. 1681n, 1681o) that existed on the day before the date of enactment of this Act.

This provision expressly preserved all private enforcement rights that existed under the FCRA as of the date of the new law. The only restrictions in the Senate Bill on private enforcement under sections 1681n and 1681o appeared in section 312(c) (with respect to proposed newly added subsections of section 1681m) and in section 151(a), which added new protections for identity theft victims as part of section 1681g. Because these were new provisions of the FCRA, section 312(d) did not apply to them. Section 312(d) stated directly that regardless of any limitations on the enforcement of these newly added provisions, Congress had no intention to cut back the pre-existing private enforcement regime.

3. *The Conference Bill*

The provisions of FACTA come from the Senate Bill, as amended in the Senate and later by House and Senate conferees. On November 5, 2003, without voting on the Senate Bill, the Senate amended the House Bill by gutting it, replacing it with the provisions of the Senate Bill, and passing it. 149 Cong Rec. S13980-94 (2003).

On November 6, both houses agreed to a conference. 149 Cong Rec. H10514-15, S13994 (2003). The conferees hurriedly negotiated a conference report, which was completed on November 21. H.R. Rep No. 108-396 (2003); 149 Cong. Rec. H12198. The House immediately passed the conference bill on November 21. 149 Cong. Rep. 12247 (2003). The Senate passed the bill the following day. Id. S15570. The President signed the conference report version of House Bill No. 2622 — now FACTA — into law two weeks later on December 4, 2003. Pub. L. 108-159, 117 Stat. 1960 (2003).

If the House had simply accepted the Senate's amendments — that is, had accepted the Senate Bill — FACTA would not have clouded private enforcement of section 1681m. The House and Senate conferees, however, agreed to changes to section 1681m in the Senate Bill that resulted in the scrivener's error.

The conference version of the House Bill — that is, the bill that became FACTA itself — incorporated the risk-based pricing notice section of the Senate Bill, section 311. *See* 149 Cong. Rec. S13989 (2003). Subsection (a) of section 311 is now codified as 15 U.S.C. § 1681m(h). The conference report adopted the Senate's section 311 with two exceptions. First, the risk-based pricing subsection was re-lettered from (j) to (h) in the codified version. Second, the conference version of section 311 added two new paragraphs to the new section 1681m(h):

> (7) Compliance.--A person shall not be liable for failure to perform the duties required by this section if, at the time of the failure, the person maintained reasonable policies and procedures to comply with this section.
>
> (8) Enforcement.—
>
>> (A) No civil actions.—[Sections 1681n and 1681o] shall not apply to any failure by any person to comply with this section.
>>
>> (B) Administrative enforcement.--This section shall be enforced exclusively under [section 1681s] by the Federal agencies and officials identified in that section.
>
> (Code sections inserted.)

The conferees also adopted section 312(c) of the Senate Bill, which had been the only provision in that bill relating to private rights of action under section 1681m. This subsection of the Senate Bill had stated in part: "sections [1681n and 1681o] do not apply to any violation of … (3) subsection (e) or (f) of [1681m]." 149 Cong Rec. S13990 (2003) (code sections inserted). The conferees included this provision of the Senate version in FACTA, but eliminated the reference to section 1681m(f). FACTA § 312(e)(1).

The conferees also agreed to include section 312(d) from the Senate Bill in FACTA, which appears as section 312(f) in the conference bill. 149 Cong. Rec. S13990 (2003). This is the provision (noted above) stating that "nothing in the Act shall be construed to affect any liability under section 616 or 617 of the Fair Credit Reporting Act (15 U.S.C. 1681n, 1681o) that existed on the day before the date of enactment of this Act."

Because the Senate Bill contained no limitation on private enforcement of the existing subsections of section 1681m, any provisions in FACTA eliminating these remedies must have been introduced by the House conferees into the conference version of the bill. However, the report on the conference bill presented to the House before its November 21 vote contained no indication that the House conferees had obtained elimination of private enforcement of section 1681m as a concession from the Senate, or even that this had ever been an issue in the conference.

To the contrary, this report shows that the new paragraph (8) of subsection 1681m(h) was not intended to have that effect. Representative Michael Oxley (R-OH), one of the House conferees, provided the House this section-by-section report on the conference bill. 149 Cong. Rec. E2512-19 (2003). With specific respect to section 311, which mandated the risk-based pricing disclosures to consumers, he reported:

> The FTC and FRB are directed to jointly prescribe rules to carry out this section. *The rules are to address the form, content, time and manner of delivery of the notice; the meaning of the terms used in the section; exceptions to the notice requirement; and a model notice*. The section provides creditors with a safe harbor if they maintain reasonable policies and procedures for compliance, and *the section is only subject to administrative enforcement by the appropriate Federal agencies*.
>
> *Id.* at E2516 (emphasis added).

