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EXAMINING THE NEED FOR H.R. 2885, THE CREDIT MONITORING CLARIFICATION ACT

HEARING

BEFORE THE

COMMITTEE ON FINANCIAL SERVICES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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EXAMINING THE NEED FOR H.R. 2885, THE CREDIT MONITORING CLARIFICATION ACT

Tuesday, May 20, 2008

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The committee met, pursuant to notice, at 10:05 a.m., in room 2128, Rayburn House Office Building, Hon. Barney Frank [chairman of the committee] presiding.

Members present: Representatives Frank, Kanjorski, Waters, Maloney, Watt, Moore of Kansas, Clay, McCarthy, Baca, Miller of North Carolina, Scott, Green, Cleaver, Perlmutter; Bachus, Royce, Jones, Biggert, Price, and Heller.

The CHAIRMAN. This hearing of the Committee on Financial Services will come to order.

We are here today to have a legislative hearing on H.R. 2885, the Credit Monitoring Clarification Act. The chairman of the Capital Markets Subcommittee, Mr. Kanjorski of Pennsylvania, is the sponsor and the lead person on this committee on this issue as on many others.

So I will be convening the hearing, but I will be turning over the gavel to Mr. Kanjorski, who will be the prime sponsor and guide as we go forward on this legislation. I think we have a bill where there is conceptual agreement. There are some questions about the specifics, so this is a hearing in which I think it will be very important to focus on how to do this and make, I think, an important contribution to the good functioning of the financial community.

So, with that, I am going to turn it over to the gentleman from Pennsylvania, who will be making the opening statement and conducting the hearing.

Mr. KANJORSKI. [presiding] Thank you, Mr. Chairman.

The Committee on Financial Services will come to order. Without objection, all members' opening statements will be made a part of the record. I thank you, Mr. Chairman, for convening the full committee hearing on H.R. 2885, the Credit Monitoring Clarification Act. Congressman Royce and I have worked on this issue for several years, and our legislation enjoys the support of many members of the Financial Services Committee.

If promoted and sold in a truthful manner, credit monitoring services can help consumers maintain an accurate credit file and provide them with valuable information for fighting identity theft. Credit monitoring is also often provided free-of-charge to victims of

data security breaches, and as a result has gained wide acceptance in the marketplace.

In 1996, we enacted the Credit Repair Organizations Act, otherwise known as CROA. This law protects consumers against the problematic and unethical credit practices of credit repair organizations. In enacting CROA, we put in place a broad definition of what constitutes a credit repair organization. In the decade following the enactment of CROA, products such as credit monitoring services have come into the market. In recent years, however, some parties have begun to interpret the CROA definition of a credit repair organization to include credit monitoring services, exposing the providers of credit monitoring services to legal ambiguity. These interpretations also result in the provision of confusing credit repair notices to credit monitoring consumers.

Additionally, because CROA prohibits advance payments, the providers of legitimate credit monitoring products cannot offer annual subscriptions. The Federal Trade Commission has for several years indicated support for differentiating the treatment of credit monitoring services for the treatment of repair organizations under CROA.

In testimony and correspondence, the Commission has regularly noted that it "seized little basis on which to subject the sale of legitimate credit monitoring and similar educational products and services to grow specific prohibitions and requirements, which were intended to address deceptive and abusive credit repair business practices."

To address the Commission's concerns, we have worked for a number of years on the legislation. In the 109th Congress, during the mark-up of the Accountability and Trust Act in the Financial Services Committee, we offered an amendment that passed in a voice vote to clarify the treatment of credit monitoring under CROA. Since then, we have worked to revise and include our legislative proposal to include new consumer protections and refine the credit monitoring exception.

As introduced, H.R. 2885 would provide an activity-based exemption from CROA for credit monitoring services. The users of these services would get new consumer protections, too. Additionally, our bill updates the credit repair disclosures required under CROA to reflect changes made by the Fact Act in 2003 that provide consumers with access to free credit reports.

Today's hearing will help us to determine how we can further improve H.R. 2885. In an effort to strike the right balance we have modified this legislation considerably over the years. We will continue to do so going forward, I suspect. The Commission has advised us that the exemption for legitimate credit monitoring services must be carefully considered and narrowly drawn.

Consumer groups also want to ensure that the legislation does not ultimately undermine CROA's existing consumer protections against fraudulent credit repair organizations. I agree with both of them. To achieve the goal of workable credit monitoring exemption under CROA, that maintains strong consumer protections, the Commission has previously urged the Congress to continue to reach out to stakeholders. Today's hearing acts on that recommendation

by bringing together a number of stakeholders who detail concerns and find common ground.

In sum, I am pleased that we have the opportunity here to learn more about the benefits of credit monitoring and to learn more about the concerns with our legislation. We need to ensure that as we move forward with the consideration of H.R. 2885, we do not allow bad actors to use the proposed exemption to circumvent CROA's protections. It is therefore my hope that we can work with all interested parties going forward to perfect the language of the bill.

Are there any other members with opening statements?

Mr. Bachus.

Mr. BACHUS. Thank you, Chairman Kanjorski. I want to thank you and Congressman Royce for your leadership in bringing the Credit Monitoring Clarification Act before this committee.

As you know, Ranking Member Biggert of the subcommittee and I are both co-sponsors of this legislation and we both commend you and Mr. Royce for all of your fine work on this legislation. I also thank Chairman Frank for agreeing to hold this hearing.

In 1996 Congress, through the leadership of this committee, enacted the Credit Repair Organization's Act, or CROA, to help consumers by putting an end to unfair and deceptive practices of entities that promised that they could remove negative but accurate data from a consumer's credit report. In its effort to help consumers, Congress imposed a number of requirements on credit repair organizations.

Perhaps most significantly we prohibited these businesses from charging customers fees before they had performed the services they promised, but industry practices have changed. CROA was enacted before certain monitoring products became popular, as consumers sought new ways to track their credit histories and to protect themselves against identity theft.

As I said earlier, the gentleman from Pennsylvania, Subcommittee Chairman Kanjorski, and the gentleman from California, Mr. Royce, took leadership on this issue and worked closely with the Federal Trade Commission to ensure that their legislation will allow these legitimate credit monitoring products to be offered without running afoul of CROA.

Under the legislation, firms offering credit monitoring services must provide consumers with certain disclosures and the opportunity to counsel without paying a penalty or fee. H.R. 2885 also updates the more general disclosures that must be provided to customers or consumers under CROA to conform the statute to changes made by the Fair and Accurate Transactions Act, or the Fact Act of 2003, which this committee fashioned in a bipartisan way, and I think has been one of the great successes of bipartisan cooperation in the past Congress.

H.R. 2885 will build on this and is substantially similar to provisions that were included in data security legislation that passed the committee in the 109th Congress, but was never considered by the full House. So, once again, Mr. Kanjorski, I want to thank you; I want to thank Representative Royce and the other co-sponsors of this legislation; I want to Chairman Frank for holding the hearing;

and finally, I thank the witnesses for being here today and for the testimony you will offer.

Thank you very much.

Mr. KANJORSKI. Thank you, Mr. Bachus.

I would like to recognize the Congressman from Kansas, Mr. Moore, who has been instrumental in support of this legislation.

Mr. MOORE OF KANSAS. Thank you, Mr. Chairman, and I thank you for holding this important hearing today on H.R. 2885, the Credit Monitoring Clarification Act. As we all know, identity theft and misuse of personal data are extremely serious problems in our society.

The consequences of identity theft can become increasingly severe the longer it goes undiscovered, and it is very important that consumers have all the available tools to monitor their sensitive personal data and direct fraudulent activity early in the process. Credit monitoring services are important tools that empower consumers with information about changes to their credit report and explanations for these changes so consumers can take immediate action to protect themselves in the event of an error on their credit report.

Additionally, these products help consumers make educated decisions that will improve their credit status. Unfortunately, the continuation of these services is endangered due to an unintended consequence of a 1996 law enacted by Congress, the Credit Repair Organizations Act, CROA, to protect consumers against the problematic and unethical practices of credit repair organizations.

I don't believe that Congress enacted CROA with the intent of diminishing access to credit monitoring products which were not yet in existence at the time the law was enacted. For this reason, I am a co-sponsor of H.R. 2885, which would clarify that credit monitoring products are not subject to the same restrictions as credit repair products under CROA.

As we move forward, Mr. Chairman, we should make every effort to ensure that H.R. 2885 is narrowly crafted so it will prevent unscrupulous persons from gaining access to this exemption. But, I hope this hearing is a precursor to passage of this legislation in committee and in the full House.

Thank you, Mr. Chairman, I look forward to hearing the witnesses' testimony today. Thank you.

Mr. KANJORSKI. Thank you, Mr. Moore.

And now, we will hear from the gentlelady from Illinois, Mrs. Biggert.

Mrs. BIGGERT. Thank you, Mr. Chairman, and I would like to thank Chairman Frank for holding today's hearing on a bill to clarify congressional intent regarding a Credit Repair Organizations Act or CROA provision that defines credit repair organizations.

I would also like to thank my colleagues, Congressman Kanjorski and Congressman Royce, for introducing H.R. 2885. I am honored to be a co-sponsor of this bill along with Ranking Member Bachus. Today is not the first time that we worked on a technical corrections bill.

For example, last week, the House passed a bill, the Credit and Debit Card Receipt Clarification Act, to clarify a misinterpreted fair and accurate credit transactions act or Fact Act provision. The

vague provision resulted in confusion, a loophole, and lawsuits regarding which credit card numbers a business must truncate on a consumer's credit card receipt. Similarly, the bill we will examine today, H.R. 2885, aims to clarify the intent of Congress regarding a provision in CROA that defines credit repair organizations.

Everyone has heard or seen the ads about credit repair services: "Bad credit; no credit; we can erase your bad credit, 100 percent guaranteed." But let's face it. Only time and prudent financial planning can repair a person's credit report, and that's why many credit repair ads are so misleading—to prevent consumers from paying for illegitimate credit repair services.

Credit repair organizations are not allowed under current law to charge an up-front fee for their credit repair services. On the other hand, credit monitoring services, which are primarily provided by the three major credit bureaus, are legitimate services allowing a consumer to monitor activity on their credit report to detect and dispute, for example, incorrect data or fraudulent activity.

Pre-credit monitoring services often will be provided to a consumer giving him a tool to detect fraudulent activity as a result of a data breach. Another use of credit monitoring services, and my favorite, is when for an up-front fee, a consumer uses a credit monitoring service to evaluate his or her credit scoring report. The consumer then works to improve his or her credit working by working to pay bills on time and lower his or her debt. That is financial literacy and personal responsibility at their best.

The up-front fee for the credit monitoring service is legitimate. Unfortunately, once again, some trial lawyers filed lawsuits against credit bureaus claiming that credit monitoring service falls under CROA's definition of credit repair organization.

As I mentioned earlier, credit repair organizations are not allowed to charge an up-front fee for their credit repair services. In short, certain trial lawyers want CROA interpreted to mean that a credit monitoring service is a credit repair service and therefore cannot charge an upfront fee. If a credit monitoring service charges an up-front fee, it is in violation of the law.

I was recently told by Credit Bureau representatives that for fear that they will be sued again under CROA, credit bureaus are waiting to roll out new credit monitoring products and services that could help consumers today. It is important that legitimate credit monitoring services not be considered credit repair services. We should work to ensure that legitimate uses of credit monitoring are not hampered by a technical glitch in the law, and I think that H.R. 2885 does just that.

With that, I look forward to hearing today's witnesses and their testimony on H.R. 2885.

I yield back.

Mr. KANJORSKI. Thank you, Mrs. Biggert.

I would now like to recognize the gentleman from Georgia, Mr. Scott, who also has been instrumental in supporting this bill and helping to draft it.

Mr. Scott?

Mr. SCOTT. Thank you so much, Mr. Chairman. And it is indeed a pleasure to work with you on this bill, H.R. 2885, which will strengthen existing consumer protections that are addressed in the

Credit Repair Organizations Act and will help address the need for further consumer protections. But first, I would like to recognize one of our guests here, Ms. Robin Holland, a wonderful person from Equifax, in Atlanta, Georgia.

Let me say just a few things about her because she is a very dynamic person. She is a senior vice president for global consumer services at Equifax, and her function is to oversee Equifax's consumer support operations, which includes credit reports and consumer fraud inquiries. She is a frequent guest on CNN and NBC Nightly News. She also teaches workshops on identify theft and she helps consumers control their credit.

Welcome to the committee, Ms. Holland. It is a pleasure to have you here.

Now, let me just say why H.R. 2885 is so important. Legitimate credit monitoring services strongly support H.R. 2885, because they know that this will help improve upon already successful initiatives that are implemented in CROA. Consumers who received notices from credit monitoring service organizations regarding activity on their credit reports can then access their credit reports in view of the action there.

By accessing their reports, in many instances, consumers find they are potential victims of identity theft, or the report may reveal that an incorrect item was placed on the report, whichever way, this is very important for consumers to have. CROA was extremely important in combatting harmful credit repair activities; however, CROA's definition of credit repair organizations could apply to any organization that supplies credit monitoring services; and, as such, should be amended so these legitimate companies offering credit monitoring services are protected from lawsuits or the prospects of new litigation.

This bill in no way weakens consumer protection initiatives. Instead, consumers will receive important new protections under this legislation. No existing law gives a consumer the right to cancel the credit monitoring subscription before the end of its term and receive a pro rata refund. This bill would give consumers this new right. This legislation would also assure that consumers are given clear and concise disclosures about their right to free, annual credit reports. In all, we will indeed benefit from the enactment of H.R. 2885 by serving business and consumers alike.

I look forward to the testimony of the distinguished witnesses.

Thank you, Mr. Chairman.

Mr. KANJORSKI. Thank you very much, Mr. Scott.

Now, we will hear from our colleague, Mr. Royce of California, who has been instrumental in this. I daresay those people in the public, and particularly the media, say that the two sides of the aisle do not cooperate on matters. I can attest to the fact that they are dead wrong.

Mr. Royce and myself are co-sponsors of so many pieces of legislation, and if anyone wants to check our philosophical differences, they are also extreme.

Mr. Royce?

Mr. ROYCE. I don't know if they are that extreme, Mr. Chairman, but I do thank you. I thank you for all of your work on this issue, and I thank you also for helping to arrange this hearing today. I

think it was in the 109th Congress that you and I first introduced this legislation; and it was following the passage of the Credit Repair Organizations Act in 1996 that these credit monitoring services first began to emerge. Unfortunately, because of the expansive definition of CROA, credit reporting agencies found themselves subject to CROA when trying to provide legitimate credit monitoring services.

So this broad definition has created a legal ambiguity. It has created uncertainty in the marketplace for these credit reporting agencies, and it has been the basis for several frivolous lawsuits, class-action type lawsuits that have cost the industry tens of millions of dollars.

Now, the Federal Trade Commission has consistently expressed support for differentiating the treatment of credit monitoring services from the treatment of credit repair organizations under CROA. There was a hearing before the Senate in July of 2007, and Lydia Parnes, who is the Director of the Bureau of Consumer Protection at the FTC, said that as a matter of policy, the FTC sees little basis on which to subject the sale of legitimate credit monitoring and similar educational products and services to CROA's specific prohibitions and requirements, which were intended to address deceptive and abusive credit repair business practices.

Now, those very arguments are reiterated in a letter that each of us received today from the FTC. Credit monitoring services offered customers several legitimate services related to tracking the credit report, including notifying consumers when there are significant changes to the credit report files. These services can protect consumers against identity theft. They limited the damage following security breaches.

So, in closing, the Credit Monitoring Clarification Act is a small but critical piece of legislation which clarifies the definition of a credit repair organization and provides much-needed legal certainty in the marketplace. And, again, Mr. Chairman, I would like to thank you for all your work on this and we should thank the witnesses for coming today to testify. I yield back the balance of my time.

Mr. KANJORSKI. Thank you, Mr. Royce.

And now, we will hear from the gentleman from Georgia, Mr. Price.

Mr. PRICE. Thank you, Mr. Chairman.

I, too, want to add my words of thanks to you and Mr. Royce for your leadership on this issue and for chairing this committee. I want to begin by associating myself with the remarks of the other gentleman from Georgia in welcoming Ms. Holland from Equifax, a wonderful corporate citizen in the State of Georgia.

Mr. Chairman, as you well know, it often falls to us to revisit legislation that has been passed by a previous Congress due to the law of unintended consequences, where Congress does something and the falling dominoes affect something that is much further down the table or down the road. And I believe that H.R. 2885, the Credit Monitoring and Clarification Act, does that very important function. Again, I want to thank Subcommittee Chairman Kanjorski and Congressman Royce for their work for years, literally, on this issue and for their leadership.

As has been stated, Congress in 1996 enacted the Credit Repair Organization Act or CROA at the urging of consumer report agencies to stop the unfair and deceptive practices of entities that promised consumers they could alter or remove negative but accurate and current data from a credit report. And while the goal is very worthwhile, the term "credit repair organization" was intended to apply solely to companies who charge money in order to improve a consumer's credit record, credit history, or credit rating.

It wasn't intended, as numerous lawsuits alleged, to cover consumer reporting agencies or other entities that make available credit information for monitoring or informational or educational or credit literacy purposes. The issue that we must address is that CROA was written too broadly, or at the very least interpreted too broadly. As written, CROA covers any service which directly or indirectly intends to "improve a credit report."

As a result, the trial bar has predictably brought class action suits against all three of the national credit bureaus and many of their resellers. The trial bar has alleged that the selling of a credit monitoring product serves at least the implied purpose of "improving" a consumer's credit record. If legislative relief is not provided, the potentially catastrophic consequences of class action awards, I would suggest would drive credit monitoring products from the marketplace, or at the very least, adversely distort their pricing and their delivery.

Mr. Chairman, as you know, these companies provide a needed and a wonderful service. They should not fall prey to liability due to inartful congressional action. It is important to remember that CROA was enacted before any of the recently developed positive and popular consumer education and credit file monitoring products were created.

Credit file monitoring products have become a consumer's first line of defense against identity theft, and credit file monitoring products are routinely made available to victims of security breaches. Congress should not allow unintended consequences and an overly active trial bar to strip consumers of the most powerful tools to combat identity theft that they have at their disposal.

I hope that the chairman of the full committee will work quickly with the sponsors of this legislation to ensure rapid adoption by the House. I look forward to working positively to that end, and I thank the chairman and yield back.

Mr. KANJORSKI. Thank you, Mr. Price.

Are there any other members who desire to make an opening statement?

There being none, we will now start with the introduction of the panel. First, let me thank the panel for appearing before the committee today, and without objection, your written statements will be made a part of the record. You will each be recognized for a 5-minute summary of your testimony.

First, we have Ms. Robin Holland, the senior vice president of global operations at Equifax, which provides credit monitoring services. I must say, from listening to Mr. Scott, obviously, you are well-represented here on the committee, Ms. Holland, so you had better be very good in your testimony.

Ms. HOLLAND. Thank you.

STATEMENT OF ROBIN HOLLAND, SENIOR VICE PRESIDENT, GLOBAL OPERATIONS, EQUIFAX INC.

Ms. HOLLAND. Thank you. Mr. Chairman and members of the committee, I want to thank you and thank your outstanding staff for the opportunity to testify today on behalf of Equifax in support of the reform of the Credit Repair Organization Act, or CROA, as it is commonly called.

We have submitted written testimony for the record. And with your permission, I just want to take a few minutes to highlight that testimony. Let me first say a word about Equifax. Equifax is the oldest, the largest, and the only domestically publicly traded national credit bureau. Equifax is proud of its history, and proud of its services, and, most importantly, proud of its credit monitoring services. These services help consumers to understand their credit score, their credit report. They help consumers to better manage their use of credit and, most importantly, it helps them guard against identity theft.

