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LEGISLATIVE HEARING ON H.R. 3149, THE EQUAL EMPLOYMENT FOR ALL ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

OF THE

COMMITTEE ON FINANCIAL SERVICES

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

SEPTEMBER 23, 2010

Printed for the use of the Committee on Financial Services

Serial No. 111–159

U.S. GOVERNMENT PRINTING OFFICE

62–684 PDF WASHINGTON : 2010

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
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LEGISLATIVE HEARING ON H.R. 3149, THE EQUAL EMPLOYMENT FOR ALL ACT

Thursday, September 23, 2010

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

The subcommittee met, pursuant to notice, at 10 a.m., in room 2220, Rayburn House Office Building, Hon. Luis V. Gutierrez [chairman of the subcommittee] presiding.

Members present: Representatives Gutierrez, Watt, Moore of Kansas, Waters, Baca, Green, Scott, Cleaver; Neugebauer, Paulsen, and Lance.

Chairman GUTIERREZ. This hearing of the Subcommittee on Financial Institutions and Consumer Credit will come to order. Good morning and thanks to all of the witnesses for agreeing to appear before the subcommittee today.

Today's hearing will examine H.R. 3149, the Equal Employment for All Act, introduced by Representative Cohen. This legislation would prohibit the use of credit reports for employment purposes with several limited exceptions.

As we will hear today, this is a growing and controversial use of these reports, and I look forward to the discussion. We will be limiting opening statements to 10 minutes per side, but without objection, all members' opening statements will be made a part of the record.

We may have members who wish to attend but do not sit on the subcommittee. As they join us, I will offer an unanimous consent motion for each to sit with the committee and for them to ask questions as time allows.

I yield myself 5 minutes for an opening statement.

The Equal Employment for All Act was introduced by Representative Steve Cohen on July 9, 2009, and currently has 55 cosponsors. I am proud to be an original cosponsor of the bill and have discussed its importance at hearings, briefings, and townhall meetings. This legislation, if enacted, would be a significant step forward in eliminating unfair hiring practices and open up more good jobs to those unemployed Americans who, aside from a poor credit report, are otherwise qualified to do these jobs.

H.R. 3149 would amend the Fair Credit Reporting Act to prohibit an employer from using a consumer report for either employment purposes or for making an adverse action, including promotions, transfers and terminations, if the report contains information that

bears upon the consumer's creditworthiness, credit standing, or credit capacity. This prohibition applies even if the consumer consents to the use or procurement of a consumer report for employment purposes or in connection with an adverse action concerning employment.

The bill provides certain exemptions to this prohibition that we feel are proper, including jobs that require a national security or FDIC clearance, jobs with a State or local governmental agency that specifically require a credit check, or employment that is at a supervisory, managerial, professional, or executive level at a financial institution or is otherwise required by law. This legislation does not prohibit the use of background screening for a criminal background, even when it is not required by law.

This subcommittee has held two hearings this year, on March 24th and May 12th, in which we reviewed the methodology, impact of, and the use of consumer reports under the Fair Credit Reporting Act and discussed the potential impact of H.R. 3149, along with other reform proposals. We heard from various industry representatives, consumer advocates, and others.

More recently, on August 30th, I held a townhall meeting in Chicago that was attended by hundreds who came from Detroit and Boston, even as far as Los Angeles and elsewhere, to express their concerns about the increasingly widespread use of credit checks for employment purposes. This practice unfairly hurts the chances of otherwise qualified candidates to get a job.

Credit reports are simply inappropriate for use in most hiring decisions. An individual's credit history is often marred by circumstances beyond their control, such as income loss, medical problems, and the breakup of families, which often leads to bankruptcy. The Consumer Bankruptcy Project has estimated that 85 percent of bankruptcies are caused by these issues and a bankruptcy can have a strongly negative impact on your credit report. The industry's own studies indicate that bankruptcy, when noted in a credit report, is something that potential employers take into account when making employment decisions.