Representative Oxley's references to "section" are to section 311 of the conference bill, not to section 1681m of the FCRA.

4. *Deliberately Abolishing Private Enforcement of the Adverse Action Disclosure Requirement Creates Multiple Inconsistencies and Redundancies*

If Congress had intentionally abolished private enforcement of all of section 1681m by the use of the word "section" in paragraph (8) of subsection 1681m(h), it would render several other provisions of FACTA as redundant and superfluous
First, it would render Section 1681s-2(c)(3), as amended by FACTA § 312(e), to be totally superfluous. That section expressly provides that the private remedies sections do not apply to one portion of section 1681m, namely subsection 1681m(e), the provision dealing with the Red Flag Guidelines. It would make no sense for Congress to exempt section 1681m(e) from private enforcement if all of section 1681m were already exempt by virtue of §1681m(h)(8).

This redundancy indicates that the reference to "section" in § 1681m(h)(8) was intended to apply to § 1681m(h) only. Indeed, "this section," standing alone and taken even in its most technical sense in the drafting hierarchy, may sensibly refer to the "section" of which it is a part — 311 of FACTA — rather than section 1681m of the

FCRA. Using “this section” to refer to a section of FACTA is entirely consistent with the hierarchical organization of statutes described in the Congressional drafting manuals.

Furthermore, Congress repeatedly used “this section” to refer to sections of FACTA itself. *See, e.g.*, FACTA §§ 211(d)(1)(A), 211(d)(4), 213(b), 312(f), 313(b)(3), 318(b), 411(d), 412(d), 412(g), 515(d), 518(a), 518(e), 518(f). Congress also used FACTA section numbers within text to be codified in Title 15. *See, e.g.*, FACTA § 211(a) (adding a new subsection (a) to 1681j, including paragraph (1)(B), stating in part: “Subparagraph (A) shall apply with respect to a consumer reporting agency described in section 603(p) only if the request from the consumer is made using the centralized source established for such purpose in accordance with *section 211(c)* of the Fair and Accurate Credit Transactions Act of 2003”) (emphasis added); § 211(c) (amending § 1681g(c)(1)(B)(5) in similar fashion). In section 151, Congress used “this section” to refer to section 151 itself in amending section 1681g. Section 151(a) added a new subsection (e) to section 1681g. Section 151(a) of FACTA provides that new section 1681g(e)(3)(c) will state in part: “The request of a victim under paragraph (1) shall … (C) if asked by the business entity, include relevant information about any transaction alleged to be a result of identity theft to facilitate compliance *with this section* …” (Emphasis added.) “This section” refers to section 151, not section 1681g, because the information to be included in the victim request is to facilitate compliance with the new disclosures businesses are now required to provide identity theft victims under section 151, not compliance with any other part of section 1681g.

5. *Multiple Facts Demonstrate that Congress Did Not Intend to Deliberately Abolish Private Enforcement of the Adverse Action Disclosure.*

The legislative history of FACTA leaves little doubt that use of “this section” was not intended to eliminate the 30 year old pre-existing right of consumers to seek redress of the adverse action disclosure requirements. Evidence of this includes:

- Neither the House nor the Senate Bills ever proposed to limit private enforcement of any of the pre-existing subsections of section 1681m.
- FACTA included section 312(f), which expressly preserves private enforcement under the existing provisions of the FCRA. While not codified in the United States Code, this provision is still effective law as part of the Statutes at Large. Pub. L. 108-159, 117 Stat. 1960, § 312(f) (2003).
- FACTA specifically added current section 1681s-2(c)(3), which exempts "subsection (e) of section 1681m" from private enforcement. In addition, Congressional conferees deliberately amended this provision to remove subsection 1681m(f) from the list of FCRA provisions for which FACTA excluded from private enforcement. Removing subsection 1681m(f) would have been a meaningless exercise if Congress had intended FACTA to abolish private enforcement of all of the subsections of section 1681m.

- Representative Oxley's section-by-section report on FACTA before the vote in the House referred to the liability and enforcement limitation provisions of section 311 as applying only to that FACTA section, not to section 1681m as a whole.