Let me emphasize right at the outset that Equifax very much supports CROA and its comprehensive and strict regulation of credit repair organizations. These organizations routinely promise consumers that they will help them improve their credit score or their credit report by removing adverse but, nonetheless, accurate and timely information from their reports.

This is a deceptive, fraudulent, and ultimately, quite incorrect representation, and the victims include consumers whom I talk to every single day in my job, creditors, and the National Credit Bureaus, including Equifax. Ironically, however, CROA has been used wrongly and inappropriately to attempt to punish consumer reporting agencies for offering these great credit monitoring products.

And, let's be very clear about the difference between credit monitoring products and so-called credit repair services. Credit monitoring products, including the products offered by Equifax, facilitate consumer access to credit reports and scores. They provide proactive notification of changes in their reports and scores. They provide explanations of scoring algorithms and provide consumers with numerous credit score-related tools, which include projects and forecasts.

Simply stated, credit monitoring products are the very best strategy to promote consumer financial literacy, something that we all need to work together to increase in our country. And we are also the consumer's very best strategy to prevent and mitigate the cruel impact of identity fraud. CROA's definition of credit repair services is so broad that it can arguably but wrongly be interpreted as covering any of these vital credit monitoring services, because these services directly or indirectly can be used to approve a consumer's credit record, credit history, or credit score.

CROA defines a credit repair organization as an entity which purports directly or indirectly to help consumers improve their credit report. For this reason, Equifax urges Congress to enact legislation to make it absolutely clear that credit monitoring is not credit repair. The FTC has expressed the same sentiment, that is, that there is no basis for applying CROA to credit monitoring services.

If CROA were to be misapplied to credit monitoring services, it would mean that consumers would no longer be able to buy these services on a subscription basis, and that consumers would receive notices and warnings which are appropriate for consumers faced with sales pitches for credit repair services, but which are entirely inappropriate and indeed confusing and deceptive when applied to credit monitoring services.

And it would mean that entities offering consumer monitoring services would potentially be faced with liability, including the discouragement of all moneys paid by all persons at least in a class action suit for the credit monitoring service. Quite frankly, this would virtually drive credit monitoring services out of the marketplace. It is for this reason that we very much appreciate this committee's interest in CROA reform.

We also appreciate efforts in the Congress where bipartisan legislation has been introduced that makes clear that credit monitoring activities are not credit repair activities. The House bill also provides consumers with additional protections including a very detailed description of their free reports and I.D. for our protections under FACTA and the Fair Credit Reporting Act, and it gives them the ability to cancel this contract with the right to a pro rata refund.

Thank you for the opportunity to testify, and of course I will be delighted to answer any questions.

[The prepared statement of Ms. Holland can be found on page 80 of the appendix.]

Mr. KANJORSKI. Next, we will hear from Ms. Anne Fortney, a partner with Hudson Cook.

Ms. Fortney.

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

Ms. FORTNEY. Thank you, Mr. Chairman, and members of the committee, for the opportunity to appear before you.

I am Anne Fortney, a partner in the Washington, D.C., office of the Hudson Cook law firm. Our firm specializes in consumer financial services, and we assist in compliance with a variety of consumer protection laws. I bring to this practice more than 30 years experience in the consumer financial services field, including service as Associate Director for Credit Practices at the Federal Trade Commission.

In private practice, I have worked extensively with credit grantors and with the consumer reporting industry. I commend you for holding this hearing and I offer testimony in support of H.R. 2885, the Credit Monitoring Clarification Act.

I believe that this bill enhances consumer protections and clarifies the scope of CROA. Some background may provide context for my views.

While at the FTC, I first learned of problems caused by credit repair organizations. Consumers paid substantial fees in advance to companies that promised to clean up or repair poor credit histories by removing negative but accurate information from consumer reports.

The consumer reporting and credit granting industries were burdened with frivolous accuracy disputes generated by credit repair organizations. Although these organizations could not deliver on their promises to remove all negative information from their credit report histories, in the process, they were sometimes successful in deleting some information.

Their tactics undermined the integrity and the reliability of the consumer reporting system. In 1996, at the urging of the Federal Trade Commission and the consumer reporting industry, Congress enacted CROA to combat these unfair and deceptive acts and practices. CROA included a broad definition of a credit repair organization in order to ensure that these organizations could not easily evade coverage.

When CROA was enacted, credit monitoring services had not yet been developed. Even as these services were being developed, no one thought that CROA applied. These services are valuable tools to educate consumers about their credit practices and to protect them against identity theft and other problems that might negatively affect their credit. They are legitimate services offered by consumer reporting agencies, their affiliates, and retailers. Banks and other creditors also provide credit monitoring for their customers, and these services are often offered to consumers following a data security breach. The FTC has recognized the value of credit monitoring for consumers.

There is no similarity between credit repair tactics and credit monitoring services. No matter what the form of credit repair, and there are many variations now on this form, the tactics are always the same. And the result is always the same: fraud on consumers and fraud on the consumer reporting and credit granting system.

In addition, no credit repair organization can offer credit monitoring services, because no one can provide these services without a contractual relationship with a consumer reporting agency or reseller for access to the credit reporting data. And no consumer reporting agency would permit such a contractual relationship.

Even though the valuable services offered by credit monitoring companies bear no resemblance to the deceptive tactics of credit repair organizations, some have interpreted CROA broadly to reach credit monitoring.

The reason is that these services might be marketed as a tool that could assist consumers in improving their credit. Well, credit monitoring can, in fact, help consumers manage and thereby improve their credit.

As a result of the interpretation that CROA may apply to credit monitoring, companies offering these services have been subject to costly litigation. Typically, the litigation does not involve claims of unfair or deceptive credit repair tactics, but simply an argument that CROA technically applies. Courts have not reached a consensus on whether or how CROA should apply to credit monitoring, and many cases have settled.

Until Congress amends CROA, companies offering credit monitoring will continue to face the threat of new litigation. For these reasons, CROA must be amended. I believe that a narrowly tailored exemption is the best solution. H.R. 2885 would accomplish this. The bill would provide credit monitoring companies with an

exemption from CROA, and at the same time create new disclosure and pro rata refund requirements specifically for credit monitoring.

Those protections do not exist today. The bill, therefore, would benefit consumers as well as the industry.

True credit repair organizations could not hide behind a claim that they were credit monitoring companies under this bill. Consumer reporting agencies would not allow credit repair organizations to access consumer credit file information and the FTC could still prosecute credit repair organizations under CROA and the FTC Act.

In conclusion, I encourage Congress to enact H.R. 2885 to amend CROA.

Thank you. I am happy to answer any questions the committee may have.

[The prepared statement of Ms. Fortney can be found on page 64 of the appendix.]

Mr. KANJORSKI. Thank you very much, Ms. Fortney.

Next we will hear from Mr. Howard Beales, an associate professor of strategic management at George Washington University.

Mr. Beales?

STATEMENT OF J. HOWARD BEALES III, ASSOCIATE PROFESSOR OF STRATEGIC MANAGEMENT AND PUBLIC POLICY, SCHOOL OF BUSINESS, GEORGE WASHINGTON UNIVERSITY

Mr. BEALES. Thank you, Mr. Chairman, and members of the committee, for inviting me to testify today.

My name is Howard Beales, and I teach in the business school at George Washington University. I have a Ph.D. in economics from the University of Chicago and more than a decade of experience in addressing consumer protection issues at the Federal Trade Commission.

Most recently, I was the Director of the Bureau of Consumer Protection there from 2001 through 2004. I am appearing today as a former official who had responsibility for enforcing CROA and an academic with a long-standing interest in consumer protection regulation.

CROA is an unusual statute. Rather than prohibit credit repair outright, CROA imposes a business model that is simply not workable. No credit repair organization may charge for its service before the service is fully performed. In other markets, payment after the fact is confined to services where there is a face-to-face relationship between the buyer and the seller or a continuing relationship.

Otherwise, it is not a feasible way to conduct most consumer transactions. In addition, there must be a written contract, a 3-day cooling-off period, and extensive disclosures. Imagine what it would be like to get your lawn mowed if sellers followed that business model. Give the difficulties of the CROA business model, it is not surprising that there are few cases that involve organizations that admit they are subject to CROA. Instead, they try to avoid the statute.

Imposing an unworkable business model on a business that is almost always fraudulent, like credit repair, is not particularly problematic if the definition is tightly drawn. In CROA, however, the definition is extremely broad. It includes anyone who sells any

service to improve any consumer's credit record, credit history, or credit rating, or provides advice about those subjects.

Read literally, this language would cover some of the FTC's consumer education materials, such as "Building a Better Credit Report," which will let you learn how to improve your credit score. They are available for free from the FTC, but they are also available for a charge of $1 from the Federal Citizen Information Center in Pueblo, Colorado. For $1 more, you can pick up a copy of your credit score, co-sponsored by the Consumer Federation of America, and learn how to raise your score, also payable before the advice is rendered. It is absurd to think that Congress meant to restrict such obviously valuable consumer education efforts.

But to avoid that conclusion, you have to look beyond the statutory language. There is, after all, a wealth of advice about improving your credit rating. Valuable, real world businesses face exactly this problem. One example, this credit monitoring which alerts consumers about changes in their credit report. These services enable consumers to correct information that was only included in their credit report because of fraud. Again, there is no conceivable public purpose in restricting these services.

Another example is services that evaluate what consumers might do to improve their credit scores. Consumers in the modern world need to understand what influences their score and how they can improve it. That is, consumers need advice about how to improve their credit rating. It can't be done by changing the past, but consumers can change their credit rating by changing their behavior.

Some changes, like consistently paying on time, take time. Others, like paying down outstanding debt, can affect scores more quickly. But there are also urban myths about how to improve scores, like closing unused accounts, that will actually reduce scores if consumers follow that advice. Consumers in the language of CROA need accurate advice. It is possible to avoid the absurd results. Doing so, however, requires looking beyond the simple language of the statute. Some courts have been willing to do so. Others have not, depending in part on the facts of the case.

Unfortunately, as is often true, bad facts make bad law, and some of the cases have involved some bad facts. *Hillis* v. *Equifax* involves some good facts. The case involves Score Power, a service that included access to a simulator, that allowed consumers to see how various actions would affect their credit score over time.

The court looked beyond the statutory language of CROA and concluded that credit rating and credit record all refer to a consumer's historical, tangible, and displayable credit record. The critical question was whether the defendants had implied to the average consumer that they would perform a form of credit repair or were merely engaged in legitimate credit counseling. The line drawn in *Hillis* is a reasonable one, but other cases have not reached the same results.

To avoid losing valuable services, a line must be drawn to distinguish legitimate credit monitoring from illegitimate credit repair. The *Hillis* line is reasonable, but it is a line, and it creates the need to prove that a credit repair fraud is, in fact, making claims to consumers that it can modify the historical credit record. Congress, rather than the courts, should draw the line.

Courts have been attempting to discern what Congress meant and they have come to different conclusions. Whether drawn by Congress or the court, any line that distinguishes fraud and legitimate business will create new opportunities for fraud. That is inherent in distinguishing between fraud and legitimate conduct, and it is not without costs. But there are also obvious costs of prohibiting legitimate products that are useful to consumers. It is Congress, not the courts, that should seek to strike the best possible balance in drawing a line.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Beales can be found on page 36 of the appendix.]

Mr. KANJORSKI. Thank you very much, Mr. Beales.

Now, we will hear from Mr. Bennett, an attorney with Consumer Litigation Associates.

Mr. Bennett?

STATEMENT OF LEONARD A. BENNETT, CONSUMER LITIGATION ASSOCIATES, P.C.

Mr. BENNETT. Good morning, and thank you for the opportunity to appear on behalf of the National Association of Consumer Advocates, the low income clients of the National Consumer Law Center and the U.S. PIRG.

Let me begin with a couple of caveats. I try cases, but the folks that I represent, myself in particular, do not support the type of litigation that is suggested to have been such a detriment to the credit industry. The NACA members, for example, were not the folks who tried to pioneer into legitimate credit monitoring and tied to CROA.

And the advantage today, not just in terms of the opportunity for bipartisan agreement on this bill, but you actually have an opportunity for agreement between consumer groups and the CRAs and legitimate entities that sell credit monitoring, there is no dispute amongst which you have heard here about the interests that this committee could further by separating legitimate credit monitoring, useful information.

Information sold by Ms. Holland's company—and I know, Ms. Holland, your phrases are justified—versus those, for example, that are sold by the Lexington Law Group, who was one of our nemeses. The Credit Repair Organizations Act is an issue in CROA that apart from the committee, when we deal with the credit reporting agencies and we talk outside of this committee hearing, it is something we share. Ms. Holland and I spoke before the committee that credit repair is a detriment, is a scourge, to both the industry as well as to the consumers on whose behalf we advocate. And the question here is not whether or not legitimate, pure credit monitoring, should be subject to CROA, but rather, how do you separate that?

I beg to differ with my colleague and the conclusion that was suggested that credit repair organizations cannot use credit monitoring. That is demonstrably incorrect, and I have included in my written testimony from the Web site of the Lexington Law Group, one of the consumer nemesis, one of the first offenders in our view under CROA, the products that they sell as part of their credit re-

pair package, they sell credit monitoring. They sell something called report watch and identity theft insurance.

While legitimate companies such as Equifax may not sell to those credit repair organizations, the bill, H.R. 2885, as currently drafted, is so broad in the new exemptions it offers, and the definition or lack of credit monitoring as to open a floodgate, the last floodgate to render CROA ineffective. The people we represent, the advocates, the attorneys general, the JAGs, the consumer organizations who have to as private attorneys general enforce CROA, will have absolutely no means to do so.

And it is an interest that I expect both the consumer reporting agencies and consumer groups share. The credit repair is a disaster if it is unfettered, unbounded, and unregulated. The bill as drafted needs changes, and, I know that certainly the committee has been receptive. We appreciate the time that staff and committee members have offered us.

But the changes, just to outline a couple I have recognized in my written materials, the first is that the exemptions after credit monitoring that allow anything related to providing advice to identify theft victims, which is what Lexington Law Group already has, is so broad, the advantage that industry would advocate from this bill is by saying if there's credit monitoring then it won't be credit repair.

That simplifies it, but as an attorney, our attorneys haven't read it. The affect of it is if this bill is enacted would conclude, if you have credit monitoring, they will not be with the services sold with it, the governance and CROA. And that's fine for legitimate companies who are moving in a direction with this advice, score, interpretation, and so forth. But moving the other direction, like the Lexington Law Group, you have companies who will begin to add credit monitoring.

And it doesn't have to be a legitimate credit report such as the quality report from Atlanta's Equifax. It could be a small company out in California that doesn't maintain an extensive database, but could claim we are offering you a copy of the report that this side company now sells. To the extent that this committee is able to free legitimate companies from the governance of CROA, it will have the reciprocal effect in the other direction.

We appreciate the time that you have given us. We appreciate the good work that both sides of the aisle and this committee have offered and we remain willing to work with anyone as we hope to with industry to improve this bill.

[The prepared statement of Mr. Bennett can be found on page 45 of the appendix.]

Mr. KANJORSKI. Thank you very much, Mr. Bennett, and thank you to the whole panel for your testimony. It looks like we have some difference of opinion, but no difference of opinion that we want to get somewhere where we are not quite sure how we get there.

I have some questions that I am sure the rest of the panel will have. Let us start with the proposition, Mr. Bennett. You said that probably all members of the panel want to accomplish the conceptual idea of what we have in mind, but exactly how do we do it?

Is it possible for the various interest groups to come together and really define and accept?

Have you tried to work that out, if I may ask the whole panel?

Mr. BENNETT. Well, Congressman, I was busy making trouble as a trial lawyer a week or two ago, and didn't have an opportunity to work with that professor. I do know Ms. Holland. I know Ms. Fortney. I know Mr. Pratt. We spoke CRAs. Pat and I spoke. Ms. Holland and I spoke last week. I have a very good, friendly relationship with the chief litigation attorneys for Equifax and I asked to set up a meeting so that we could try to come up with something.

We have, Congressman, for years when we're off the record in CRA and consumer lawyers are talking. They are both just pounding their fists and pulling their hair out about credit repair, and so I really think that there is the possibility in the bill to accomplish that. Ms. Holland could offer a better side of that, but our side; we would work hard for that.

Ms. HOLLAND. We are always interested in working with anybody who wants to do what is right by consumers. At Equifax, we have a legislative affairs team, which I am not a part of, but certainly I contribute to that. And I echo Mr. Bennett's comments that certainly we would be willing to work together, because at Equifax we always want to do what is best for the consumer.

Mr. KANJORSKI. Thank you, Ms. Holland.

I would really like to get working on this. Our problem is how we craft the credit monitoring exception; and, if we do not do it correctly, we fail in our attempt to solve what I consider to be a serious problem. I think all of the sponsors of the legislation recognize it, and obviously the panel recognizes it as a serious problem.

Is there anybody who has an idea of what the test could be that would allow the FTC to quickly determine who is a legitimate credit monitoring provider? Is there some test out there that is a magic set of words such that if they do not hit this test, they just do not comply? And, on the other hand, if they do, they are in the box?

Ms. Fortney, let us draw on your 30 years of experience.

Ms. FORTNEY. And I have worked on this legislation as well. I think as everybody has discussed, it is difficult to come up with what would be essentially a bright-line test, because it should be something that is easily discernable.

So, if there were litigation at the stage of a motion to dismiss, a court could recognize that a company is, or is not, within the definition of a credit repair organization. We recognize that there are concerns with the current, what is referred to as an activity-based exemption. We are very willing to work with everyone to see if there are ways that exception could be more precisely drawn.

I do disagree with Mr. Bennett. I think that if the exception is drafted in such a way that it is clear that only companies that have access to credit monitoring services from consumer reporting agencies, as defined in the Fair Credit Reporting Act, or resellers that worked with those agencies; again, I have not looked at the materials of the Lexington Law Firm or similar companies, but I doubt very much if those types of companies have an ongoing contractual relationship with consumer reporting agencies or their resellers in order to provide a credit monitoring product. And we know that

credit repair organizations and other companies that want to commit fraud will say just about anything, but the test really is what do they do.

Mr. KANJORSKI. Well, I assume, Mr. Bennett, that it would not be very hard to set up an organization that appears to be a credit monitoring organization, but is not using the information and the thoroughness that is usually associated with the likes of the highly credible monitoring organizations. Is that correct?

Mr. BENNETT. Absolutely, Congressman, and with due respect to Ms. Fortney, who has considerably more experience than me in the field, the bill as currently written doesn't make the exemption to limit it to—I hate to use the phrase "legitimate consumer reporting agencies"—but legitimate consumer reporting agencies. It is so limited. And I understand just from secondhand accounts that the FTC has considered the possibility of a party-specific carve-out as opposed to an activity carve-out that there could be ways, if we worked through the legislation together, to use definitions that have not only a legislative definition, but significant, objective case law interpreting it, such as what is a consumer reporting agency or a national consumer reporting agency.

Those types of changes, we think, can strengthen it. In the case of the consumer reporting agencies, it is a stretch, despite that we are often on the opposite side. It really would be a stretch to say that Equifax would engage in deceptive conduct. I don't think that is where the concern would come from, but there needs to be a protection that would be sort of a fall-back, that despite the efforts of the committee and the interests to craft the right language to draw that sort of backstop in the event that as Mr. Pratt calls the savvy CROs come up with ways around this to prohibit deceptive acts and practices in this regard.

Mr. KANJORSKI. Thank you.

Mr. Beales, I know you are anxious to contribute something. I will give you a few minutes, because my time is running out.

Mr. BEALES. Thank you.

I don't think there is a magic solution. I mean, we certainly looked hard for it in the time that I was at the Federal Trade Commission, because this was very much an issue and we didn't think that the statute should be applied, you know, to credit monitoring, and the FTC still doesn't.