Along with many others in Congress, I am concerned that relying upon credit reports will continue to have a harmful impact on many, especially on communities of color as minorities have disproportionately worse credit reports even when income is taken into consideration. No fewer than 8 separate studies in the last 15 years conducted by the Federal Reserve, the Federal Trade Commission, the Brookings Institution, and Fair Isaac itself have documented the disproportionately lower report quality of minorities. The Equal Employment Opportunity Commission has repeatedly expressed their concern that the use of credit reports for employment purposes might violate Title VII of the Civil Rights Act.

Even if there is no overt bias on the part of an employer against an applicant based on their credit report, there is the potential for a subconscious bias against those who have more negative data on their reports versus those who do not.

You simply cannot tell a person's character, integrity, or how well they will perform their job by looking exclusively at their credit report. A credit report should not be one of the determining factors of whether someone gets a job. The fact that someone has a

credit report that is not superior to another job candidate does not make them less able to do the work at an office or factory, nor does it make them more or less likely to steal from their employer.

Four States, including my own of Illinois, have already passed legislation at the State level that will ban the widespread use of credit reports for employment purposes. Seventeen other States have legislation on this topic coming before them as well. Congress should act to make these sensible protections available to all Americans, not just those lucky enough to live in a State that is willing to protect them from this practice.

We have heard testimony from the Consumer Data Industry Association, from Experian, TransUnion, and Equifax, from FICO and VantageScore and others about how credit reports are prepared and used. Among other witnesses, today we will hear from the National Association of Professional Background Screeners about how its members use, prepare, and provide background checks and consumer reports to employers. We will also hear from the Society for Human Resource Management about how its members use a current or prospective employee's consumer or credit report to make employment-related decisions.

I welcome and thank these and other witnesses for appearing with us today.

Now, I call upon the Minority for any opening statement.

Mr. Neugebauer, would you—

Mr. NEUGEBAUER. Thank you, Mr. Chairman, and I will be brief.

I just wanted to respond in that I think what is interesting is I think about 60 percent of the businesses in this country use credit reports as one of the tools that they use in making a final determination. So this is not like—evidently, there has been some reason to correlate that as a part of the screening process, that credit reports are being helpful. Otherwise, we wouldn't have such a large number of employers using that tool.

Obviously, we already have laws that prohibit discriminating against someone because of race, and everybody on this panel I think would agree that is unacceptable and that is the reason there are laws on the books to do that.

But, also, this bill even precludes an applicant from allowing a business owner to run a credit report even if he or she requested it, basically taking away the individual's right. And, quite honestly, in some cases—I have been an employer. We have done credit reports on employees. Certainly it was just a tool, and I think the thing I would say to you is that I don't think it is the primary tool used, but I think that evidently the business community has found it to be a useful tool.

And the fact that if I had two or three applicants who maybe were going to perform managerial functions in my company and they were all equal in many ways and I was looking for a tipping factor, if I found someone who was having a difficult time managing their own personal affairs, I would question whether they had the capability of managing my affairs as well.

So I think there are several things troubling about this legislation, one, taking away an individual's right. We are moving left, but we are skipping to the left in this area. And, also, telling businesses that they can't use tools that they have evidently found to

be effective in making hiring decisions, to me, is another taking, and certainly, I think our Founders didn't intend for us to move in that direction.

Also, I ask unanimous consent to enter into the record statements submitted by NFIB, the Financial Services Roundtable, and 30 other business and trade associations, all whom are opposed to this legislation.

Mr. GUTIERREZ. Without objection, it is so ordered.

Mr. NEUGEBAUER. I thank you, and I yield back my time.

Chairman GUTIERREZ. Anybody else?

We are ready to hear from the author of the bill. For our first panel, we will hear from the author of H.R. 3149, Representative Steve Cohen from the 9th District of Tennessee.

Mr. Cohen, you have 5 minutes.

STATEMENT OF THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mr. COHEN. Thank you, Mr. Chairman. I appreciate the opportunity to address the committee, and I also thank the ranking member for agreeing to this hearing and the members who are here on this panel.

The Equal Employment for All Act is an important bill, and I hear the arguments made in opposition. But the fact is in this economy, which is in a recession—regardless of what any person might say or group, we are in a recession. It is difficult to find jobs right now, and when some employers use credit checks for a lot of people, particularly minorities, it makes it almost impossible to get a job.