Thus, Congress did not intend to limit private enforcement of section 1681m except with respect to two of the newly added subsections, (e) and (h). But in the hurry to prepare the conference report in the days between November 6 and November 21, "this section" was inadvertently used instead of "this subsection" in the conferees' insertions at the end of section 311(a), namely paragraph (8) of section 1681m(h). This was simply one of likely many drafting irregularities in the huge bill, hurriedly negotiated between the houses under the looming January 1, 2004 deadline for the sunset of the FCRA's state law preemption provisions, and then passed hurriedly without time for review or debate. FACTA includes 45 sections with subparts almost too innumerable to count. It contains over 26,000 words.

C. <u>After FACTA's Enactment, the Industry Did Not Claim to Have Eliminated Consumer Enforcement of the Adverse Action Disclosure Requirement.</u>

A week after FACTA was signed into law, an article appeared in *American Banker* regarding the 35-day gap that the bill had left between the expiration of preemption provisions under the 1996 amendments and the effective date of FACTA.[37] The reporter for *American Banker* noted in passing that FACTA "*perhaps inadvertently* eliminates the existing right of consumers and state officials to sue for any violations of the adverse-action provisions of the FCRA." (emphasis added).

Had Congress intended FACTA to carve private damages suits wholesale out of the user liability section of the FCRA, the banking and credit industry would have trumpeted that change in the days following the President's signature. Instead, just days after FACTA became law, a leading industry trade journal reported that private enforcement of section 1681m was only "perhaps" and only "inadvertently" eliminated. *American Banker* was reporting the simple truth that neither Congress nor the industry ever contemplated that result.

It would have been extraordinary for Congress, after over 30 years of well-established private enforcement of section 1681m, to abolish that right without the slightest indication from any member of Congress or any lobbying or fanfare from the consumer credit industry. Even four years after FACTA's passage, industry representatives declined to claim that FACTA had intentionally abolished this private enforcement remedy. In a 2007 hearing before the full committee, Chairman Barney Frank engaged in the following colloquy with Stuart Pratt, President and CEO of the Consumer Data Industry Association, and Anne Fortney of Hudson Cook, another industry representative.[38]

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37 M. Heller, *Regulators Scurry to Close FACT Act Loophole*, American Banker (Dec. 12, 2003), at 3.
38 *Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information: Hearing Before the H. Comm. on Fin. Serv.*, 110 Congr. 50 (2007).

The CHAIRMAN. We will look into that. Let me just ask, the other question is to Ms. Fortney and Mr. Pratt, because both Ms. Wu and Mr. Bennett talked about the interpretation that we had sub silentio repeal of the private right of action. Do you agree that was something that was not done intentionally? And what would your view be to our restoring it? Mr. Pratt?

Mr. PRATT. We didn't work on that section of the FACT Act. It relates to the date of furnishers and the date of—

The CHAIRMAN. Okay. Ms. Fortney?

Ms. FORTNEY. I think the statute is clear, and that is why the vast majority—

The CHAIRMAN. That wasn't the question.

Ms. FORTNEY. Okay. I know.

The CHAIRMAN. Then why don't you answer it?

Ms. FORTNEY. The answer is, I don't know that whoever drafted that—

The CHAIRMAN. Fair point. But would you like to leave it the way it is?

Ms. FORTNEY. I am sorry?

The CHAIRMAN. Would you object if we restored the right of action that is in the bill?

Ms. FORTNEY. I don't have an opinion on that, sir.

The CHAIRMAN. Oh, okay. Then it is two to nothing, two abstentions.

D. <u>Court Decisions Abolishing Consumer Redress for Adverse Action Disclosure Violations Have Deprived Consumers of their Rights under the FCRA</u>

Unfortunately, the mistaken use of the phrase "this section" in Section 1681m(h)(8) has been interpreted by most of the 46 courts to address the issue to apply to the pre-existing adverse action requirements, creating chaos and uncertainty.[39] These

39 Perry v. First Nat. Bank, 459 F.3d 816 (7th Cir. 2006) (collecting cases); Banga v. Allstate Ins. Co., 2010 WL 1267841 (E.D. Cal. Mar. 31, 2010); Tobler v. Equifax, 2009 WL 1491046, at *3 (E.D. Mich. May 27, 2009); Meyers v. Freedom Credit Union, 2007 WL 2753172, at *5 (E.D. Pa. Sept. 21, 2007); Gelman v. State Farm Mut. Auto. Ins. Co., 2007 WL 2306578, at *9 (E.D. Pa. Aug. 9, 2007); Soroka v. JP Morgan Chase & Co., 2007 WL 895249, at *6 (S.D.N.Y. Mar. 19, 2007); Miller v. Corestar Fin. Group of Pa., Inc., 2007 WL 419194, at *2 (Feb. 5, 2007);; Murray v. HSBC Auto Fin., Inc., 2006 WL 2861954, *7 (N.D. Ill. Sept. 27, 2006); Panko v. Discover Fin. Servs., LLC, 458 F. Supp. 2d 580, 584 (N.D. Ill. 2006); Murray v. E*Trade Fin. Corp., 2006 WL 2054381, at *3 (N.D. Ill. July 19, 2006); Soroka v. Homeowners