The difficulty is that any line creates factual questions about which side of the line are you on. I think, as I said in my testimony, the line in *Hillis* is reasonable. Are you making promises about changing your historic credit record? That's what credit repair is all about. But it does create a factual question that complicates litigation from sort of either side, because you have to be able to establish that was the claim that a real credit repair organization was actually making.

And it creates a factual question the other way, too, because it's not immediately obvious that there was no such claim. And even in *Hillis,* that was exactly what happened. So I think it can be done. You can craft a line that will work pretty well, but you can't craft a line that is bullet-proof and incapable of being circumvented without one that looks at facts.

Mr. KANJORSKI. Well, I think you have hit on something that I would like to ask the whole panel. We want to move this legislation, and it is touchy and difficult, and we do not want to flub it, to tell you the truth. And I think as I recognize from the panel's testimony and discussion here today, and from everybody I am familiar with, we want to do by all sides the right thing and accomplish the end result.

In order to do that, maybe I could ask the panel to cooperate in a strange way. Beyond this hearing date that you will make yourselves available for a roundtable discussion with the staff so that we can literally pin you down for several hours and put the pressure on you to come up with a legitimate standard or definition that we can use to accomplish our end.

Could the panel agree to be available in that way with the staff to accomplish that end?

Ms. FORTNEY. Yes, sir.

Ms. HOLLAND. Yes.

Mr. KANJORSKI. Without charging exorbitant fees?

Well, I would appreciate it, and maybe we could prove that there are ways to accomplish good legislation in a speedy fashion. And that is what we want to attain here, so as I cut off my questioning period, I want to thank you in advance for your cooperation with the staff.

We will get in contact with you in the next several days so that those meetings can be arranged, and we would like your wholehearted support and intellectual talents and capacities to be really lasered onto this problem to see if we can solve it within a reasonably short period of time.

So thank you very much. And now, for 5 minutes of her insightful questioning, my good friend, Mrs. Biggert from Illinois.

Mrs. BIGGERT. Thank you, Mr. Chairman. This is a general question, but it seems like credit monitoring services seem to be like other subscription services. You pay a fee, and then you receive the service in monthly installments, like cable television or magazines, I guess. Does CROA prohibit these kinds of arrangements in which providers can charge subscription fees for services? Mr. Bennett and Ms. Fortney?

Mr. BENNETT. I don't believe it does. Absolutely not unless it's something other than credit monitoring. Certainly no one in our organization would accept or have accepted the cases that have been criticized in the testimony today. My office, certainly—and we extensively litigate credit reporting generally—wouldn't go near such a case. I don't believe that the law would so restrict credit monitoring.

It's really the ancillary services and not so much those that are at issue with a company like Equifax that really cross the line.

Mrs. BIGGERT. Well, the company offers the credit monitoring and additional credit repair services. Wouldn't those services then fall outside the exemption that H.R. 2885 allows?

Ms. FORTNEY. I believe they would.

And also to answer the question about the subscription, your analogy to cable television is a very good analogy, because people do pay for that, I believe, in advance. There are many types of subscriptions that are paid in advance. Credit monitoring is paid in

advance on a monthly subscription basis, and the problem with CROA is that CROA prohibits the receipt of any fees in advance before the services are rendered. And that is really the heart of the difficulty.

The companies that are offering credit monitoring are not engaging in the deceptive practices that led to the enactment of CROA. And the lawsuits don't allege that; they're focusing on just a very technical definition. So if the bill is able to make clear in the definition who is included and who is excluded, then the credit repair organizations will remain as they should under CROA, and the credit monitoring companies will be able to be exempted.

But we have also discussed the fact that the exemption would bring with it certain additional consumer protections, pro-rata refunds. If the subscription is paid, for instance, on something other than a monthly basis, if it is paid on an annual basis, the consumer who cancels would be able to get a pro-rata refund. Also disclosures explaining more to consumers about what is involved in credit monitoring.

Mrs. BIGGERT. Thank you. So I guess the question is, how do you draw the line in the sand?

Ms. FORTNEY. That is the question.

Mr. BENNETT. Congresswoman?

Mrs. BIGGERT. Mr. Bennett?

Mr. BENNETT. The problem is in terms of the drafting, the CROA definition is expansive. And the reason it's an issue for credit monitoring is because it includes essentially any service offering advice about improving your credit record, and that can include an identity theft victim, who needs help getting identity theft accounts off their trade line; it doesn't just mean illegitimate. But the H.R. 2885 language only puts someone back into the CROA definition if it's representations that they're going to modify or remove adverse information that is accurate, which is Mr. Beales' concern, which is our concern. Because credit repair organizations don't say that; they're a lot more savvy now. They don't come out and say, "We will help your remove inaccurate information." They say, "We will help you remove adverse information." They don't really tie themselves down like that.

And so the CROA definition is different than the exclusion.

Mrs. BIGGERT. Okay. Thank you. And I just had one more question for Mr. Beales, quickly. How has the Internet changed the credit monitoring business?

Mr. BEALES. Well, I'm not sure that I can answer that. But it seems like it has really made it possible in a way that it probably wasn't before. I mean, if you had to rely on snail mail to get your notification that something had changed in your credit report, it's a little hard to imagine how a credit monitoring business—

Mrs. BIGGERT. I just wondered if you knew that there was more, because of the pop-ups and all the things, the advertising on the Internet.

Mr. BEALES. I'm sure—I mean that's the way the product is most often delivered is over the Internet. So in that sense, I'm sure there is more of it than there was with less Internet use.

Mrs. BIGGERT. Okay. Thank you. I yield back.

Mr. KANJORSKI. Thank you, Ms. Biggert.

And now, the gentlelady from California, Ms. Waters.

Ms. WATERS. Thank you very much, Mr. Chairman.

For the panel, I have become very concerned about the use of credit scores in areas that seem to have little relation to a customer's ability to make timely payments, such as the use of credit scores to set up car insurance premiums. Last week, I introduced H.R. 6062, the Personal Lines of Insurance Fairness Act of 2008, with Representative Gutierrez, and tomorrow the Oversight and Investigations Subcommittee will hold a hearing on this practice.

But I'm interested in the role, if any, credit monitoring services play in the practice of using credit scores to set insurance premiums. Specifically, can any of you tell me if there has been any research on whether or not use of these services has a positive or negative impact on a consumer's credit score for those consumers who choose to use them? In short, is it worth the subscription fee? And on average, how much do consumers pay for these services?

Many consumers subscribe to these services because they are offered for the first 30 days free of charge. Do you know anything about this?

Ms. HOLLAND. Ms. Waters, let me just first say that the credit monitoring service is a very, very valuable tool. And while I can't speak to the insurance fees, but what I can say to you is that these tools, what I strongly believe—I speak to consumers every day, and what I find is that there is a need for consumers to have a better understanding of their credit, their credit score, and what are the right types of decisions you make related to that? That's not a black/white, poor/rich issue. That is an issue that everyone needs to understand.

And so these credit monitoring services really help consumers and educate them about: Here's a change in your credit file; here's how that change has impacted your credit file. They can see this information, they can act on the information almost instantly. And so to me, I think not having these tools and resources, these credit monitoring services actually would do a great disservice to consumers who have—those—

Ms. WATERS. Okay. Before you go any further, what does this bill do to the so-called important services you are describing? How does this bill help or hurt, and what impact does this have in dealing with the agencies that repair credit?

Ms. HOLLAND. Well, number one, how it helps the consumers is that if they subscribe to these services, they don't need these credit repair organizations. They don't need these bad actors with bad scripts, who promise them things that they cannot deliver.

What this does is put them in control; it gives them the knowledge and the power to make sure that they are making good decisions and that they are able to have good credit scores that allow them to get the best offerings, whether it is to buy a refrigerator or to buy a car, or anything.

Ms. WATERS. Let me just ask, if I may, I think it was Mr. Bennett?

Mr. BENNETT. Yes?

Ms. WATERS. Mr. Bennett, would you describe again why you think this bill does not help, and that this bill empowers, perhaps,

the repair agencies to do the kind of work that many of us are concerned about.

Mr. BENNETT. Yes, certainly. We began with an assumption which I have not raised here, that there is no threat to credit monitoring. These cases, or the few of them that were discussed, the credit monitoring services prevailed on all important issues. When they settled, they settled for free credit monitoring. That was what was paid to the people who these other non-NACA lawyers represented.

That trade-off versus the trade-off of the unfettered ability to use credit repair so long as you sell credit monitoring or something that could be a credit monitoring product, we think is a trade-off, and we're surprised that industry supports it in that fashion. It would eliminate the last ability that we have against credit repair organizations; which to be candid, we represent consumers, NCLC represents low-income consumers. These are amongst the most vulnerable of individuals out there who are targeted by credit repair.

If you do a Google search for, "How do I fix my credit report?" or "Identity theft," credit repair organizations pop up first. And so the balance—you're using a hammer to swat a fly with respect with credit monitoring. The trade-off, as currently crafted, opens up the people we represent, we think, to far more villainous trade-off.

And I think with respect to the credit repair, if you were to do a search—and we have heard a lot about these cases against credit monitoring, and there are a couple of them.

But as long as the statute of CROA has been around, try finding cases where our side can get around the exclusions that are already used, the nonprofit exclusion, the ability to break things down into services to require payment before credit repair is done. We aren't necessarily winning the battle; otherwise, we wouldn't have the credit repair problem in general. And to carve out an exclusion as opposed to with bipartisan support correct CROA in a way to help the industry, to help consumers, this committee has an opportunity. It can help credit monitoring legitimate services, and it could help protect the people who we represent, who you all represent, against the real bad apples.

Ms. WATERS. Thank you. I yield back.

Mr. KANJORSKI. Thank you very much, Ms. Waters.

And now, we will have the gentleman from California, Mr. Royce.

Mr. ROYCE. Thank you, Mr. Chairman.

Maybe we could go to Ms. Holland. Ms. Holland, could you explain for us, maybe, the effects that this previous wave of lawsuits had on your company and the products and services that you offer, as well maybe as what we might expect going forward if Congress fails to enact a legislative fix here? Could you get into some of those details for us, Ms. Holland?

Ms. HOLLAND. Mr. Royce, at a minimum, the lawsuits have had an effect in terms of ongoing innovation and development of credit monitoring services and products. You know, at Equifax we introduced the first product in 2000, and because of consumer feedback, we have continued to refine those products and make offerings that consumers tell us that they want.

So when you talk about lawsuits that are going on related to CROA, what ends up happening is, is that those developments and

innovations are stalled, because companies such as Equifax are concerned about CROA, and therefore they're not going to be able to build and make these services for consumers.

What we believe with this amendment is that consumers get a more robust notice. They get their rights as it relates to a free report. They get a pro-rata refund. They're able to cancel any of these services if they don't want them at any time, with no penalty of any fee.

And so we strongly believe that CROA as it exists right now will do a disservice to these companies that offer these monitoring products, and quite candidly with the clause of disgorgement of all revenues, very well could drive these products out of the marketplace, which in turn to me is harmful to consumers.

Mr. ROYCE. And why would that be harmful to the consumers?

Ms. HOLLAND. Well, because—

Mr. ROYCE. Maybe Mr. Bennett feels we would be better off without these industries to begin with. Explain the benefit to the consumer, then.

Ms. HOLLAND. Well, the benefit of the credit monitoring services is that consumers literally have at their fingertips tools and resources to make better decisions and to manage their credit. And so when you have these tools and services go away, they're going to be subject to bad actors and these fly-by-night companies, who could care less about them, who could absolutely care less. Not a week goes by that I don't talk to a consumer who says, "Hey, I paid 'X' amount of money." They said they were going to delete all of his negative information, and they didn't do it. Well, then our company explains to them, "You know, no one can do that for you."

Mr. ROYCE. But you are a lot easier target. I mean, for lawsuits of tens of millions of dollars, you're an easy target. The fly-by-night operators, whom we were originally trying to get in CROA, they're hard to find.

Ms. HOLLAND. Right.

Mr. ROYCE. They're not easy to locate, because they just strike and move on, or change their name, or—

Ms. HOLLAND. Right. They change their name. They come up and start a different company under a different name. But you know, Equifax is always going to be there, right there on Peachtree Street in Atlanta. And so we're an easy target.

Mr. ROYCE. Yes. Well, I'll follow up with Ms. Fortney, because she has a background in this, too. And on the argument you just made, Ms. Fortney, are you aware of instances in which CROA is impeding the introduction of new consumer services into the marketplace?

Ms. FORTNEY. Yes. In addition to the problems that companies offering credit monitoring services currently have—and the litigation is ongoing, the litigation and the threat is always there—and the reason why there have been relatively few lawsuits is because relatively few companies offer credit monitoring services.

But the threat of the litigation has been an impediment to companies coming out with tools that can help consumers better manage their credit. References to tools such as credit score simulators, things of that kind, have not been put on the market in some instances, because those tools can, in fact, help consumers improve

their credit. And as we have seen today, the difficulty with CROA is that the definition of a credit repair organization includes anyone who represents directly or indirectly that they can help consumers improve their credit, even if they can do so.

So very much so, the law as currently drafted, is impeding the introduction of new tools that can help consumers better manage their credit.

Mr. ROYCE. I yield back.

Mr. KANJORSKI. I assure you, we did not cut off the microphone. I am sorry.

Mr. Moore from Kansas?

Mr. MOORE OF KANSAS. Thank you, Mr. Chairman. A question for Ms. Fortney and Mr. Beales. It appears that the FTC generally is in agreement that CROA should not be applied to legitimate credit monitoring services. Do you believe that's an accurate characterization of the FTC's position on the issue?

Ms. FORTNEY. That is my understanding of their position, yes.

Mr. BEALES. And mine as well.

Mr. MOORE OF KANSAS. Very good. It's also my understanding that the industry worked with the FTC in getting CROA enacted into law. Why didn't, in your opinion, the FTC issue an opinion letter explaining why it was not the intent of CROA to have credit monitoring services fall into the definition of credit repair organizations?

Ms. FORTNEY. The FTC no longer issues staff opinion letters under the Fair Credit Reporting Act. And the reason they don't is that the courts were not required to follow them or even defer to them, and in some instances the courts refused to do so.

So although the Commission, as I understand it, does support the industry's concerns here, drafting or writing a staff opinion letter would probably not put an end to the litigation or solve the problem.

Mr. MOORE OF KANSAS. Do you agree, Mr. Beales?

Mr. BEALES. Well, I think some of the difficulty is the same one that you're having here, is how do you draw the line? An opinion letter would have to craft a line based on the language of the statute or the intent; but it would have to draw a line. And that has been the difficulty is finding a reasonable way to draw the line without creating too many of the kinds of problems Mr. Bennett is worried about.

Ms. FORTNEY. The other problem is the Commission does not have rulemaking authority under CROA. So whatever line the Commission were to draw in a letter would not necessarily solve the problem.

Mr. MOORE OF KANSAS. Thank you very much. Thank you, Mr. Chairman.

Mr. KANJORSKI. Thank you, Mr. Moore.

Now, we will hear from the gentleman from Georgia, Mr. Price.

Mr. PRICE. Thank you, Mr. Chairman. And I want to thank the panelists. I think this has been helpful, although I think that we continue to struggle with the differences between—you all have been very polite to each other, and I appreciate that, but I think there are some differences here that I would like to try to explore.

Mr. Bennett, would you agree that there are indeed individuals who have taken advantage, for lack of a better term, of CROA for frivolous or unnecessary, or lawsuits that the vast majority of the American people would say, "Well, that just ought not apply."

Mr. BENNETT. Yes. And in fact, the vast majority, if not the entirety of our organization would similarly agree.

Mr. PRICE. How do you reconcile that then with your testimony that you gave just a moment ago, and your printed testimony where you state that credit monitoring isn't governed by CROA under current law?

Mr. BENNETT. Because in those cases, lawyers filed—non-consumer lawyers, without backgrounds in the area filed those cases. And from a practical standpoint—I pay mortgages, I run my law firm, we have to win our cases to prevail—those individuals made a foolhardy decision to pursue a case that did not have significant merit. And on the important dispositive motions, in *Hillis,* for example, they lost.

Mr. PRICE. But as we have heard from Ms. Holland, there are consequences of those suits, correct?

Mr. BENNETT. There are, and we agree, Congressman, we absolutely agree with a couple of things. We agree that credit monitoring can provide services that are advantageous. And similarly we agree that CROA could be better crafted to more narrowly exclude legitimate non-deceptive credit monitoring from the bill. It's just a matter of how do we—

Mr. PRICE. Identify that line.

I appreciate that, and I would echo the sentiments and the comments of the chairman, that hopefully we will be able to get together and come up with that bright line.

Ms. Holland, I would like to explore a little bit further. I know that you said that the effects of these lawsuits would significantly, and may have significantly decreased the amount of innovation and development and also the potential for driving products out of the marketplace. I am interested in the issue of identity theft and the benefit to consumers for gaining this credit monitoring information to them; and if H.R. 2885 isn't passed, what the consequences are to consumers who are trying to protect themselves from identify theft.

Ms. HOLLAND. I think that if you no longer have credit monitoring services such as we offer, that you are taking away one of the number one tools that consumers use to protect themselves from identify theft. If we take a look, the FTC had a survey, and they basically stated that 11 percent of the consumers found out about identify theft using a credit monitoring service. When you hear about these data breeches that occur at these companies, the first thing they do is offer the consumers who are impacted a credit monitoring service.

So you are taking away a tool that has been the number one tool that people go to; it is the go-to tool for preventing and mitigating identify theft. And so I think despite the fact that it increases financial literacy, what I said earlier is a great thing that you lose is the whole protection against identify theft.

Mr. PRICE. Mr. Bennett, would you agree with that?

Mr. BENNETT. I do agree. I think that one of the advantages to what I'll call non-deceptive pure credit monitoring is that you can see what's coming. And I think it fits in best with a number of protections that you and this committee have supported under FACTA and other FCRA protections. The Alert systems, for example. Credit monitoring is a sort of diversion of a paid alert system.

Mr. PRICE. I'm running out of time, and I want to get to another point of your written testimony, and that is where you state that H.R. 2885 would expose every ID theft victim to unregulated credit repair. Seeing as how you agree with Ms. Holland about the importance of credit monitoring companies for individuals to protect themselves from identify theft, but then state that this would in essence, I guess, harm consumers who are concerned about identify theft, what is the specific language—if you're aware of, and if not maybe you can get back to us—what is the specific language in H.R. 2885 that you believe results in exposing every identify theft victim, to unregulated credit repair?

Mr. BENNETT. It is Section 2(b)(1)(c), that it excludes governance under CROA if the product is sold in conjunction with the provision of materials or services to assist the consumer who is a victim of identify theft. I cite the Lexington Law Group, which is sort of the poster child.

Mr. PRICE. Right.

Mr. BENNETT. And the Lexington Law Group says, "Lexington Law Group can assist you in identify theft restoration. They will work to clean up your credit report, increase your credit score by challenging all the negative credit report items occurred. We also," and so forth.

Mr. PRICE. Okay. I understand. I am out of time, but I thank you, Mr. Chairman. I hope we can work on that specific language to make it so that it's amenable to responsible individuals in the consumer efficacy industry. But I just want to reiterate once again that I think these companies are providing a remarkable and valuable service to all Americans, and I hope that we will be able to prevent the problems that we have from CROA.

Mr. KANJORSKI. Thank you very much, Mr. Price.

And now, Mr. Scott, you are recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. What is it about the current definition of credit repair organization that brings about a difficulty or a gray area here, where we need to amend it for clarification because of the opening up of possibilities of lawsuits?

Ms. FORTNEY. The definition includes—there are a number of activities that make an entity a credit repair organization under the statute. And the definition includes representations directly or indirectly that the entity can help consumers improve their credit.