The use of credit checks to determine employment is a growing trend but a dangerous trend, and while some submit that it is an effective tool, that business must find it effective, I would submit to you, Mr. Chairman and members of the committee, there is no way business can know it is effective because if they don't give a person a job because of a bad credit score, how do they know that was a bad employee? They never hire anybody who has a bad credit score if they use that as the determining factor not to hire him. So they never know. They hire the other guy or the other woman.

It is unfortunate that in our society, a high percentage of the people with bad credit scores are minorities, and I will get to that in a minute. In my district, 1 in 10 people are unemployed. My district has a very high African-American population. Among African Americans, it is more like one in five, and throughout the Nation, we see those same types of statistics. While in the Nation, it is 9.6 percent unemployment, among African Americans it is 16.3 percent, and among Latinos it is 10.4 percent.

One of the reasons that credit checks contribute to the high unemployment among African Americans and Latinos is because they have not had a history of wealth in this country. That is what is known, gentlemen, as institutional racism. It is not racism on the front. I am not going to hire you because you are African American or you Latino or I am not going to hire you because you are a woman. It is the history of our Nation and what goes into it and the work product. And when you are African American and your

family started out as slaves, from 1865 before, you didn't have a chance to build up wealth. Caucasians did. So you are starting behind.

Jim Crow laws, you are still not getting jobs and opportunities, and you are getting to go to separate *Plessy* v. *Ferguson* schools that mean you are still in the hole. Whites are going to the good schools and getting the good books and getting the opportunity and Blacks aren't. So Whites build up a history of having money, family wealth passed on, the old family farm that we are trying to protect through inheritance laws, make sure we get whole family farms and not just 60 percent of it.

So those folks have money. They lose their job in this economy—and a lot of people have lost their jobs because they just cut back. FedEx cut off 10 percent. If you are Caucasian and your family built up some wealth from having friends whom you could sell real estate to and get a better 6 percent of a higher and more expensive house than somebody who is poor who doesn't have as many friends for those wealthy houses or a stockbroker contact that you know from the country club or whatever, you don't have accumulated wealth to help you through bad times. So you are more likely to have a bad credit score.

The effect of that is African Americans, Latinos, and others who have immigrated to this country and haven't had wealth built up, that is what is called institutional racism. It is something that is not racism on the front. It is something that just happens through the institution of what goes in this Nation. So it is there, regardless of one does it on the front or doesn't even realize that it is something that is just part of the system.

Forty-three percent of all employers admit to performing credit checks despite the fact that there is no study that says it is effective. Eric Rosenberg with TransUnion said in a hearing in Oregon during sworn testimony that his company had zero statistical evidence to document that employees with bad credit checks are more likely to steal or commit fraud than workers with perfect credit. A study at Eastern Kentucky said the same thing, as highlighted in The Hill in an article this morning about these studies.

Nothing shows it is effective, and I would submit to you, some would say, oh, somebody's going to be more of a risk. There are exceptions for financial situations, but if somebody has a bad credit rating and they want a job, I would submit to you, once they get that job, they are less likely to commit any type of fraud than anybody else because they want that job. They are seeking a job, and they want to pay off their bills and earn a living. So they want to keep that job and not only not get arrested but keep that job. I think they are going to be extra good employees.

There is simply no basis to show that it is an effective tool, and I think it is used in a de facto way to discriminate against people, whether it is intended to or not.

This legislation has been endorsed by the NCAAP, the National Organization for Women, the National Consumer Law Center, the Leadership Conference on Civil Rights, the National Association of Consumer Advocates, Unite Here, the National Employment Law Project, the U.S. Employers Interest Research Group, the AFL-CIO, and the Lawyers Committee for Civil Rights.

The law is simple. It says people should have a chance, some would say a second chance. I would say it is not even a second chance because they have done nothing wrong, but in show business, people get second chances all the time. In business, they do. If you think a credit check really determines whether you can be trustworthy, ask Sir Alan Stanford of Stanford Financial and all of his people, and what is the man's up name up in New York who ripped everybody off? Madoff, Bernie Madoff. They had great credit ratings. It is hard to tell somebody who is a crook and isn't credit ready, and I would submit a hard-working person with a bad credit rating because of this society who wants a job is a better risk than somebody else, and I think they want to get that job and keep it to pay off their bills.