courts that have addressed this issue have fastened on the term "section" in paragraph (8) of section 1681m(h), holding that this term unambiguously refers to section 1681m as a whole.

Only two courts have been percipient enough to analyze the legislative history and realize that use of the word "section" was an error.[40] It was the court in one of these cases that term this a "scrivener's error."[41]

As a result, there have been allegedly at least 44 users of credit reports –lenders, insurers, and other businesses - that have denied potentially hundreds of consumers their right to receive adverse action disclosures. These documented cases are perhaps only the tip of the iceberg, as we assume that attorneys representing consumers have been discouraged from bringing these cases by these unfavorable court decisions. Indeed, an informal and quick poll of attorneys who represent consumers in credit reporting cases found six respondents who had seen violations of the FCRA adverse action requirements who had declined to bring a case because of the decisions holding that FACTA had abolished the pre-existing right of action for these violations. One of these attorneys noted that he had just turned away a client who presented such a violation, in connection with seeking rental housing. Another attorney noted that he had seen lack of adverse action notices from mortgage companies, car dealers, and providers of rental housing, all of whom had accessed consumer reports. A legal services attorney noted: "I have found that employers and landlords routinely fail to provide notice or copies of the consumer reports."

Loan Corp., 2006 WL 4031347, at *7 (M.D. Fla. June 12, 2006); Shellman v. Country Wide Home Loans, Inc., 2006 WL 1544427, at *2 (N.D. Ind. June 1, 2006); Bruce v. Keybank Nat'l Ass'n, 2006 WL 1408349, at *5 (N.D. Ind. 2006); Cavin v. Home Loan Ctr., Inc., 2006 WL 1313191, at *7 (N.D. Ill. May 10, 2006); Tremble v. Town & Country Credit Corp., 2006 WL 163140, at *2 (N.D. Ill. Jan. 18, 2006); Bonner v. CorTrust Bank, N.A., 2006 WL 1980183, at **3-4 (N.D .Ind. July 12, 2006); Miller v. CoreStar Fin. Group of Pa., Inc., 2006 WL 1876584, *2 -3 (E.D.Pa. June 29, 2006); Bruce v. Wells Fargo Bank, N.A., 2006 WL 1195210, at *2 (N.D. May 2, 2006); Crowder v. PMI Mortg. Ins. Co., 2006 WL 1528608, at *4 (M.D. Ala. May 26, 2006) (rejecting argument that section 1681m(h)(8) should not be applied retroactively); Bonner v. Home123 Corp., 2006 WL 1518974, at *4 (N.D. Ind. May 25, 2006); Bruce v. Grieger's Motor Sales, Inc., 422 F. Supp. 2d 998, 991 (N.D. Ind.); Putkowski v. Irwin Home Equity Corp., 423 F.Supp.2d 1053, 1060 62 (N.D.Cal.2006); Bonner v. H & R Block Mortg. Corp., 2006 WL 760258, at *3 (N.D. Ind. Mar. 23, 2006); Phillips v. New Century Fin. 2006 WL 517653, at *2-4 (C.D. Cal., Mar. 1, 2006); Harris v. Fletcher Chrysler Prods., Inc., 2006 WL 279030, at *2 (S.D. Ind. Feb 02, 2006); White v. E-Loan, Inc., 409 F. Supp. 2d 1183, 1184-87; Killingsworth v. Household Bank (SB), N.A., 2006 WL 250704, at *3 (N.D. Ill. Jan. 31, 2006); Stavroff v. Gurley Leep Dodge, Inc., 2006 WL 196381, at **2-5 (N.D. Ind., Jan.20, 2006); Villagran v. Freeway Ford, Ltd., 2006 WL 964731 (S.D. Tex. Jan. 19, 2006); Murray v. Cross Country Bank, 399 F. Supp. 2d 843, 844 (N.D. Ill. 2005); Murray v. Household Bank, 386 F. Supp. 2d 993, 997-99 (N.D. Ill. 2005); Hernandez v. Citifinancial Servs., Inc., 2005 WL 3430858, at *6 (N.D. Ill., Dec.9, 2005); McCane v. America's Credit Jewelers, Inc., 2005 WL 3299371, at *3 (N.D. Ill. Dec. 1, 2005); Phillips v. New Century Fin. Corp., No. SA CV 05-0692, Order at 5 (C.D. Cal. Nov. 9, 2005); Pietras v. Curfin Oldsmobile, Inc., 2005 WL 2897386, at * 4 (N.D. Ill. Nov. 1, 2005).