And the reason is that when credit repair organizations were first coming on the scene, that is exactly what they said, "We can help you improve your credit. We can repair your credit. We can remove negative information." In fact, they still say that.

So the definition includes, as part of the activities that would make an entity a credit repair organization, the fact that the entity is representing directly or even indirectly that it can improve the consumer's credit.

Well, in fact, credit monitoring services and related tools do help consumers improve their credit; but the definition doesn't depend on whether the representation that the entity can help improve the credit is accurate or inaccurate; it's just if the entity directly or indirectly makes that representation.

Mr. SCOTT. And that is what opens up this window of possible liability that brings about the need to correct that to prevent that liability, that brings on the lawsuits, that then in effect affects the innovation of products that Ms. Holland talked about. Is that a correct assessment?

Ms. FORTNEY. That is correct.

Mr. SCOTT. All right.

Now, Mr. Bennett, why would you object to that? That seems to be perhaps a technical adjustment we need to make. Where am I losing something? Why are you objecting to that?

Mr. BENNETT. Well, again in principle—and I think that Congressman, you have said it best—a technical adjustment would be necessary. But in principle, we don't disagree. I think that having non-deceptive, having the legitimate credit monitoring that Equifax sells available and not governed by CROA is an objective we share and we will support.

The problem is the deceptive services sold by other companies, they do fit that definition. What is happening is with H.R. 2885, you are taking credit monitoring and you are providing the use or the inclusion of credit monitoring as a free pass. And the bill does it legitimately in the case of Equifax. But that free pass is not limited just to legitimate companies that use credit monitoring, but in the cases of credit repair organizations that will now add credit monitoring products to their illegitimate credit repair services, and now those illegitimate services benefit from the ambition of this community, this committee, and our interests at having legitimate and pure credit monitoring.

It is where that line is drawn, Congressman, and I think that we probably agree that credit repair is a really horrific problem for the industry and for consumers.

Mr. SCOTT. Do you agree with that, Ms. Fortney? Where do you differ from what he just said?

Ms. FORTNEY. Where I differ is that I agree that credit repair organizations will attempt to—if this bill is enacted in its present form, they will attempt to characterize their activities such that they would then come within the exception.

The issue, though, is if that is all they did—if all they did was offer credit monitoring through a consumer reporting agency as defined—or reseller as defined in the Fair Credit Reporting Act—if all they did was provide legitimate identify theft help after somebody has been a victim, they wouldn't be a credit repair organization. That's not what makes them a credit repair organization. What makes them a credit repair organization is all the other activities that are also included in the definition of a credit repair organization that brings them under the scope of CROA.

Mr. SCOTT. All right. Well, thank you for that. And I agree with you, Mr. Chairman, that this is a great committee, and it's going to be very helpful to us in crafting this bill. And both of your points of view certain illuminate this situation.

Now Ms. Holland, let me ask you to explain for us exactly how subscribing to a credit monitoring product will help a consumer guard against identify theft or to mitigate identify theft?

Ms. HOLLAND. When a consumer subscribes to a credit monitoring service, they are given a—

Mr. SCOTT. You might want to get a little closer to the microphone.

Ms. HOLLAND. When consumers subscribe to a credit monitoring service, they are sent an alert, and that alert tells them if there has been a change to their credit file, such as a line of credit has been opened or a balance has changed. When they receive that alert, they are able to go online, access their credit repair, and evaluate what that change was. If that change was not initiated by them, they have no knowledge of it, they could be an indication of fraud, and they can immediately begin the fraud process.

So almost instantly they know about changes in their file, and they can act upon it.

Secondly, after you have become a victim, as we have seen with all the data breeches, they now, if their information has been sold or it's on the black market, they now have a credit monitoring service, so they're going to continue to get those alerts. They can act upon it, they can protect their file with anything from a fraud alert. And so there are so many tools. It puts the power in the consumer's hand. And they now can be proactive, using this service to protect themselves against the horrible effects of identify theft.

Mr. SCOTT. Well, thank you very much, and I think you're right on it, because the weakness in our system is that the consumer is laissez-faire.

Ms. HOLLAND. Yes.

Mr. SCOTT. I mean this will help engage that consumer in his own financial affairs to take control.

Thank you, Ms. Holland. Thank you, committee.

Mr. KANJORSKI. Thank you, Mr. Scott.

And now, Mr. Clay from Missouri.

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

Ms. Holland, I am a co-sponsor of H.R. 2885, the Credit Monitoring Clarification Act. We are in agreement that this legislation is necessary as CROA was established before credit monitoring services.

The intent was never to equate these services with credit repair organizations. You oversee the consumer reports operations of Equifax, Inc., a major credit reporting agency that also offers a credit monitoring service. How has regulation under CROA restricted the service that your organization offers consumers as a credit monitoring organization, and how will this change under H.R. 2885?

How does this benefit the consumer, since that is who we are primarily concerned with?

Ms. HOLLAND. Absolutely. At Equifax, we certainly believe in empowering consumers, because knowledge is power. CROA as it currently exists really hinders our ability to continue to develop products that meet the consumer marketplace's needs. So, for example, we conduct quite a lot of focus groups, and we have ideas that will enhance these credit monitoring products. But because of how

CROA exists right now, without this amendment that we're proposing, we really have, you know, taken kind of back seat and stalled on some of those products in introducing them and continuing the research and what we can continually do to enhance those products.

What we believe the amendment does—because remember, it is all about the consumer here—we are all about wanting to protect and empower consumers—the first thing that is very important is a consumer can get this credit monitoring service under our amendment. They can cancel it at any time. They're not going to be penalized; they're not going to have to pay a fee. And they're entitled to a pro-rata refund.

Secondly, they are going to get clear—and what I always call when I deal with consumers—"user-friendly" notices about what their rights are. Not notices that are in little-bitty font type. You know, we have all seen them. The notices that clearly say, "Here is what your rights are under a free credit report."

And I think most importantly that taking away—financial literacy to me is so important when I talk the consumers every day, and when I go out and do seminars, is that it also will allow them to increase their knowledge of financial literacy. And they in turn can make better choices and have a better life.

Mr. CLAY. Thank you for that response.

Anyone else on the panel, can you elaborate on how you think this bill will benefit consumers?

Ms. FORTNEY. Well, I agree with Ms. Holland that the bill will assure the continuation of credit monitoring services and will also enable companies offering other valuable tools for consumers to bring them onto the marketplace and to offer those products to consumers.

The other thing is that defending a class action lawsuit based on even technical definitions of CROA is an enormously expensive, burdensome undertaking for a company, and does interfere with the ability of a company to devote its resources to doing the things that it is in business to do.

And so I think that even though a lot of these lawsuits have settled, as long as the definition of credit repair organization and CROA remains the way it is, companies are going to be faced with the threat of new litigation, are going to have to defend new lawsuits, and that also impedes their ability to offer products and services to consumers.

Mr. CLAY. Thank you for that response.

Mr. Bennett?

Mr. BENNETT. Since I am the official who has criticized the bill, let me switch to the other side. This bill does a number of good things, and certainly aspires to do others. In terms of strengthening CROA itself, this is an opportunity where all of us at this table, I'm sure, would like to see a bill that makes the illegitimate non-credit monitoring credit repair, the savvy folks who have been circumventing CROA allows this committee to put some teeth back in as to the illegitimate; at the same time when it plugs those holes to make sure that the legitimate credit monitoring companies don't get caught up in it. And we support that, we would be enthusiasti-

cally in support of it if CROA could serve that function as well as it's considered.

We have discussed some of the necessary improvements. We think absolutely, drawing the line about deceptive conduct has to be in the bill. It has to be such that deceiving and manipulating—whether you call it credit monitoring like Lexington Law Group does or not—is different than what Equifax is doing, and what Tru Credit or TransUnion is doing.

And so this bill offers a great opportunity not only from industry's standpoint to make sure that credit monitoring services don't get caught up, but to refortify the original commitment against the illegitimate companies.

Mr. CLAY. And do you find credit monitoring services to be pretty effective as far as notifying the consumer? The red flag goes up in their credit report?

Mr. BENNETT. I do think—I mean there is a question as to cost, trade-offs, but those are business decisions. In terms of whether it is good to have more information for consumers, absolutely. The more information consumers have, honest information, non-deceptive information, the better our clients are empowered.

Mr. CLAY. Thank you.

Thank you, Mr. Chairman. I yield back.

Mr. KANJORSKI. Thank you very much, Mr. Clay.

The Chair notes that some members may have additional questions for this panel, which they may wish to submit in writing. Without objection, the hearing record will remain open for 30 days for members to submit written questions to these witnesses, and to place their responses in the record.

Before we adjourn, without objection, a letter from the Federal Trade Commission, dated May 20, 2008, will be made a part of the record.

I want to thank the panel, and take special time to thank you, because I think you have really made a contribution in your testimony today, and more than that, your willingness to serve as an advisory panel over the next several weeks to see if we can, in fact, get some standard that will allow us to move forward with this legislation. So individually and collectively I want to thank you on behalf of the committee for that most generous offer. Thank you.

And now this panel is dismissed, and the hearing is adjourned.

[Whereupon, at 11:40 a.m., the hearing was adjourned.]

A P P E N D I X

May 20, 2008

U.S. Congresswoman

Ginny Brown-Waite

Representing Citrus, Hernando, Lake, Levy, Marion, Pasco, Polk, and Sumter Counties

Committee on Financial Services Hearing
"Examining the need for H.R. 2885, the Credit Monitoring Clarification Act"
May 20, 2008

Statement for the Record

Mr. Chairman, thank you for holding this hearing today. And thank you to the witnesses for appearing.

Mr. Chairman I am a cosponsor of H.R. 2885, and I thank my colleague Rep. Kanjorski for introducing it.

This bill takes an important step in protecting consumers' identity. As we all know, the 1996 Credit Repair Organization Act that Congress passed is too broad. It deters credit monitoring agencies from offering notification services to consumers that help to protect them from identity theft.

The 1996 Act is too broad and is a magnet for frivolous lawsuits from trial attorneys looking for another pot of profits.

H.R. 2885 will specify that CROA was enacted to apply only to credit repair organizations and not credit monitoring agencies. This is a necessary and important fix to consumers, and I look forward to the opportunity to vote in favor of it.

Thank you again Mr. Chairman for holding this hearing, and I yield back the balance of my time.

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Financial Services Committee
Financial Services Hearing "Examining the Need for H.R. 2885, the Credit Monitoring Clarification Act."
Opening Statement for Congressman André Carson
May 20, 2008

Thank you, Chairman Frank and Ranking Member Bachus for holding this important hearing today to discuss the need for clarification of credit monitoring services.

Over the last decade, consumers have become increasingly savvy in tracking their credit histories, especially since access to free credit reports was expanded with the enactment of the FACT Act in 2003. Unfortunately, as consumers turned to online credit organizations for reliable information, many fell victim to unscrupulous companies who offered to repair their credit flaws and simply took their money.

In response to this troubling trend, Congress passed the Credit Repair Organizations Act in 1996. CROA offered much broader protections for these consumers than was previously available, but it included a broad definition of credit repair organizations. This definition is now impeding on the operation of a relatively recent credit service option, monitoring. Now, we must examine how we should update the act to accommodate credit monitoring services while maintaining the integrity of consumer's highly sensitive credit information.

Chairman Kanjorski's bill, HR 2885, seeks to responsibly separate in legal terms the kinds of services credit monitoring and credit repair organizations provide consumers. Further, it protects consumers by including disclosures and notification requirements credit monitoring companies must adhere to and options for consumers to terminate their subscriptions with such companies.

I share in a concern that several of the witnesses today make note of and that is ensuring that those unscrupulous credit repair operations do not find loopholes in the legislation we are discussing today to again take advantage of consumers. I know, however, that the sponsors of this bill have been diligent in crafting language that is would not allow bad actors to misrepresent themselves as credit monitoring services to receive advance fees.

I want to thank the witnesses for joining us today for this discussion and I look forward to hearing your testimony.

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OPENING STATEMENT OF
CONGRESSMAN PAUL E. KANJORSKI

COMMITTEE ON FINANCIAL SERVICES

HEARING ON EXAMINING THE NEED FOR H.R. 2885,
THE CREDIT MONITORING CLARIFICATION ACT

MAY 20, 2008

Thank you, Mr. Chairman. I very much appreciate your decision to convene this hearing on H.R. 2885, the Credit Monitoring Clarification Act. Congressman Royce and I have worked on this issue for several years, and our legislation enjoys the support of many Members of the Financial Services Committee.

If promoted and sold in a truthful manner, credit monitoring services can help consumers maintain an accurate credit file and provide them with valuable information for fighting identity theft. Credit monitoring is also often provided free of charge to the victims of data security breaches. As a result, it has gained wide acceptance in the marketplace.

In 1996, we enacted the Credit Repair Organizations Act. Otherwise known as CROA, this law protects consumers against the problematic and unethical practices of credit repair organizations. In enacting CROA, we put in place a broad definition of what constitutes a credit repair organization.

In the decade following enactment of CROA, products such as credit monitoring services have come into the market. In recent years, however, some parties have begun to interpret CROA's definition of a credit repair organization to include credit monitoring services, exposing the providers of credit monitoring services to legal ambiguity.

These interpretations also result in the provision of confusing credit repair notices to credit monitoring consumers. Additionally, because CROA prohibits advance payments, the providers of legitimate credit monitoring products cannot offer annual subscriptions.

The Federal Trade Commission has for several years indicated support for differentiating the treatment of credit monitoring services from the treatment of credit repair organizations under CROA. In testimony and correspondence, the Commission has regularly noted that it "sees little basis on which to subject the sale of legitimate credit monitoring and similar educational products and services to CROA's specific prohibitions and requirements, which were intended to address deceptive and abusive credit repair business practices."

To address the Commission's concerns, we have worked for a number of years on legislation. In the 109th Congress during the markup of the Data Accountability and Trust Act in the Financial Services Committee, we offered an amendment that passed on a voice vote to clarify the treatment of credit monitoring under CROA.

Since then, we have worked to revise and improve our legislative proposal to include new consumer protections and refine the credit monitoring exception. As introduced, H.R. 2885 would provide an activity-based exemption from CROA for credit monitoring services.

The users of these services would get new consumer protections, too. Additionally, our bill updates the credit repair disclosures required under CROA to reflect changes made by the FACT Act in 2003 that provide consumers with access to free credit reports.

Today's hearing will help us to determine how we can further improve H.R. 2885. In an effort to strike the right balance, we have modified this legislation considerably over the years. We will continue to do so going forward, I suspect.

The Commission has advised us that the exemption for legitimate credit monitoring services must be carefully considered and narrowly drawn. Consumer groups also want to ensure that the legislation does not ultimately undermine CROA's existing consumer protections against fraudulent credit repair organizations. I agree with both of them.

To achieve the goal of a workable credit monitoring exemption under CROA that maintains strong consumer protections, the Commission has previously urged the Congress to continue to reach out to stakeholders. Today's hearing acts on that recommendation by bringing together a number of stakeholders to detail concerns and find common ground.

In sum, I am pleased that we have the opportunity to hear more about the benefits of credit monitoring and to learn more about the concerns with our legislation. We need to ensure that as we move forward with the consideration of H.R. 2885, we do not allow bad actors to use the proposed exemption to circumvent CROA's protections. It is therefore my hope that we can work with all interested parties going forward to perfect the language in the bill.

PREPARED STATEMENT OF

J. HOWARD BEALES III

Associate Professor of Strategic Management and Public Policy
School of Business
The George Washington University

On

"Examining the Need for H.R. 2885, The Credit Monitoring Clarification Act"

Before the

HOUSE COMMITTEE ON FINANCIAL SERVICES

Washington, D.C.
May 20, 2008

Chairman Frank, Ranking Member Bachus, and members of the Committee, thank you for inviting me to testify today on the need for H.R. 2885, the Credit Monitoring Clarification Act. My name is Howard Beales, and I am an Associate Professor of Strategic Management and Public Policy in the Business School at George Washington University. I have a Ph.D. in economics from the University of Chicago, and more than a decade of experience addressing consumer protection issues at the Federal Trade Commission. Most recently, I was Director of the Bureau of Consumer Protection from 2001 through 2004. I am appearing today on my own behalf, as a former official who had responsibility for enforcing the Credit Repair Organizations Act (CROA), and an academic with a long-standing interest in consumer protection regulation.

Let me begin by describing the problem of credit repair, and the approach CROA takes to address the problem. Then I will turn to more recently developed services that are arguably swept under CROA, though they are very different from the credit repair services that were the target of CROA.

The crucial characteristic of credit repair is its promise to remove or change accurate information in the consumer's credit file. By its very nature, this promise is inherently fraudulent. Accurate, timely, negative information bearing on creditworthiness cannot be removed by the consumer, or anyone else acting on the consumer's behalf. Indeed, creditors' ability to obtain accurate information that the consumer might prefer not to share is crucial to the integrity of the consumer credit system, and makes possible the miracle of instant credit.

Although there is no legitimate way to remove accurate information from credit reports, credit repair organizations attempt to exploit the system to get accurate information removed. For example, some credit repair organizations have advised consumers to apply for an employer identification number and use that instead of a Social Security number when applying for credit. Others have repeatedly disputed the same accurate information, in the hopes that the furnisher who provided the information will fail to respond to the dispute in a timely fashion and the credit reporting agency will have no choice but to remove the information from the credit report, at least temporarily.

At least conceptually, there is nothing wrong with paying someone else to go through the process of correcting inaccurate information in a credit report. Thus, at a conceptual level, it is possible to imagine a legitimate credit repair service. If they exist at all, however, such services are exceedingly rare.

Rather than prohibit credit repair outright, Congress imposed a business model that is simply not workable for a mass market consumer product or service, particularly one that is arranged and often delivered online. No credit repair organization may charge for its service before the service is fully performed. Although consumers pay for many personal services after the service is performed, payment after the fact is largely confined to services where there is a face to face relationship between the buyer and seller, or where there is an ongoing relationship between them. I am not aware of any mass market, relatively standardized service that is sold on such a basis. It is simply not a feasible way

to conduct most consumer transactions. In addition, there must be a written contract, which is virtually nonexistent in the personal services that are actually paid for after the service is performed, a three day cooling off period before the contract becomes enforceable, and extensive disclosures. Imagine what it would like to get your lawn mowed if sellers followed that business model.

Given the difficulties of the CROA business model, it is perhaps not surprising that there appear to be relatively few cases in which organizations admit that they are credit repair organizations subject to CROA. Instead, they try to structure their operations to avoid the statute. They attempt to distinguish credit counseling services from credit repair, or they offer to renegotiate overdue debts with creditors, or they structure themselves as "nonprofit" organizations. And if they are credit repair organizations, they structure their fees as numerous smaller fees for specific tasks such as setting up a file to skirt the prohibition on accepting payment before the service is performed.

Imposing an unworkable business model on a business that is almost always fraudulent is not particularly problematic if the definition is tightly drawn. CROA's definition, however, is extremely expansive, in part because there were virtually no legitimate businesses that fell within the definition when the statute was enacted.

The critical language in CROA is the definition of a credit repair organization, and is extremely broad. It includes "any person" who uses interstate commerce "to sell, provide, or perform" any service, or represent that they will do so, "for the express or implied purpose of (i) improving any consumer's credit record, credit history, or credit rating; or (ii) providing advice or assistance to any consumer" about those subjects.[1]

Read literally, this language would cover some of the Federal Trade Commission's consumer education materials, like "Building a Better Credit Report," which will let you "learn how to improve your credit score, deal with debt, spot credit-related scams, and more." [2] The FTC makes these materials available for free, but they are also available through the Federal Citizen Information Center in Pueblo, Colorado, for a charge of $1 – before any advice is given.[3] For only $1 more you can pick up a copy of "Your Credit Scores," cosponsored by the Consumer Federation of America, and learn "how to raise your score" -- also payable before the advice is rendered, and well before the score is actually raised. Whether you order one pamphlet or both, there is no written contract, no cooling off period, and no disclosure document, all of which CROA require.

It is absurd to think that Congress meant to restrict such obviously valuable consumer education efforts as these when it enacted CROA. But to avoid the conclusion that they are in fact covered, you have to be willing to look beyond the seemingly plain statutory language. There is, after all, a sale, of advice, about improving your credit rating. The

[1] 15 U.S.C 1679a(3)(A).

[2] The marketing description is taken from the Federal Citizen Information Center's website, at http://www.pueblo.gsa.gov/results.tpl?id1=18&startat=1&--woSECTIONSdatarq=18&--SECTIONSword=ww (visited May 17,2008).

[3] In the interest of full disclosure, there is also a $2 "service fee" for any order, which is waived for free publications ordered online.

price is low, but the statute bans a CRO from receiving *any* money before the service is "fully performed." On the plain language of the statute, the only interesting question is whether the credit reporting organization is the Federal Citizen Information Center, the Federal Trade Commission, or the Consumer Federation of America – or perhaps all three are covered. If any or all of them are credit repair organizations, there is no practical way to make this information available through the Federal Citizen Information Center.

Unfortunately, there are valuable real world, commercial products currently on the market that face exactly this dilemma. One such service is credit monitoring. The typical credit monitoring service alerts consumers to any change in their credit reports, at either one or all three of the major consumer reporting agencies. A principal value of such services is their ability to alert consumers that they may be the victims of identity theft. The FTC has stated that "as a matter of policy, the Commission sees little basis on which to subject the sale of legitimate credit monitoring and similar educational products and services to CROA's specific prohibitions and requirements..."[4] The products have seemed valuable enough that federal government agencies have offered them for free to consumers whose information has been compromised in data security breaches.[5] The whole point of these services is to detect identity theft as early as possible, to enable consumers to improve "their credit record, credit history, or credit rating" by correcting information that was only included because of fraud. Like the consumer education examples, there is a payment before services are delivered, there is no written contract, there is no cooling off period, and there is no disclosure document. And like consumer education, there is no conceivable public purpose in restricting these services.

Another example is services that evaluate what consumers might do to improve their credit scores. Credit scores are vital to the availability of credit to some consumers, and they influence the terms of both credit and insurance for the vast majority of consumers. It is important for consumers in the modern world to understand what influences their credit score, and what they can do to improve it. That is, consumers need "advice" about how to "improve" their "credit rating."

Of course, consumers cannot improve their credit score by changing the past, which is the essence of what the traditional credit repair organization promises to do. But consumers can change their credit rating by changing their behavior. Some changes, like consistently paying on time, may take a significant amount of time before they change a credit score. Other changes, like paying down outstanding debt, or even redistributing debt across different credit accounts, can affect credit scores more quickly. Unfortunately, there are also "urban myths" about how to improve credit scores – like

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[4] Prepared Statement of the Federal Trade Commission Before the Senate Committee on Commerce, Science and Transportation, United States Senate, July 31, 2007, at 19 (available at http://www.ftc.gov/os/testimony/P034412telemarket.pdf) (Visited May 17, 2008).

[5] See, e.g., USDA Offers Free Credit Monitoring to Farm Services Agency and Rural Development Funding Recipients Q & A, available at http://www.usa.gov/usdaexposure.shtml#Receiving%20a%20Letter (Visited May 17, 2008).

closing unused accounts – that will likely reduce credit scores if consumers follow that (usually free) advice. Consumers, particularly those with lower credit scores, need accurate information about how they can best improve their credit score. They need, in the language of CROA, "advice."

Many, including government agencies, can offer general advice about how to improve credit scores for free. But the nature of credit scoring is that the most important factor reducing the score for one consumer may *not* be the most important factor for another, with a different credit history and different circumstances. The most valuable advice is personalized advice, which requires access to the consumer's credit report. That, in turn, involves an up-front cost, which reasonably requires an up-front payment. If such personalized advice services are covered by CROA, that up-front payment is illegal. Again, it serves no conceivable public purpose to prohibit these services.

It is possible to avoid the absurd result that CROA effectively prohibits up front charges for consumer education materials, credit monitoring, or personalized advice about the factors most likely to improve a particular consumer's credit score. Doing so, however, requires looking beyond the simple, and expansive, language of the statute, which would apparently sweep in all of these services.

Some courts have been willing to do so; others have not. Perhaps not surprisingly, willingness to look for the underlying Congressional purpose has seemed to depend on the particular facts of the case – and especially, on whether it appeared to be a truly legitimate service. Unfortunately, as is often true, bad facts make bad law – and some of the cases have involved some very bad facts.

Let me start with a case that involved good facts – Hillis v. Equifax Consumer Servies and Fair Issac Inc.[6] The case involved "Score Power," which was provided in a joint venture of Equifax and Fair Issac. It included an Equifax credit report, a FICO score based on that report, and access to a simulator that allowed consumers to see how various actions might affect their scores over time. It was, in essence, the personalized advice about how a consumer might improve his or her credit score discussed above.

In Georgia, the District court judge in Hillis was willing to look beyond the statutory language of CROA to consider what Congress was trying to accomplish. It concluded that

> ... the Court is persuaded that the terms in the definition of a CRO (credit record, credit history, and credit rating) all refer to component of a consumer's historical, tangible, and displayable credit record. In short, Congress defined a CRO in a way that focuses not on 'credit' generally, but instead on those who claim they can undo or improve a consumer's past, historical, displayable, and tangible credit record.[7]

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[6] Hillis v. Equifax Consumer Services, Inc. and Fair Issac, Inc, 237 F.R.D. 491 (N.D. Ga); 2006 U.S.Dist.Lexis 60182 (August 18, 2006, N. Dist. Ga.).
[7] Id. at 516.

The court did not grant summary judgment, however, because it believed "there is at least a genuine issue of material fact as to whether Defendants, through their representations, implied to the average consumer that they performed a form of credit repair or instead were merely engaged in a form of legitimate credit counseling to help consumers improve their FICO scores over time."[8]

The line drawn in Hillis is a reasonable one. Unfortunately, other cases have not turned out the same way, even with good facts. In Helms v. Consumerinfo.com, decided before Hillis, the district court judge in Alabama considered a pure credit monitoring service. She found "it doubtful that Congress intended the definition of credit repair organizations to be construed so narrowly so as to cover only fraudulent companies."[9] Perhaps misled by the statute's approach, she also noted that "CROA is not a blanket prohibition on the operation of credit repair businesses."[10] It is, however, a practical prohibition, and for a business interested in offering a useful service to consumers, the difference between blanket and practical prohibitions is immaterial. Attempting to structure a product to avoid CROA's coverage, if possible at all, would likely involve considerable legal risk.

Other cases have involved bad facts, at least according to the complaints. Zimmerman v. Cambridge Credit Counseling Corp. et. al.,[11] for example, involved a company that was organized as a not for profit organization, representing that it would help consumers reduce their debt payments and thereby improve their credit ratings. The court held that CROA applied, dismissing the Hillis decision in a footnote that stated "it would betray the statute's intent to confine CROA's reach to only those practices that Congress explicitly identified in enacting it."[12] It is worth noting that in the Ameridebt case[13], the FTC pursued very similar allegations without invoking CROA.

To avoid losing valuable services for consumers, a line must be drawn to distinguish legitimate credit monitoring from illegitimate credit repair. The line drawn in Hillis is a reasonable one, if the courts follow it. It is, however, a line, and it creates the need to prove that a credit repair fraud that seeks to disguise itself as a credit counselor or a credit monitoring service is in fact making claims to consumers that it can modify their historical credit record. If the courts instead follow Zimmerman, valuable services will likely be prohibited.

Congress, rather than the courts, should draw the line. Courts have been attempting to discern exactly how Congress intended the broad language of CROA to apply, and they have come to different conclusions. Congress should clarify the statute.

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[8] Id. at 517.
[9] Helms v. Consumerinfo.com, Inc., 436 F. Supp. 2d 1220; 2005 U.S. Dist. LEXIS 42777 (Feb. 14, 2005, N. Dist. Ala.).
[10] Id. at 1234.
[11] Zimmerman v. Cambridge Credit Counseling Corp., 529 F. Supp. 254. 275; 2008 U.S. Dist. LEXIS 3155 (Jan. 7, 2008, Mass.).
[12] Id. at n. 20.
[13] FTC v. Ameridebt et al., filed November 19, 2003, available at http://www.ftc.gov/os/caselist/0223171/031119compameridebt.pdf (Visited May 19, 2008).

Whether drawn by Congress or the courts, any line that distinguishes between fraudulent and legitimate will create new opportunities for the credit repair organizations that are the real target to seek to avoid the statute. That is inherent in distinguishing between fraudulent and legitimate conduct, and it is not without costs. There are obvious advantages to private plaintiffs and public enforcement agencies in needing only to prove that advice about credit was promised, without worrying about whether it was legitimate advice or fraudulent. But the alternative to drawing a line is to prohibit legitimate services that are valuable to consumers, and that involves even higher costs. It is Congress, not the courts, that should seek to strike the best possible balance.

AMERICAN BANKER
On Focus and In Depth

Housing Stimulus Deal Omits Bankruptcy Provision

American Banker | Thursday, April 3, 2008

By Cheyenne Hopkins

WASHINGTON — After scrambling through the night and into Wednesday, Republican and Democratic senators reached a deal on a housing stimulus bill that would leave out some of the most aggressive measures, including a provision to let bankruptcy judges rework mortgages.

Details of the bill were announced late Wednesday, and lawmakers were expected to begin debate on the bill today. Passage of a final package is expected next week.

The housing bill would require enhanced mortgage disclosures; authorize $4 billion of block grants to let states buy foreclosed properties; modernize the Federal Housing Administration; and let state and local governments, in conjunction with housing authorities, ease restrictions on tax-exempt mortgage revenue bonds so that borrowers could refinance into cheaper loans.

Absent from the deal, however, were more far reaching proposals to give bankruptcy judges the power to rework mortgages and to let the FHA purchase mortgages worth more than the appraised value of a house after a substantial writedown by the lender.

The bankruptcy provision, adamantly opposed by the Bush administration and the financial services industry, was the crux of the fight between the political parties and was removed to ensure the broader housing package won bipartisan support.

Though Senate Banking Committee Chairman Chris Dodd's staff was said to be pushing to include the Connecticut Democrat's broader FHA plan to help stabilize home prices, sources said it met objections from Sen. Richard Shelby of Alabama, the panel's No. 1 Republican.

However, both measures are likely to come back to the forefront soon.

Observers said they expect Senate Majority Whip Richard Durbin to try to add the bankruptcy provision back to the housing bill as an amendment. On Wednesday morning the Illinois Democrat went to the Senate floor to blame mortgage brokers and lenders for killing the bankruptcy provision.

"Who opposes it? The big banks that created this mess in the first place," he said. "I'm sorry they had their day. They've had their chance. Most of them made plenty off of the mess, and their CEOs are going to escape unscathed from this terrible economy."

But it was unclear how much support such an amendment would need. Republicans were considering asking for a 60-vote rule that requires more than a simple majority to pass amendments. Sen. Durbin is highly unlikely to win enough votes for his amendment if that rule is put in place.

Even if it is not, lawmakers could opt for an alternative bankruptcy amendment that Sen. Arlen Specter of Pennsylvania, the top Republican on the Senate Judiciary Committee, is expected to offer. His measure would let bankruptcy judges alter the terms of a mortgage only with the lender's consent.

Without a bankruptcy provision, some consumer groups said the bill was a collection of half-hearted measures that would do little to correct the housing crisis.

"Without taking this important step, the Senate will have fallen short of taking the necessary measures to address the root cause of the foreclosure crisis and the greater economic crisis we have found ourselves in," said Josh Nassar, a lobbyist for the Center for Responsible Lending. "Additional aid and better disclosures will have some impact, but they will not get to the root of the crisis, and the foreclosure numbers will continue to escalate."

But Jaret Seiberg, senior vice president of financial policy for Stanford Washington Research Group, said the final package could still have some impact.

"Each provision helps at the margin, and the more you eat away at the margin, the more you start addressing the problem," he said.

Industry groups were largely supportive of the housing package without the bankruptcy provision attached. However, they did raise issues with a provision that would enhance mortgage disclosures, including increasing legal liability for lenders that do not comply. Lenders could be fined a minimum of $5,000 for each loan; the current maximum is $2,000.

Industry lobbyists said they expected some version of the disclosure requirements to pass but were hoping to amend them to reduce exposure.

The housing package also included provisions to modernize the FHA, but several elements appeared different from an FHA reform bill the Senate passed late last year. The original Senate bill, approved by a vote of 93 to 1, would have raised the limit at which the FHA could guarantee loans to $417,000 but would reduce the down-payment requirement by half, to 1.5%.

In contrast, the new housing package includes provisions to raise the FHA guarantee limit to $550,000 and raise the down-payment requirement to 3.5%. Sources said the down-payment hike was sparked by concerns from Sen. Shelby about the impact of a higher loan limit combined with lower down-payment requirements.

Observers warned that the agreement in the Senate was fragile, and that individual pieces could change. If they did not, the FHA reform provisions would differ from those in a House bill passed last year. That bill would raise the loan limit to $729,750 and allow the agency to insure loans with no down payment.

The agreement's other provisions include allowing businesses to carry back net operating losses over four years, instead of the current two-year limit, and authorizing $100 million for foreclosure prevention counseling.

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Written Testimony

Before The

HOUSE COMMITTEE ON FINANCIAL SERVICES

Regarding

"Examining the Need for H.R. 2885, the Credit Monitoring Clarification Act"

May 20, 2008

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on behalf of the

National Association of Consumer Advocates
National Consumer Law Center (for its low income clients)
U.S. Public Interest Research Group

Chairman Frank, Ranking Member Bachus and other distinguished members of the Financial Services Committee, thank you for inviting me to testify today in this important hearing to consider the necessity, utility and impact of H.R. 2885, a proposed amendment designed in principle to shelter legitimate credit monitoring services from the governance of the Credit Repair Organizations Act (CROA). In shortest summary, we oppose the current bill as written and are hopeful that consumer advocates will have an opportunity to work with the Committee to modify the bill to more effectively improve the CROA.

My name is Leonard A. Bennett. I am a consumer protection attorney. My practice is almost entirely limited to enforcing the various federal law protecting consumers in the preparation and use of their credit reports, including a significant background under the CROA. I have been asked to appear before you on behalf of the National Association of Consumer Advocates (NACA), a non-profit association of attorneys and consumer advocates committed to representing customers' interests. Our members are private attorneys, JAG officers from the various service branches, state attorneys general deputies and other public sector attorneys, legal services attorneys, law professors and law students whose primary focus is the

protection and representation of consumers. I also offer this testimony today on behalf of the U.S. Public Interest Research Group and the low income clients of the National Consumer Law Center. We oppose changing the Act to expand the protection credit-monitoring services since the proposed changes instead facilitate evasion of the Act's salutary protections by credit repair organizations. Instead, we offer suggestions for improving the Act to strengthen its protections against deceptive credit repair services.

Credit-Monitoring is a Profitable Business, not a Public Service

To understand the near unanimous opposition of consumer groups to the present legislation it is important to know more about the credit monitoring services than is readily revealed by the industry.

The credit reporting agencies (CRAs) already have a duty under the Fair Credit Reporting Act to keep credit reports as accurate as possible to and to correct any problems promptly. Previous hearings before Congress have revealed the extent to which the CRAs have failed in this duty.

Instead of fulfilling their duties under the FCRA, the national CRAs have developed credit-monitoring and related services as a growing and substantial profit center marketed through the threat of identity-theft and other similar credit reporting inaccuracies. Each agency markets a credit-monitoring product directly to consumers. For example, Experian has

branded and marketed by large television buys its misnamed service www.freecreditreport.com. As the agency reported to its shareholders on May 23, 2007:

> Consumer Direct [*online credit reports, scores and monitoring Services]* delivered excellent growth throughout the period, with strong demand from consumers for credit monitoring services, which led to higher membership rates.

On its internet home page, www.equifax.com, Equifax sells its credit monitoring products to consumers stating: "Make sure your reports are accurate & free of fraud." In its quarterly filing, the agency reported that its sale of these reports and its credit monitoring products directly to consumers had generated no less than 10% of its operating revenue and one sixth of its credit reporting revenue.

Ironically, all three agencies market products with "identity theft" insurance to provide attorneys fees and expenses necessary to obtain the correction of their credit reports from those same agencies. Consumers are told to buy the CRA products or else remain in fear that they will be inaccurate and full of fraud despite the CRAs duty to maintain accurate reports for free. Consumers are asked to pay monthly amounts to the CRAs in order to learn what these private companies are reporting about the consumer to their subscribers.

There is a common misperception pushed by the credit reporting industry that the CRAs are somewhat like quasi-governmental entities – highly regulated and established for a public purpose. Certainly our economy benefits from greater information for all concerned, and the CRAs cannot be fairly cast as villains. But neither are they neutral and indifferent public interest organizations. They are private businesses seeking to maximize profit and shareholder value. Nothing more. The move to credit monitoring as a profit center is thus to be expected. Credit reporting is just one in a series of recent business moves the national CRAs have made to expand their range of business. The CRAs have sought to vertically integrate and have used their control of credit file databases to considerable advantage in nearly every aspect of the credit system. Originally serving only as data warehouses, in the early 1990s, the CRAs began to purchase or force out the regional and local agencies that had previously sold their credit reports. Thereafter, the national CRAs began to target the reseller and mortgage rescoring industry and have since begun to dominate same. Most recently, the CRAs have sought to target the position of Fair Isaac in the credit scoring industry by joining together to create an alternate CRA controlled scoring model, VantageScore.[1] And on the present topic, the CRAs came

[1] In each of these examples, the CRAs have faced anti-trust litigation as a result.

late to the credit-monitoring industry, but have now embraced it fully.

Current Marketing of Credit-Monitoring is Often Deceptive

While not valueless, credit monitoring is a product that is worth much less that its hype reveals. Worse still, it is often marketed in a way that is plainly deceptive. The Committee should be particularly concerned about the efforts by for-profit credit monitoring services to dilute or obscure the important – and free – rights already available to consumers under state and federal law. The CRAs already have an obligation to provide free credit reports to consumers. After FACTA, every consumer may receive one free report from each CRA per year. If the consumer has been denied credit, is indigent or suspects possible fraud or identity theft, their additional reports are also free. Even if the consumer wants a monthly report, they can purchase one each month at nearly half the price of most credit monitoring products. The statutory imposition of these free and modestly priced reports makes sense in light of the actual price of credit reports paid by CRA business customers – often as low as two cents ($.02) per report.

Experian has been penalized twice by the Federal Trade Commission for deceptively linking subscription-based credit monitoring offers to the federal free annual credit report on request right established by the 2003 FACT Act. In August 2005, Consumerinfo.com paid $950,000 to settle

charges by the FTC that Experian offered consumers a free copy of their credit report and "30 FREE days of Credit Check Monitoring" without adequately explaining that after the free trial period for the credit-monitoring service expired, consumers automatically would be charged a $79.95 annual membership unless they notified the defendant within 30 days to cancel the service. Consumerinfo.com billed the credit cards that it had told consumers were "required only to establish your account" and, in some cases, automatically renewed memberships by re-billing consumers without notice. The settlement required Consumerinfo to pay redress to deceived consumers, barred deceptive and misleading claims about "free" offers, and required clear and conspicuous disclosure of terms and conditions of any "free" offer. Experian then violated this settlement agreement, and in February 2007 was fined a second time by the FTC for $300,000 to settle charges that its ads for a "free credit report" continued to fail to disclose adequately that consumers who signed up would be automatically enrolled in a credit- monitoring program and charged $79.95. Although Consumerinfo.com now contains the disclosures, they are in fine print, and the website implies that the truly free report is not "user-friendly" like the free one that comes with the monitoring service.