40 Barnette v. Brook Road, Inc., 429 F. Supp. 2d 741 (E.D. Va. 2006); Kubbany v. Trans Union, LLC, 2009 WL 1844344 (N.D. Cal. June 2, 2009).

41 Barnette v. Brook Road, Inc., 429 F. Supp. 2d 741 (E.D. Va. 2006).

E. A Simple Fix

The scrivener's error that has deprived hundreds of consumers of their rights already, and has the potential to harm thousands more in the future, can be corrected with a very simple fix. The fix consists of the addition of three letters to two places in the FCRA:

Proposal: Revise 15 U.S.C. § 1681m(h)(8) to read:

(A) No civil actions.---Sections 1681n and 1681o shall not apply to any failure by any person to comply with this subsection.

(B) Administrative enforcement ---- This subsection shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials identified in that section

This change reinstates a right that had existed for over 30 years from to FACTA, and has no impact on any other provision of the FCRA or FACTA.

III. CONGRESS SHOULD REQUIRE THAT PAID OFF MEDICAL DEBT BE DELETED FROM A CONSUMER'S CREDIT REPORT

The National Consumer Law Center, on behalf of its low-income clients, is pleased to support the Medical Debt Relief Act of 2009, H.R. 3421. Millions of Americans struggle with overwhelming medical debts that they can not afford to pay because they do not have health insurance. Even consumers with health insurance coverage can find that their credit histories are damaged because of problems with unaffordable co-pays and deductibles, out-of-network charges, and disputes with insurance companies.

The collective scope and impact on medical debt on the credit histories of American consumers is enormous and cannot be understated. According to the Commonwealth Fund, accrued medical debt plagued nearly 72 million working age adults in 2007.[42] Of those consumers, 28 million were contacted by a collection agency for unpaid medical bills, and thus had the potential of have their credit reports damaged by the negative existence of a collection account on their reports. One stunning statistic from a 2003 Federal Reserve study is that over half of collection agency accounts and nearly one-fifth of lawsuits that show up as negative items on credit reports are for medical debts.[43]

Moreover, consumers may find that their medical debt has been characterized as a debt in collection for credit reporting purposes even though the medical debt has been

42 M. M. Doty, S. R. Collins, S. D. Rustgi, and J. L. Kriss, Seeing Red: The Growing Burden of Medical Bills and Debt Faced by U.S. Families, The Commonwealth Fund, August 2008.
43 Robert Avery, Paul Calem, Glenn Canner, & Raphael Bostic, *An Overview of Consumer Data and Credit Reporting*, Fed. Reserve Bulletin, at 69 (Feb. 2003).

fully paid or settled. This may result from no fault of the consumer, but from a dispute between the insurance company and provider. It may even result from a provider's failure to properly bill the insurer. Despite the fact that the bill is paid off or otherwise settled and has a balance of zero, the presence of the medical bill as a collection matter remains on the consumer's credit records for seven years and may adversely impact a consumer's credit score.

H.R. 3421 amends the Fair Credit Reporting Act to exclude fully paid and settled medical debt from a consumer's credit report. It is a sensible and straightforward approach requiring the removal from a consumer's credit report any reference of a medical account with a balance of zero. The Medical Debt Relief Act of 2009 will prevent the credit records of millions of consumers from being unfairly tarnished. Rather, credit records will show that these hard working consumers, who successfully paid off or settled their medical bills, are more creditworthy than the current system would otherwise lead a prospective lender to believe.

IV. **CONGRESS SHOULD BAN THE USE OF CREDIT SCORING IN INSURANCE**

Along with many civil rights and consumer groups, the National Consumer Law Center, on behalf of its low-income consumers, opposes the use of credit-based insurance scores. The practice creates wide racial disparities and is fundamentally unfair to consumers. We have attached our 2007 report, *Credit Scoring and Insurance: Costing Consumers Billions and Perpetuating the Economic Racial Divide*, which discusses the problems with this practice in detail.

Thank you for the opportunity to testify, and I look forward to your questions