Moreover, the main Equifax, TransUnion and Experian websites are

worse. Each prominently mentions the ability to obtain a "free credit report", but they then link to a sign up for the paid monitoring service. Although the websites have disclosures embedded about the price distinction between the truly free reports and those sold through the monitoring packages, the disclosures are obscure and easy to overlook. All three websites make it very difficult to learn about how to get a truly free report, and very easy to respond to a prominent "get my free report" link and inadvertently sign up for a paid services.

The CRA credit-monitoring products also have an alternate purpose. They assist the CRAs in funneling consumers who need to dispute inaccurate information in their files into the CRA automated reinvestigation process. I have been privileged to speak at conferences, seminars and training programs for both lay and attorney audiences on the basics of credit reporting and the ideal means to obtain an accurate and complete credit report. And I have written the Accuracy chapter in the primary legal treatise on the same subject. I have also twice testified before this Committee on the Fair Credit Reporting Act. In each context, I have cautioned about the current automated reinvestigation system used by Equifax, Trans Union and Experian. When a consumer makes a dispute, whether of an inaccurate tradeline, as an identity theft victim or even a

person inaccurately reported as deceased – all remarkably common - the CRA process attempts to reduce the substantive disputes to the same four to six generic codes used by the CRA online system. Thereafter, when a superficial investigation leads to FTC or State Attorney General complaint or even litigation, the CRA justifies its superficial investigation by its complaint of inadequate detail in the consumer's dispute, essentially complaining about the vagueness of its own multiple-choice dispute code menu. In litigation, this defense often works. However, when we explain the FCRA dispute process to JAG attorneys, other public interest attorneys of consumers seeking help, we warn against falling into the funnel of this online dispute process. The procedure recommended by nearly every consumer advocate and public interest group in the field is to make a detailed, documented written dispute sent by certified mail (a significant percentage of CRA disputes are "lost in the mail.") Unfortunately, the CRA credit-monitoring products do not suggest or even seem to permit detailed meaningful disputes. They discourage or bar documented written disputes.

Of related concern is the nature of the products actually sold as credit-monitoring. The credit reports that the CRAs actually sell through such services are frequently entirely different that those sold to their business subscribers. The CRAs use different matching algorithms and criteria when

preparing reports for credit monitoring. For example, the CRAs will provide only "exact match" data – tradelines matching to the exact social security number, name and address of the consumer. This is not true for credit subscribers who can always obtain a purchased report from the CRAs with limited identifying information, including even requests without a social security number. For example, in a case litigated in Wisconsin in part on a common law fraud claim, my client Mr. Schubert had his identity mixed with another person. He had subscribed to Equifax's "Gold" credit monitoring product incorrectly believing that he could monitor what Equifax was reporting about him to his creditors.[2]

Even the credit scores included within many credit monitoring packages are largely worthless. The CRAs push and use their own scoring model, VantageScore. So far, this score has not been adopted by any major creditor as its primary risk model. Its sale or even inclusion within a premium credit-monitoring product is deceptive to the extent that the limited utility of the score model is withheld.

Accordingly, if the Committee adopts this bill or a similar version, it is critical to consumers – the constituents we share – that the amended

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[2] This Committee has previously considered, and in FACTA deferred to the regulatory agencies for comment, this significant problem of whether consumers should receive the actual report contents the CRAs provide to their creditor customers. The FTC adopted the CDIA position and the Committee has not thereafter considered the issue.

CROA include a provision prohibiting deceptive practices in the marketing, sale and delivery of credit-monitoring products.

H.R. 2885 would open the last of the floodgates on credit repair.

As Stuart Pratt of the Consumer Data Industry Association warned in his June 2007 testimony before this Committee, modern CROs are "savvier" than ever. There is no doubt that the proposed expansion of CROA exemptions will nearly eliminate the remaining utility of the statute. With limited FTC attention and resources for enforcement of the CROA, the responsibility and hope for combating deceptive credit repair organizations has fallen largely on private litigants. In most circumstances, consumer groups and advocates have been alone in enforcing the CROA. Litigating CROA cases as a private attorney general is a daunting task. The current CROA already contains exemptions and carve outs that have been frequently used by CROs to escape governance of the statute. For example, CROs use the "non-profit" exemption in the CRA to craft structures to skirt the statute's requirements. "Educational" entities that have nonprofit status are created as fronts, with their founders contracted in as vendors with over-priced goods or services sold to the "nonprofit." CROs create line-charges for "services" to avoid the CROA's prohibition against charging for credit repair before it is performed. In these and numerous other ways, CROs have

schemed and crafted uses for the current carve outs and exemptions in a manner that has significantly impeded or limited the effectiveness of CROA enforcement.

On July 31, 2007, before a Senate Commerce Committee oversight hearing on CROA, Lydia Parnes, the Director of the Bureau of Consumer Protection of the Federal Trade Commission, confirmed that the exemption in H.R. 2885 would do much the same thing, opening up loopholes in CROA that fraudulent credit repair services would exploit: "our experience with credit repair outfits is that they use every exemption to try and evade the law... "[S]o far we have not been able to come up with anything that we could really recommend as carving out an appropriate exemption, and still providing adequate protection to consumers." As currently proposed, the bill would exclude the sale of credit monitoring from governance of the CROA. But the CROA clearly does not regulate or restrict pure credit monitoring. If all industry desired was the unfettered right to sell copies of credit reports and credit scores to consumers, neither the CROA nor the consumer groups concerned with its enforcement would restrict that ambition. But that is not all industry is seeking and certainly not all H.R. 2885 would accomplish. Instead, the objective and effect of the bill is to exclude as well "analysis, evaluation, and explanation of such actual or

hypothetical credit scores, or any similar projections, forecasts. Analysis, evaluations or explanations." Virtually any credit repair service could fit within this definition.

H.R. 2885 would also withdraw from the CROA "the provision of materials or services to assist a consumer who is a victim of identity theft" when offered in conjunction with credit monitoring. Yet victims of identity theft – such as the clients of mine discussed below – may be the most likely to become ensnared in credit repair scams as they struggle to correct their damaged credit.

CROs already tie their products to credit monitoring.

It is not credit monitoring itself that industry seeks to exclude from CROA, but the collateral advice, services and products sold with the consumer's alerts, scores and reports. However, if the legislation is effective at excluding these side services so long as credit monitoring is also included in the transaction, the amendment will have the related effect of protecting as excluded credit monitoring CRO sales of their collateral credit repair products. This is not idle speculation and is already a major problem as some of the worst CROs have already begun their moves to add credit-monitoring products. The Lexington Law Group, one of the most notorious in the industry, already sells its "premier" credit repair package with

extensive credit monitoring. As the CRO explains:

> Each month, we evaluate your credit report in accordance with the five main factors known to significantly impact credit scoring. A highly customized multi-page analysis is then provided, including targeted tips which may help you raise your credit scores. [With LLG's "ReportWatch" product,] Whenever we detect changes within your credit reports which may positively or negatively impact your credit scores, ReportWatch™ alerts are quickly dispatched via email. We also provide tips, when applicable, regarding how to make the best use of this crucial data.[3]

H.R. 2885 exposes every ID Theft victim to unregulated credit repair

H.R. 2885 also raises the possibility that an identity theft victim may be twice victimized. For an identity theft victim, credit repair is a worthless product. There is little or no chance that the automated and shallow credit repair communications with CRAs can resolve the complicated mess facing a fraud victim. Nevertheless, CROs peddle their wares as a claimed cure or prevention for ID theft. In fact, we recently represented two identity theft victims who did in fact first seek assistance from the Lexington Law Group and each incurred additional setbacks as a result. The CRO represents, as if to make our point as simply as possible: "Trust the leaders in credit repair to help you recover from identity theft."[4] The CRO states:

> Attempting to resolve identity theft fraud on your own can be complicated, and it's hard to know all the steps you need to

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[3] http://www.lexingtonlaw.com/credit-repair-services/concord-premier.html
[4] http://www.lexingtonlaw.com/identity-theft/

> take, to say nothing of the time and effort required. If you are an identity theft victim, Lexington Law can assist you in identity theft restoration. Lexington Law will work to clean up your credit report and increase your credit score by challenging all the negative credit reports items accrued. We will also monitor your credit reports to catch potential identity theft fraud and provide enhanced identity theft restoration services to protect you from additional identity theft issues that do not initially appear on your credit reports.

Under current law, Credit Monitoring is not governed by the CROA

As currently worded, the CROA does not apply to a CRA or any other entity that would merely furnish credit reports, scores or inquiry alerts. *See* Hillis v. Equifax Consumer Servs., 237 F.R.D. 491, 515 (D. Ga. 2006) (discussing why credit monitoring services do not seem to be within CROA, but stating "if a credit reporting firm decides to offer a service that falls within the purview of the CROA, there is no reason that the CROA should not apply"). H.R. 2885 is a solution in search of a problem. In fact, the limited litigation that has occurred related to the primary credit monitoring products ended favorably to the CRAs with the Defendants paying little more than additional free credit monitoring.

CROA can be strengthened to protect consumers as well as industry

We are also concerned that the present debate has become almost entirely focused on how to limit or exclude from the CROA, rather than how to strengthen and salvage this important statute. There would seem to be no better example of how the credit reporting industry and consumer groups

could work together than to fortify and improve the CROA. Last year, in her testimony before the Senate Commerce Committee, my colleague Joanne Faulkner outlined the several improvements we believe are critically necessary to accomplish the still current objectives of the CROA. These include:

> 1. An express prohibition on pre-dispute arbitration clauses, commonly inserted by credit repair organizations (CROs) both to insulate them from liability as well as to keep their deceptive practices out of the public eye and under the rug.
> 2. A provision affirmatively allowing the consumer to sue the CRO in the federal or state judicial district where the consumer resides irrespective of any contractual provision to the contrary.
> 3. A provision that the consumer may obtain injunctive relief.
> 4. A prohibition on any contract provision that prevents class actions, particularly important here because an individual's damages may not be sufficient to interest competent attorney representation.
> 5. An amendment to §1679b(4) of the CROA to effectuate the intent of Congress to bar unfair and deceptive practices. Because the word "fraud" is used in that subsection only, some courts are demanding a higher burden of proof and pleading than normally imposed for unfair or deceptive practices.
> 6. A provision preventing CROs from evading §1679b(b)by charging for discrete services ("set up file"; "monthly report on progress" and the like).
> 7. Amend the exclusion for "Non-profits" to include only those organizations whose members and affiliates are also non-profit.

Thank you for the opportunity to testify. Please feel free to contact me for any additional information.

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George Mason University School of Law and Economics, Arlington, Virginia: J.D. 1994. Admitted to Virginia State Bar 1994. Admitted to North Carolina State Bar 1995.

Admitted to the United States Supreme Court, United States Courts of Appeal for the Third and Fourth Circuits, and U.S. District Courts in Virginia, North Carolina, Wisconsin, Illinois and Michigan. Admitted *pro hac vice* in jurisdictions across the country including California, Arizona, South Carolina, Rhode Island, Connecticut, Ohio, Wyoming, Maryland, Alabama, Wisconsin, Pennsylvania and Washington. Member of the National Association of Consumer Advocates (NACA) and various state bar associations.

Contributing Author, *Fair Credit Reporting Act, Sixth Edition*, National Consumer Law Center

Presented NACA's Congressional Testimony before House Committee on Financial Services, "The Fair Credit Reporting Act: Consumers' Ability to Dispute and Correct Inaccurate Information", June 19, 2007, http://www.house.gov/apps/list/hearing/financialsvcs_dem/osbennett061907.pdf.

Presented NACA's Congressional Testimony before the House Committee on Financial Services, "The Fair Credit Reporting Act: How it Functions for Consumers and the Economy", June 4, 2003, Proposed Amendments to the Federal Fair Credit Reporting Act, http://financialservices.house.gov/media/pdf/060403lb.pdf.

Speaker and Panelist at numerous state and national seminars and consumer law courses, including regular invitations to speak at the NACA Fair Credit Reporting Act and Auto Fraud conferences, the National Consumer Law Center's Consumer Law conferences; CLE programs for the ABA and various state bars:

2008

- U.S. Army JAG School, Charlottesville, Virginia, Course Instructor, *Fair Credit Reporting Act,* May 2008;

- National Association of Consumer Advocates, *Fair Debt Collection Practices Act National Conference*, Nashville, Tennessee, *Multiple Panels,* April 2008;

2007

- Washington State Bar, Consumer Law CLE, Invited Speaker, July 2007, *Fair Credit Reporting Act.*

- National Association of Consumer Advocates, *Fair Credit Reporting Act National Conference*, *Multiple Panels*;

- U.S. Army JAG School, Charlottesville, Virginia, Course Instructor, *Fair Credit Reporting Act.*

- Georgia State Bar, Consumer Law CLE, Speaker, *Fair Credit Reporting Act.*

2006

- National Consumer Law Center, National Consumer Rights Conference, Miami, FL, Speaker for Multiple Sessions, *Fair Credit Reporting Act*,

- Texas State Bar, Consumer Law CLE, Speaker, *Federal Claims in Autofraud Litigation*

- Santa Clara University Law School, Course, *Fair Credit Reporting Act.*

- Widener University Law School, Course, *Fair Credit Reporting Act.*

- United States Navy, Navy Legal Services, Norfolk, Virginia, *Auto Fraud*;

2005

- Missouri State Bar CLE, Oklahoma City, Oklahoma, *Fair Credit Reporting Act*;

- National Consumer Law Center, National Consumer Rights Conference, Boston, Mass. *Fair Credit Reporting Act Experts Panel*; and *ABC's of the Fair Credit Reporting Act.*

- National Association of Consumer Advocates, *Fair Credit Reporting Act National Conference*, New Orleans, Louisiana, *Multiple Panels*;

- United States Navy, Naval Justice School (JAG Training), Newport, Rhode Island, *Consumer Law.*

2004

- American Bar Association, Telephone Seminar; *"Changing Faces of Consumer Law"*,

- National Consumer Law Center, National Consumer Rights Conference, Boston, Mass.

- *Fair Credit Reporting Act Experts Panel*; and ABC'*s of the Fair Credit Reporting Act.*

- National Association of Consumer Advocates, *Fair Credit Reporting Act National Conference*, Chicago, Illinois; *Multiple Panels*

- Oklahoma State Bar CLE, Oklahoma City, Oklahoma, *Identity Theft*;

- Virginia State Bar, Telephone Seminar, *Identity Theft.*

- United States Navy, Naval Justice School (JAG Training), Newport, Rhode Island, *Consumer Law*

- United States Navy, Navy Legal Services, Norfolk, Virginia, *Auto Fraud*;

- Virginia State Bar, Richmond and Fairfax, Virginia, *Consumer Protection Law*;

- Michigan State Bar, Consumer Law Section, Ann Arbor, Michigan; *Keynote Speaker.*

Numerous published opinions favorable to consumers.

STATEMENT OF ANNE P. FORTNEY

BEFORE THE

COMMITTEE ON FINANCIAL SERVICES
HOUSE OF REPRESENTATIVES

ON

EXAMINING THE NEED FOR H.R. 2885,
CREDIT MONITORING CLARIFICATION ACT

May 20, 2008

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Statement of Anne P. Fortney

Chairman Frank, Congressman Bachus and members of the Committee, thank you for this opportunity to appear before the Committee on Financial Services.

I am a partner in the Washington, DC office of the Hudson Cook law firm. Our firm specializes in consumer financial services;[1] my practice focuses primarily on issues arising under consumer protection laws, including the Fair Credit Reporting Act, the Gramm-Leach-Bliley Act, the Credit Repair Organizations Act, and similar laws. I bring to this practice more than 30 years experience in the consumer financial services field, including service as Associate Director for Credit Practices at the Federal Trade Commission (FTC), as in-house counsel at a retail creditor and as a practitioner who counsels clients on compliance with the consumer protection laws. I also serve as a consultant and an expert witness in litigation involving these consumer protection laws.[2]

I first became aware of problems caused by credit repair organizations while at the FTC. We heard from consumers, as well as industry representatives, about the injury that these organizations inflicted. We learned that consumers typically paid thousands of dollars in advance based on false promises that these organizations could "clean up" or "repair" negative credit histories. The consumer reporting and credit granting industries were burdened with frivolous disputes generated by these organizations, and even the

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[1] As explained on the firm's website: "Hudson Cook, LLP was established in 1997 with a single purpose in mind - to provide the best possible service to companies needing advice and assistance in the ever changing and challenging world of consumer financial services law. Our wide-ranging services cover virtually all aspects of state and federal consumer financial services law. At some law firms, the consumer financial services practice is at best an adjunct to the litigation or general business or banking law practice. At Hudson Cook, consumer financial services law is what we do." www.hudsoncook.com.

[2] A more detailed description of my background and experience is attached to this statement.

limited success of their tactics caused the loss of accurate consumer report data. While the FTC pursued credit repair organizations under its FTC Act powers, it became apparent that legislation was needed to directly address the tactics of these organizations. After I had left the FTC, in 1996, Congress enacted the Credit Repair Organizations Act (CROA), 15 U.S.C. §§ 1679 *et seq.*

I commend you for holding this hearing on H.R. 2885, the Credit Monitoring Clarification Act (CMCA), to amend CROA.

Value of Credit Monitoring Products and Services

To provide context for the discussion about the need to amend CROA, it is important to recognize the value of credit monitoring services. Credit monitoring services notify consumers when there has been some activity that affects information in their consumer reports and to provide immediate access to that information. The products and services offered by these companies educate consumers about their credit practices and protect them against identity theft or from other problems that might negatively affect their credit. Credit monitoring services are often provided to consumers by companies that have experienced a data security breach.

Credit monitoring services are a proven means of notifying consumers that they are victims or potential victims of identity theft or other fraud. According to a Better Business Bureau study, 11% of fraud victims discovered the fraud through credit monitoring/reports.[3] Consumers who subscribe to credit monitoring services might also learn that an inaccurate item was placed on their credit report. With this information,

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[3] *See e.g.* Better Business Bureau Report, *New Research Shows Identity Fraud Growth is Contained and Consumers Have More Control Than They Think*, January 31, 2006, www.bbbonline.org/IDtheft/safetyQuiz.asp.

consumers can protect their credit histories by disputing the fraudulent or inaccurate information to the consumer reporting agencies.

Credit monitoring services also educate consumers about how their credit decisions – such as paying bills late or on time, opening new accounts, exceeding their credit card limits – will impact their credit scores. Some consumers simply want the peace of mind that monitoring services will give them.

The FTC has also recognized that credit monitoring services can help consumers maintain accurate consumer report files and can give them valuable information to combat identity theft.[4] Credit monitoring services are offered by consumer reporting agencies, their affiliates and resellers. Banks and other creditors also provide monitoring services for their customers. A consumer's ability to access these services from a variety of legitimate sources gives consumers an important measure of control over and knowledge about their credit files.

Purpose of CROA

CROA was enacted in 1996 in response to a narrow and predatory practice engaged in by companies referred to as "credit repair clinics" or "credit repair organizations" (CROs). The CROs represented that they would remove negative information from a consumer report – even if it was accurate – in exchange for a substantial fee paid in advance of services being performed. The only way a CRO could fulfill its promises in many cases was to flood the consumer reporting agencies with multiple disputes about the same negative information on the same consumer. The goal of the CROs was to clog or disrupt the consumer reporting industry's reinvestigation

[4] Prepared Statement of Federal Trade Commission Before the Senate Committee on Commerce, Science and Transportation, U.S. Senate, July 31, 2007, p. 19-20.

process so that the information could not be verified within the statutory time period, with the result that consumer reporting agencies would be forced to delete negative but accurate information in a consumer's credit file.

CROs' practices had severe consequences for consumers, the credit reporting industry and creditors. From the credit industry's perspective, CROs threatened the accuracy, integrity and reliability of consumer report information because consumer reporting agencies were forced to delete negative but accurate information in the consumer report file. Credit grantors were injured when they extended credit to consumers based on incomplete credit report histories. The CROs' promises and acts injured the industry's reputation because consumers believed that they were entitled to have negative information removed when they submitted disputes regardless of whether the information was accurate. From the FTC and consumers' perspectives, CROs made false and deceptive misrepresentations that they had the ability to improve or repair a consumer's credit file when they did not. The FTC opposed the high fees CROs collected before performing any services requested; the FTC also objected to the false and deceptive advertising practices of many CROs.

The consumer reporting agencies, the credit granting industry, the FTC and consumer groups were aligned on the need to address the predatory practices of CROs. In 1996, the consumer reporting industry and the FTC urged Congress to pass a bill that they believed would effectively stop the deceptive practices of CROs.

The Scope of CROA

CROA includes a provision that prohibits CROs from collecting any fees before fully completing the promised credit repair service. 15 U.S.C. § 1679b(b). The statute also requires a written contract and a disclosure that was intended to convey a warning to discourage any consumer from entering into an agreement with a CRO for credit repair services. 15 U.S.C. § 1679c and § 1679d.

The CROA definition of credit repair organization was also drafted very broadly to ensure that credit repair clinics or organizations could not evade coverage of the restrictions. Under CROA, a "credit repair organization" includes any person who sells, or claims to be able to provide or perform, "any service" for the express or implied purpose of improving any consumer's credit record, credit history, or credit rating, or assisting consumers in this regard. 15 U.S.C. § 1679a(3). The expectation was that such a broad definition would help reach a very specific business practice and eradicate its predatory and harmful acts.

When CROA was enacted, credit monitoring products had not been developed. Even as credit monitoring products were being developed, no one ever anticipated that CROA could be interpreted by apply to consumer reporting agencies that provided credit monitoring and ancillary educational products. Not only did consumer reporting agencies believe that CROA protected them the same way it protected consumers, they also believed that CROA's purpose, findings and required disclosures simply would not apply to them or the products and services they would offer consumers.

Credit Repair Organizations Practices Do Not Include Credit Monitoring

Although CROA gave the FTC an important tool in prosecuting CROs, it had limited effect in preventing credit repair schemes. Because CROs operate by committing fraud and other deceptive acts and practices, many CROs simply modified their tactics. For example, a more recent variation of credit repair tactics involves the "sale" of positive credit report tradelines. Under this scheme, consumers purchase "authorized user" status on another consumer's existing credit card. The buyer never obtains or uses the card but may benefit from the fact that creditors furnish to consumer reporting agencies trade line information on authorized users, as well as the primary account holders. Because the industry has taken steps to combat this tactic, consumers who often pay thousands of dollars for this authorized account user status do not derive the promised benefit. To the extent this fraud succeeds, it impairs the consumer credit system. No matter what the form of "credit repair," the tactics are the same – fraud on consumers and fraud on the credit reporting and credit granting systems.

In addition, no CRO can offer credit monitoring services because no consumer reporting agency would give a CRO access to its credit reporting files.

Thus, there is no similarity between the valuable services offered by credit monitoring companies and the deceptive tactics of credit repair organizations. However, because credit monitoring services might be marketed as a tool that could assist consumers in improving their credit, and could help consumers achieve higher credit scores, they have been mischaracterized as credit repair activities.

The Interpretation and Application of the Statute Necessitates an Amendment to CROA

In the last several years, some have interpreted CROA to apply to companies that offer credit monitoring services and related educational products. The interpretation led to a wave of litigation against companies offering credit monitoring products and services. The argument proffered to support the application of CROA to credit monitoring is that these products and services are marketed in such a way that they could have the effect of improving a consumer's credit history. Some supporters of this interpretation have noted that the CROA definition of CROs does not depend on whether a company offering the service can, in fact, improve consumers' credit scores, histories or ratings in a legitimate manner, such as through monitoring credit report file information and educating consumers.

Credit monitoring companies now face the unexpected challenge of an interpretation that would bring them within the scope of a statute that simply does not apply to its services. Companies may offer credit monitoring services for a fee, usually on a monthly or annual subscription basis. If a company is found to be a credit repair organization, then it cannot accept advance payment for its services, even if it fully performs those services as promised. Moreover, many of CROA's provisions, including the disclosure requirements, do not make sense when applied to credit monitoring products and services because they do not and could not cause the type of harm that the CROA provisions were meant to prevent.

Credit monitoring companies have also faced unanticipated litigation, which has created even more confusion about compliance obligations. For example, in *Hillis v. Equifax Consumer Services, Inc.*, 237 F.R.D. 491 (N.D.Ga. Aug.18, 2006), the court

found that credit monitoring companies were not covered by CROA. However, other courts have not adopted this position, and have instead found that under the plain language of the statute, credit monitoring companies are covered by CROA. In contrast to *Hillis*, in the recent case of *Reynolds v. Credit Solutions, Inc.*, 2008 WL 835270 (N.D. Ala. Feb. 26, 2008) the court declined to follow relevant guidance in *Hillis* because it found that opinion strayed from the plain language of CROA. Still other courts have found that by merely advertising that credit monitoring products could improve a consumer's credit made the credit monitoring company subject to CROA. *Zimmerman v. Cambridge Credit Counseling Corp.*, 529 F.Supp.2d 254, 276 fn 20 (D. Mass. Jan. 7, 2008); *Helms v. Consumerinfo.com, Inc.*, 436 F.Supp.2d 1220 (N.D. Ala. Feb. 14, 2005). Some companies that have offered credit monitoring products and services have settled the cases. *See, e.g., Browning v. Yahoo! et al*, 2007 WL4105971 (N.D. Cal. 2007).

As the availability of new services has evolved, the law has remained unchanged. Circumstances have made CROA ambiguous. Over time, it has become clear that an amendment to CROA is needed in order to avoid further unintended consequences of a statute that was designed to protect both consumer reporting agencies and consumers. I believe that consumers should be able to make educated choices about valuable products and services. Businesses should be permitted to sell valuable products within the confines of the law.

HR 2885 Would Create a Narrow Exemption from CROA for Credit Monitoring and Related Products and Services

I believe that a narrowly tailored exemption is the best way to amend the CROA. CROA protects consumers against fraud, deception and misleading representations, and it

gives consumers the right to cancel a covered service. To preserve these protections, H.R. 2885 would exempt credit monitoring services from the CROA provisions that apply to credit repair organizations, but would also create comparable consumer protections applicable to credit monitoring services. These protections include the right to cancel the credit monitoring service and receive a pro-rata refund. There would also be a new disclosure requirement to inform consumers about credit monitoring services. This disclosure would make sense in light of the product offered.

H.R. 2885 would also protect consumers by narrowly drawing the exclusion for credit monitoring services so that the exclusion would not apply to anyone who makes representations or promises that are typical of a credit repair organization, such as claiming to be able to modify or remove adverse information that is accurate and not obsolete in the consumer's credit report. H.R. 2885 would also aid CROA enforcement by clarifying the scope of the nonprofit exemption, which some credit repair organizations have distorted or misused to evade coverage.

H.R. 2885 is not intended to create any loophole for CROs. In fact, if CROs found a way to work around the statute, then consumer reporting agencies and creditors as much as consumers would be victims. The proposed amendment to CROA would not change the application of CROA to real credit repair organizations. If an entity attempts to avoid CROA by claiming that it was a credit monitoring company, the FTC will still have enforcement authority under CROA, as well as the FTC Act.

Because H.R. 2885 resolves an unintended ambiguity in the scope of CROA and creates new consumer protections for credit monitoring services, it will benefit

consumers, as well as consumer reporting agencies. In this way, the bill will assure the continued availability of credit monitoring services and the consumer benefits they offer.

An amendment to CROA can address concerns of consumers and still enable companies offering credit monitoring services to provide valuable products without the threat or surprise of litigation. An amendment will benefit all parties. I, therefore, respectfully urge that the amendment to CROA be adopted.

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Curriculum Vitae

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Employment

• 2003-Present	Partner, Hudson Cook, LLP.
• 1997-2003	Managing Partner, Lovells, Washington, DC; Of Counsel (1997-1998).
• 1987-1997	Partner, Carlsmith Ball, Honolulu, HI and Washington DC; Of Counsel (1987-1989).
• 1982-1986	Associate Director for Credit Practices, Bureau of Consumer Protection, Federal Trade Commission (FTC), Washington DC.
• 1976-1982	Attorney, JC Penney Company, Washington DC.
• 1973-1976	Attorney, Bureau of Consumer Protection, FTC, Washington DC.
• 1972-1973	Attorney Advisor, Commissioner Mary Gardiner Jones, FTC, Washington DC.
• 1969-1971	Associate, Cleary, Gottlieb, Steen and Hamilton, Washington DC.

Education

• 1985	Harvard University, John F. Kennedy School of Government, Senior Managers in Government Program.
• 1969	Georgetown University Law Center (Juris Doctor).
• 1966	Mary Washington College (Bachelor of Arts with Final Honors).
• 1965	Institute for American Universities, Aix-en-Provence, France.

Bar Admissions

- 1987 Hawaii State Bar Association.
- 1982 United States Supreme Court Bar.
- 1969 District of Columbia Bar.

Expert Witness in Litigation involving FCRA Issues

Ashby et al. v. Farmers Group, Inc., et al., Case No. CV01-1446-BR, U.S. District Court for the District of Oregon, 2004; 2006.

Beck v. Equifax Information Services, LLC, et al., Case No. 3:05CV091, U. S. District Court for the Eastern District of Virginia, Alexandria Division, 2005.

Brownstein v. Equifax Information Services, LLC and American Express Company, Case No. 05-1774, U. S. District Court for the Eastern District of Pennsylvania, 2006.

Bruce v. Keybank National Association, doing business as Champion Mortgage, Case No. 2:05-CV-330, U.S. District Court for the Northern District of Indiana, 2006.*

CSI Investment Partners II, L.P., et al., v. Cendant Corporation, et al, Case No. 00Civ.1422(DAB), U.S. District Court for the Southern District of New York, 2006.*

Cairns v. GMAC Mortgage Corporation, Experian Information Solutions, Inc., Equifax Information Services, L.L.C., and The Provident Bank d/b/a PCFS Mortgage Resources, CV-04-1840 PHX-DGC, U.S. District Court for the District of Arizona, 2005.

Collins v. IndyMac Bank, F.S.B., et al, Case No: SACV 06-100 DOC (ANx), U.S. District Court for the Central District of California, Eastern Division, 2007.

Cope v. Experian Information Solutions, Inc. et al., Case No. 04-CV-493-JE, U. S. District Court for the District of Oregon, 2005.*

Drew v. Equifax Information Services, LLC, et al., Case No. CV-07-00726-SI, in the U.S. District Court for the Northern District of California, 2008

In Re: Farmers Insurance Co., Inc. Fair Credit Reporting Act Litigation, MDL No. 1564, Case No. CIV-03-158-F, U.S.District Court for the Western District of Oklahoma, 2006.*

Ferrarelli v. Capital One Auto Finance, Inc. et al., pending under Case No. 1:07-CV-389 in the United States District Court for the Southern District of Ohio, Western Division.

Ferrarelli v. Federated Financial Corp., pending under Case No. 1:07-CV-685 in the United States District Court for the Southern District of Ohio, Western Division.

Geaney, et al. v. Equifax Information Services, LLC, et al., Case No. 1:05-CV-01629 REC-LJO, U. S. District Court for the Eastern District of California, Fresno Division, 2007.

Grizzard v. Trans Union, L.L.C. et al., Case No. 3 :04CV625, U. S. District Court for the Eastern District of Virginia, Richmond Division, 2005.*

In re: H&R Block Mortgage Corp., Prescreening Litigation, Case No: 2:06-MD-230 (MDL 1767), U. S. District Court for the Northern District of Indiana, 2007.

Harris v. Circuit City Stores, Inc., Case No: 1:07-cv-02512, U. S. District Court for the Northern District of Illinois, Eastern Division, 2008.

Holmes v. TeleCheck International, Inc., et al., Case No. 3:05-0633, U.S. District Court for the Middle District of Tennessee, 2006; 2008.**

Mendoza v. Verizon Wireless, et al., Case No. H-02-2465, U.S. District Court for the Southern District of Texas, Houston Division, 2003.

Mark v. Valley Insurance Company and Valley Property and Casualty, Case No. 01-1575 BR, U.S. District Court for the District of Oregon, 2003.

Moseley v. Monogram Credit Card Bank of Georgia, Case No. CV05-0801-PHX-SRB, U.S. District Court for the District of Arizona, 2006.

Murray v. IndyMac Bank, F.S.B., Case No: 04-C-7669, U.S. District Court for the Northern District of Illinois, Eastern Division, 2007.

Rausch and Jason Reynolds v. The Hartford Financial Services Group, Inc. and Hartford Fire Insurance Company, Case No. CV 01-1529 BR, U.S. District Court for the District of Oregon, 2003.

Razilov v. Nationwide Mutual Ins. Co. and Allied Group, Inc., Case No. 01-1466 BR, U.S. District Court for the District of Oregon, 2003.

Smith et al. v. The Progressive Corporation et al., Case No. 1:00-CV-210-MMP, U.S. District Court, Northern District of Florida, 2001.

Stillmock, et al. v. Rugged Wearhouse, Inc., et al., Case No.1:07-cv-01340-JFM, U.S. District Court for the District of Maryland, 2007.

Sweitzer v. American Express Centurion Bank, et al., Case No. 2:05-CV-650, U.S. District Court for the Southern District of Ohio, Eastern Division, 2007.*

Thomas v. Friends Rehabilitation Program, Inc. et al, Case No. 001012, Court of Common Pleas for Philadelphia County, 2006.

Wiesjahn v. Capital One Auto Finance, Inc., Capital One Services, Inc. et al., Case No: 2:06CV402, U.S. District Court for the Northern District of Indiana, Hammond Division, 2007.

Williams v. MBNA America Bank, NA, Case No. 2:06-CV-13910, U.S. District Court for the Eastern District of Michigan, 2007.

Willes v. State Farm Fire and Casualty Co. and State Farm Mutual Automobile Insurance Company, Case No. 01-1457 BR, U.S. District Court for the District of Oregon, 2003.

White v. First American Registry, Inc., Case No. 04 CV 1611 (LAK), U.S. District Court for the Southern District of New York, 2004.*

Wood v. Capital One Auto Finance, Inc., Case No: 06-C-7, U.S. District Court for the Eastern District of Wisconsin, Milwaukee Division, 2008.

* Cases marked with an asterisk are those where I gave deposition testimony.
** I also testified at trial in this case.

Professional Activities

- Committee Counsel, American Financial Services Association Law Committee.
- Counsel to the Consumer Data Industry Association (formerly Associated Credit Bureaus).

Civic and Professional Associations

• 1982-Present	Member, Consumer Financial Services Committee of the American Bar Association Business Law Section; Chair, Consumer Communications Subcommittee (1983-1986); Vice-Chair, Privacy Subcommittee (1991-1992); Chair, Privacy Subcommittee (1993-1995); Vice-Chair, FTC Activities Subcommittee (1997-2000); Chair, Federal and State Practice Subcommittee (2000-2003).
• 1995-Present	Member, Governing Committee of the Conference on Consumer Finance Law; Vice-President (1999 - 2007); President (since 2007).
• 1996-Present	Founding Member, American College of Consumer Financial Services Lawyers.
• 1992-1995	Vice-Chair, Financial Services Committee of the American Bar Association Administrative Law Section.

Recent Presentations at Industry Conferences and Programs

- American Bar Association Consumer Financial Services Committee (multiple times, 1997-2008).
- American Conference Institute (multiple times, 2001-2006).
- American Financial Services Association (multiple times, 1989-2008).
- Consumer Bankers Association (March and Aug. 2001).
- Conference on Consumer Finance Law (multiple times, 1995-2004).
- Consumer Data Industry Association (multiple times, 1997-2008).
- Consumer Industry Research Council (multiple times, 2000-2005).
- Credit Card Bank Compliance Association (multiple times, 2002-2007).
- Experian Law Conferences (multiple times, 1998-2008).
- Hudson Cook Housing and Auto Finance Workshop (multiple times, 2004-2007).
- National Association of Dealer Counsel (multiple times, 2006-2007).
- National Automobile Dealers Association (2007).
- National Retail Federation ("NRF") (Aug. 2000).
- NRF Credit Managers Division (Sept. 1997 and Sept. 2000).
- Practicing Law Institute (multiple times, 1998-2000).

Anne P. Fortney
Curriculum Vitae

Publications Since 1996

- *A Dealer Guide to Adverse Action Notices*, National Automobile Dealers Association Management Series (2007).
- *Federal Laws Applicable to Consumer Data Security Breaches*, 59 Consumer Fin. L. Q. 229 (2005).
- *Uniform National Standards for a Nationwide Industry – FCRA Preemption of State Laws under the FACT Act*, 58 Consumer Fin. L. Q. 259 (2004).
- *Auto Finance Litigation Under the Equal Credit Opportunity Act*, 57 Consumer Fin. L. Q. 227 (2003).
- *Selected Fair Credit Reporting and Privacy Issues and Developments*, 56 Consumer Fin. L. Q. 58 (2002).
- *How to Comply With the Fair Credit Reporting Act* (Associated Credit Bureaus, Inc. 2000).
- *How to Comply With the Fair Credit Reporting Act* (Associated Credit Bureaus, Inc. 1997).
- *Fair Lending Law Developments*, 55 Bus. Law. 1309 (2000).
- *Fair Credit Reporting Act Potential Liability of Furnishers and Users of Consumer Reports*, 1114 PLI/Corp 361 (April-May 1999).
- *Fair Lending Law Developments*, 54 Bus. Law. 1329 (1999).
- *Recent Fair Lending Developments Affecting Auto Lenders and Lessors*, 52 Consumer Fin. L. Q. 358 (1998).
- *The New Fair Credit Reporting Act – New Duties; New Liabilities; New Questions*, 52 Consumer Fin. L. Q. 17 (1998).
- *Fair Credit Reporting Act Duties of Furnishers and Users of Consumer Reports*, 1048 PLI/Comm 9 (April-May 1998).
- *Fair Credit Reporting Act Creates New Duties for Employers*, Credit World (May/June 1998).
- *An Argument for Retaining the Uniform Commercial Code*, 51 Consumer Fin. L. Q. 315 (1997).
- *Privacy, Consumer Credit Reporting, and Fair Lending Developments*, 51 Consumer Fin. L. Q. 41 (1997).
- *Fair Lending Issues Affecting Subprime Credit Markets*, 50 Consumer Fin. L. Q. Rep. 290 (1996).

HOUSE COMMITTEE ON FINANCIAL SERVICES

HEARING ON EXAMINING THE NEED FOR H.R. 2885, THE CREDIT MONITORING CLARIFICATION ACT

May 20, 2008

Testimony of:

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INTRODUCTION

Mr. Chairman and members of the Committee, I am Robin Holland, Senior Vice President, Global Consumer Services for Equifax. I want to thank you for this opportunity to testify regarding the Credit Repair Organizations Act, frequently referred to as CROA. I would especially like to thank Mr. Kanjorski for his leadership in introducing the Credit Monitoring Clarification Act (H.R. 2885), as well as Mr. Royce and the other bipartisan co-sponsors of this legislation. We are proud to support this bill along with our two great Georgia members, Mr. Price and Mr. Scott. I commend your efforts, Mr. Chairman, the members of the Committee and your excellent staff for taking up the long-overdue issue of CROA reform.

In this statement, I briefly describe Equifax; the original reasons for CROA's enactment; the credit monitoring products that Equifax has developed since the passage of CROA to assist consumers to understand their credit histories and to protect their credit histories from fraud and identity theft; and the CROA reforms that, we believe, should be put into place to protect these vital credit monitoring services and to protect consumers.

EQUIFAX

Founded in 1899, Equifax is the oldest, the largest, and the only publicly traded of the national companies that provide consumer information for credit and other risk assessment decisions. As one of the three "national" credit bureaus, Equifax's activities are highly regulated under the Fair Credit Reporting Act (FCRA) and dozens of other related federal and state statutes. Equifax is a responsible steward of sensitive consumer information and, as such, is committed to consumer privacy. We have been steadfast in working with governments, consumers, and businesses to forge effective solutions to complex information and privacy issues. Equifax believes that the marketplace can offer solutions that enlighten, enable and empower consumers. Equifax has developed products, such as credit monitoring products, which directly assist consumers in understanding their credit files and in empowering them to prevent identity theft and to manage their financial health.

THE CREDIT REPAIR ORGANIZATIONS ACT (CROA)

In 1996, Congress enacted CROA to address the consumer threat posed by credit repair organizations (CROs), commercial entities which charge consumers for providing services that purportedly would improve a consumer's credit record, credit history or credit rating.[1] In our view, promising to alter or remove negative, but accurate and timely, information from a consumer's credit report constitutes an unfair and deceptive practice that ultimately undermines consumer confidence in the credit reporting system. In order to protect the integrity of the credit reporting system, consumer reporting agencies, including Equifax and the other national credit bureaus, urged Congress to enact CROA to attempt to stop these entities from making false promises to consumers about their ability to change or alter accurate and timely data contained in credit reports. CROA imposed a number of appropriately harsh requirements on credit repair

[1] Credit Repair Organizations Act (CROA), Public Law 90-321, 82 Stat. 164, 15 USCS § 1679 (2006).

organizations, including consumer disclosures about the limits of any possible changes to a credit file.

Thus, CROA's intent is to protect consumers from paying money for a service which, almost by definition, cannot be provided and indirectly, at least, to protect consumer reporting agencies and legitimate consumer reporting activities from the deceptive and fraudulent actions of credit repair organizations. Ironically, by crafting an intentionally broad definition of "credit repair organization", CROA's definition of a credit repair organization (any entity which, directly or indirectly, purports to "improve" a consumer's credit record) has bee misread to cover credit monitoring products offered by consumer reporting agencies – the very entities that originally sought passage of the legislation.

CREDIT MONITORING

Accurate credit reports are important to individual consumers and to the economy. Individual consumers who fall victim to identity theft can be denied employment or credit and may be forced to expend significant resources correcting fraudulent credit report information. Further, identity theft ends up costing financial institutions, including the national credit bureaus, millions if not billions of dollars annually.[2] The Federal Trade Commission (FTC) recommends that consumers regularly review their credit report files to help guard against identity theft.[3] As public awareness and concern grows over the risk of identity theft, the national credit bureaus have developed products to assist consumers to monitor their credit files and to detect and to prevent identity theft.

Equifax was the first in the market to launch a credit monitoring product in October 2000. The rest of the industry launched shortly thereafter. From the very start these products have been received enthusiastically by consumers. Why? That's really very simple -- credit monitoring, by educating consumer about their credit profile, addresses two of consumers' most critical needs -- financial literacy and protection against identity theft. In just the last few years Equifax's credit monitoring products have been made available to consumer affected by literally hundreds of data breaches.

Today, the market for providing credit monitoring products is highly competitive in both product features and price. Credit monitoring products offered by the national credit bureaus are widely popular with consumers and recognized as a highly effective consumer protection service by federal and state consumer protection agencies. These products give consumers a first line of defense against identity theft, and are routinely made available to victims of security breaches. Indeed, credit monitoring has become a staple requirement of most state security breach notification laws and proposed federal security breach notification legislation.[4] The FTC has

[2] U.S. GEN ACCOUNTING OFFICE, Identity Theft: Prevalence and Cost Appear to be Growing (March 2002).

[3] FEDERAL TRADE COMMISSION, Fighting Back Against Identity Theft, "How can you find out if your identity was stolen?" (available at http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/about-identity-theft.html).

[4] *E.g.* Personal Data Privacy and Security Act of 2005, S. 1332, 109th Cong. (2005) (introduced by Senators Arlen Specter, Patrick Leahy, and Russ Feingold).

explicitly endorsed credit monitoring as part of a consumer strategy to protect against identity theft.[5]

Equifax Credit Watch™ went into production on the Equifax.com website in October of 2000. The initial product configuration included daily Equifax credit monitoring and 8 Equifax credit reports for $39.95 per year. Between October 2000 and today the product has been enhanced to provide consumers greater choice and control. Based on consumer feedback and focus group research, Equifax's credit monitoring products have been tailored to address the expressed needs of consumers, such as:

- Offering a stratified pricing structure to service consumers of all economic classes;
- Expanding credit monitoring services beyond the Internet to provide credit monitoring by mail;
- A "Family Program" that offers discounts for family members;
- Identity theft insurance; and
- For revolving trade lines, alerts for both balance changes or inactivity.

Currently, Equifax offers several credit monitoring products, including:

- Equifax Credit Watch Silver (2003): provides consumers with weekly credit monitoring of their Equifax credit file, one copy of their Equifax Credit Report™, and identity theft insurance in the amount of $2,500 per consumer, with a $250 deductible (not available to consumers in New York), to cover injuries arising from an occurrence of identity theft (subject to limitations and exclusions).

- Equifax Credit Watch Gold (2003): provides consumers with daily credit monitoring of their Equifax credit file, unlimited copies of their Equifax Credit Report™, and identity theft insurance in the amount of $20,000 per consumer (not available to consumers in New York) to cover injuries arising from an occurrence of identity theft (subject to limitations and exclusions).

- Score Watch™ (2004): provides consumers with continuous monitoring of their FICO® credit score and notification when a change in their FICO score impacts the interest rate they are likely to receive, detailed explanations for key score changes and specific tips for understanding their score, daily credit monitoring of their Equifax credit file, and two free Score Power® (which include the consumer's Equifax Credit Report™ and FICO credit score).

- Equifax Credit Watch Gold with 3-in-1 Monitoring (2005): provides consumers with daily credit monitoring of their Equifax, Experian and Trans Union credit files, unlimited copies of their Equifax Credit Report™, a 3-in-1 Credit Report which provides consumers with their credit history as reported by the three major credit reporting

[5] *E.g.* FEDERAL TRADE COMMISSION, Fighting Back Against Identity Theft, "If your information has been compromised, but not yet misused" (available at http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/compromised.html).

agencies, and identity theft insurance in the amount of $20,000 per consumer (not available to consumers in New York) to cover injuries arising from an occurrence of identity theft (subject to limitations and exclusions).

The value of Equifax's credit monitoring products has been praised by real-life consumers, including:

- Keith Porter of South Carolina who uses "Equifax to proactively manage my credit status". Mr. Porter subscribes to Equifax Credit Watch, because "staying on top of my credit standing can be time consuming" and he would like to be able to "automatically monitor and manage my credit throughout the year with very little effort." Because of Equifax Credit Report, Mr. Porter was recently alerted to an error in his credit report and was able to address the issue quickly.

- Mark Hanson of California praised Equifax Credit Watch as a way to "see my credit report instantly online which immediately reduced my stress level knowing no unauthorized activity had taken place ... the 'no news is good news' message lets me know Equifax Credit Watch is continually protecting me."

- Justin H. of Georgia thanks Equifax Credit Watch for helping him to respond quickly when a fraudulent account was opened at a large online retailer by an identity thief. Within 24 hours of being contacted by the identity thief, an Equifax fraud specialist was able to assist Justin H. to safeguard his financial status and protect his good name, resulting in an arrest. For Justin H. the "constant monitoring and speed at which it delivers alerts offer me a great deal of comfort".

CREDIT REPAIR v. CREDIT MONITORING

CROs are defined as entities that use any instrumentality of interstate commerce to sell, provide, or perform (or represent that they can perform) services or advice for the express or implied purpose of improving a consumer's credit record, credit history, or credit rating in return for a fee.[6] CROA was originally enacted to stop CROs from harming consumers and the credit reporting system through credit repair activities. Looking to the legislative history,[7] Congress did not seek to place limitations on all products and services that pertain to credit, but instead sought to target narrowly those specific harmful activities performed by CROs.

In contrast, credit monitoring and similar credit information products and services were developed to help improve consumer understanding about their credit history. Congress did not intend for the definition of a CRO to sweep in products that offer only prospective credit advice to consumers or that provide information to consumers so that the consumers can take steps on their own to improve their credit in the future. Credit monitoring and similar credit information

[6] CROA Sec. 403(3).

[7] *See* H.R. Rep. No. 103-486, at 57 (Apr. 28, 1994), *and see also Hearing on the Credit Repair Organizations Act (H.R. 458) Before the Subcommittee on Consumer Affairs and Coinage of the House Committee on Banking, Finance, and Urban Affairs*, 110th Congress (Sept. 15, 1988).

products and services should not be swept into the definition of a CRO, because such products provide information that empowers rather than harms consumers.

THE NEED FOR CROA REFORM

CROA was enacted before any of these recently developed positive and popular consumer education and credit file monitoring products were created. Unfortunately, a broad (and, ultimately, incorrect) interpretation of CROA could include consumer reporting agencies and their credit monitoring products under the definition of CROs. Inclusion of consumer reporting agencies under CROA restrictions would inappropriately restrict and complicate consumer access to credit file monitoring products and to the beneficial features offered by these products.

Without CROA reform, plaintiffs' class action suits threaten the viability of credit monitoring products. Under CROA, these suits could require the disgorgement of all revenues from the sale of the credit monitoring products.[8] Several of the first wave of these kinds of lawsuits has been settled, but this kind of litigation is an ongoing threat and, if successful, could drive credit monitoring products from the marketplace or, at the very least, adversely distort their pricing and delivery.

CROA, quite rightly, prohibits the collection of fees before completing the promised service.[9] This requirement is appropriate for credit repair organizations but inappropriate for credit monitoring products which customarily are sold through instant online delivery and an annual subscription.

Further, CROA requires that covered entities provide prospective consumer subscribers with notices that address the inability of credit repair organizations to remove adverse, but accurate, data from a credit report.[10] Warnings against the deceptive practices of credit repair organizations would be confusing and inappropriate if given to a consumer seeking credit monitoring products.

Further, credit repair organizations are subject to a number of appropriately harsh and specific penalties, including a requirement to disgorge all revenues if CROA is violated.[11] These penalties are not appropriate for credit monitoring products.

PROPOSED LEGISLATION TO REFORM CROA

Enforcement authority under CROA was placed with the Federal Trade Commission (FTC).[12] The FTC staff states that it sees no basis for subjecting the sale of credit monitoring and similar educational products and services to CROA.[13]

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[8] CROA Sec. 409.

[9] CROA Sec. 404.

[10] CROA Sec. 405.

[11] CROA Sec. 409.

[12] CROA Sec. 410(a).

Before the Committee is a bipartisan bill (H.R. 2885), which provides that an entity providing legitimate credit monitoring products, and not credit repair services, would not fall within the definition of a credit repair organization and, therefore, would not be subject to CROA. The bill would also provide for a complete and detailed notice to be sent to consumers on their rights under the Fair Credit Reporting Act, including a right to a free report. In addition, the bill guarantees subscribers to credit monitoring products a *pro rata* refund in the event that they cancel their service.

As set out in H.R. 2885, CROA can be amended to prevent the type of abusive practices that Congress originally intended to address by taking a behavior-based approach to the application of CROA's requirements. By applying CROA to only those entities engaged in the potentially fraudulent activities known as credit repair, CROA can be reformed in a way that continues to protect consumers from those activities and permits the provision of legitimate credit monitoring products and similar credit information products and services outside of the technical provisions of CROA. The nature of the activity performed by the entity would trigger application of CROA, rather than the characterization those entities assign to their products and services.

Through this behavior-based approach, CROA would be able to reach credit repair services regardless of whether the entity claims to be a CRO or a provider of credit monitoring. Improperly characterizing either the product being sold or the entity making the offer will not achieve the purpose of evading CROA. Credit repair organizations that purport to offer legitimate services, but actually engage in credit repair operations will still be subject to CROA. Conversely, if an entity offers legitimate and beneficial products, such as credit monitoring, then the activity-based approach to CROA enforcement would permit such activities to continue without being subject to CROA. Through such reforms, no entity could escape the consumer protection requirements of CROA, but consumers would benefit from the increased availability of other legitimate products, such as credit monitoring.

To the benefit of consumers, the FTC has developed extensive expertise in investigating entities engaged in unfair or deceptive trade practices through Section 5 of the FTC Act.[14] The FTC specializes in distinguishing between what companies say they do and what those companies actually do. Given a clearly established definition of credit repair activity, with specific exceptions in place for credit information products and services such as credit monitoring products, and the FTC's expertise with respect to deceptive practices, the FTC should easily be able to recognize any attempt to mischaracterize an illegal credit repair service as a legitimate credit monitoring product. To the extent a credit repair organization falsely purported to offer CROA-exempt products or services to evade CROA coverage, they could be in violation of both CROA and Section 5 of the FTC Act.

CONCLUSION

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[13] Oversight of Telemarketing Practices and the Credit Repair Organizations Act (CROA): Hearing Before the Senate Comm. on Commerce, Science and Transportation, 110th Cong., p.19 (2007) (statement of Lydia Parnes, Director of the Bureau of Consumer Protection at the Federal Trade Commission).

[14] *See* 15 U.S.C. § 45(a).

CROA reform is straight-forward and narrowly tailored to simply effectuate Congress' intent to apply CROA to credit repair organizations and not to other products and services that did not even exist in 1996 and which benefit, rather than harm, consumers. The fraudulent efforts of credit repair agencies harm consumers and the safety and soundness of the credit system. The objective of CROA always was and is to target companies which engage in fraudulent practices such as promising to delete accurate information from a consumer's credit report.

CROA reform, as proposed in the H.R. 2885, does not provide a *per se* exemption from CROA for consumer reporting agencies, based simply on their status as consumer reporting agencies. Rather, entities are exempt from CROA only if they do not engage in credit repair activities. Thus, CROA reform does not, in any way, weaken consumers' protections from deceptive practices enforced by the FTC and State Attorneys General which address the activities of credit repair organizations or address unfair or deceptive practices involving credit repair services.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Chairman

May 20, 2008

The Honorable Barney Frank
Chairman
Committee on Financial Services
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Frank:

Thank you for contacting the Federal Trade Commission concerning the Committee on Financial Services' hearing entitled "Examining the Need for H.R. 2885, the Credit Monitoring Clarification Act" scheduled for Tuesday, May 20, 2008. I am pleased to provide this written statement for the record. As you know, H.R. 2885 would exclude specified activities from the Credit Repair Organizations Act's ("CROA") coverage, thereby placing some credit repair companies beyond CROA's reach. Among the activities that would be excluded is the provision of a broad range of credit-related services, including access to credit reports, credit monitoring, credit scores or scoring tools, any analysis or explanation of actual or hypothetical scores or tools, or any similar analysis, evaluation or explanation. This letter discusses the Commission's enforcement of CROA and explains some of my concerns regarding such a statutory exemption.

In 1996, Congress passed CROA to protect the public from unfair or deceptive advertising and business practices by credit repair organizations. In addition to prohibiting false or misleading statements about credit repair services,[1] CROA includes a number of other important requirements to protect consumers, including a ban on collecting payment before the service is fully performed and a requirement to provide consumers with a written disclosure statement before any agreement is executed.[2]

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[1] CROA prohibits persons from advising a consumer to make false and misleading statements about a consumer's credit worthiness or credit standing to a consumer reporting agency. 15 U.S.C. § 1679b(a)(1).

[2] The written disclosure must explain the consumer's right to dispute inaccurate credit information directly to a credit reporting agency and to obtain a copy of their credit reports. It also must state that neither the credit repair organization nor the consumer can remove accurate, negative information from his or her report. 15 U.S.C. § 1679(c). It also requires credit repair organizations to use written contracts that include the terms and conditions of payment and other specified information. 15 U.S.C. § 1679(d).

The Commission has conducted several sweeps of fraudulent credit repair operations, including Project Credit Despair (20 enforcement actions brought by the FTC, U.S. Postal Inspection Service, and 8 state attorneys general in 2006);[3] Operation New ID – Bad Idea I and II (52 actions brought by the FTC and other law enforcement agencies in 1999);[4] and Operation Eraser (32 actions brought by the FTC, state attorneys general, and DOJ in 1998).[5]

The Commission also educates businesses and consumers about credit repair. Among other outreach efforts, the Commission publishes a large volume of educational materials designed to educate both consumers and businesses about their respective rights and obligations in the credit area. The agency's publications include: *Credit Repair: Self Help May Be Best*,[6] which explains how consumers can improve their creditworthiness and lists legitimate resources for low or no cost help; and *How to Dispute Credit Report Errors*,[7] which explains how to dispute and correct inaccurate information on a consumer report and includes a sample dispute letter.

H.R. 2885 presents the issue of whether CROA should be amended to exempt credit monitoring services, which are offered by consumer reporting agencies, banks, and others. As a matter of policy, the Commission sees little basis on which to subject the sale of legitimate credit monitoring and similar educational products and services to CROA's specific prohibitions and requirements, which were intended to address deceptive and abusive credit repair business practices. Credit monitoring services, if promoted and sold in a truthful manner, can help consumers maintain an accurate credit file and provide them with valuable information for combating identity theft.[8] However, any amendment intended to provide an exemption for legitimate credit monitoring services must be carefully considered and narrowly drawn. Drafting an appropriate legislative clarification is difficult and poses challenges for effective law enforcement. If an exemption is drafted too broadly, it could provide an avenue for credit repair firms to evade CROA.

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[3] *See* http://www.ftc.gov/opa/2006/02/badcreditbgone.shtm.

[4] *See* http://www.ftc.gov/opa/1999/10/badidea.shtm.

[5] *See* http://www.ftc.gov/opa/1998/07/erasstl.shtm.

[6] *Available at* www.ftc.gov/bcp/conline/pubs/credit/repair.shtm (English); http://www.ftc.gov/bcp/conline/spanish/credit/s-repair.shtm (Spanish).

[7] *Available at* www.ftc.gov/bcp/edu/pubs/consumer/credit/cre21.shtm.

[8] Of course, these services are not the only way for consumers to monitor their credit file. The Fair and Accurate Credit Transactions Act gives every consumer the right to a free credit report from each of the three major credit reporting agencies once every 12 months. *See* 15 U.S.C. 1681j.

Indeed, in enforcing CROA, the Commission has encountered many allegedly fraudulent credit repair operations that aggressively find and exploit existing exemptions in an attempt to escape the strictures of the current statute. For example, in one case, the Commission's complaint alleged that the defendant falsely organized as a 501(c)(3) tax-exempt organization to take advantage of CROA's exemption for nonprofits.[9] In another case, the Commission alleged that the defendant crafted a monthly billing service in an attempt to circumvent CROA's prohibition against charging money for services before the services are performed fully.[10] Because of the drafting difficulties, I urge Congress to continue to reach out to stakeholders in developing any amendments to CROA.

Thank you for your interest in this matter. I hope that this information assists the Committee. If the Committee or its staff have any additional questions or comments, please contact me or have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2946.

Sincerely,

William E. Kovacic
Chairman

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9 *FTC v. ICR Services, Inc.*, No. 03C 5532 (N.D. Ill. Aug. 8, 2003).

10 *United States v. Jack Schrold*, No. 98-6212-CIV-ZLOCH (S.D. Fla. 1998).

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