I appreciate the committee's time, and I appreciate the red light because I have been on the other side of it, and I thank you for the opportunity to give this testimony.

[The prepared statement of Representative Cohen can be found on page 47 of the appendix.]

Chairman GUTIERREZ. Thank you so much for introducing the legislation, and I won't ask you any questions. I know we have some witnesses who are going to be enlightening us on your legislation.

But I would like to just briefly say, they say that people have the moral responsibility these days to not walk away from their mortgages, walk away from their bills. I think we have the same responsibility to make sure they have a fair chance at taking care of that. I think people do, and given the kind of crisis that we have, a crisis that was not manufactured by them, that they have fallen into, I think credit reports, number one, have a lot of information that is erroneous to begin with, and number two, don't really tell the true nature, as you stated earlier.

So I thank you for your legislation.

Mr. Neugebauer, you are recognized for 5 minutes, if you have any questions.

Mr. NEUGEBAUER. Thank you.

I respectfully disagree with the author of this bill. If it is found to be ineffective by all these studies, it is interesting to me that we have a substantial number of businesses—and I understand it is increasing—that are using credit reports as a part of and not the sole tool that they are doing it.

So the other piece of it is is that from the gentleman's testimony it almost appears that he believes that employers, small businesses, large businesses across the country are using credit reports to kind of circumvent the Equal Employment Opportunity Act and, in fact, are overtly discriminating. I have not ever seen any reports or evidence of that, and I would ask the author if he has evidence that there is widespread use of this to circumvent equal opportunity laws. Because it is a fairly major accusation that you are making that these companies are, in fact, using this as a tool to be discriminatory.

And I would tell you, as a former small businessperson, I am a little offended by that, the fact that you would think that, because I was using that, I was using that to discriminate, and I don't think that is the case. I haven't seen evidence, and I am certainly

open to review such evidence if you can show me where studies have shown or that the law enforcement or people enforcing this are finding widespread use of credit reports to violate the Equal Opportunity Employment Act.

Mr. COHEN. My passion sometimes might give the wrong impression. I didn't intend to imply that people were intentionally doing it. Institutional racism and those things are things that are just part of the system that we have had over the years, and when you have had over the years these factors, where Blacks are less likely to have accumulated wealth because they didn't inherit granddaddy's plantation or granddaddy's insurance company, they happen to be working on the plantation or working maybe at a low level, they don't have it. It is unwitting, unknowing discrimination.

It is part of a system, and when you have a system where credit checks are necessarily unequal because you don't have accumulated wealth to build up on or histories of going to a certain college to get you into a college or the finances of your family to get you into that college—and contacts in college are important. I went to Vanderbilt. You go to Vanderbilt, you have better contacts to sell stocks to and you can sell Berkshire Hathaway and more shares of it than if you went to Texas Southern, and you don't have student body friends generally who have enough money to buy Berkshire Hathaway.

It is not anything intentional. It is the fact that you get wealth. It is easier to have wealth if you come from a privileged background, and all of us who are Caucasian or have had histories here of working in families have privilege, and so it is nothing intentional. I am not suggesting people are intentionally discriminating. I am saying that they are doing it because of systems in society that we have not ferreted out, and it will take years to do that.

Mr. NEUGEBAUER. I guess there I go again disagreeing with you. I know a lot of people who didn't inherit a plantation or didn't inherit anything, who actually started from scratch.

Mr. COHEN. There is no question about that, sir. That is why you don't find any Black people who did inherit a plantation.

Mr. NEUGEBAUER. I have African-American friends, I have Hispanic friends, who went out and basically they didn't inherit anything and they started from scratch and they started small businesses and they worked hard. This country was founded on the principle that if you work hard and apply yourself, you have the opportunity to succeed and to fail. Many times people fail; sometimes people succeed.

But, again, I think the concept that the reason we are doing this is because not everybody inherited something again is a flawed reason to be taking away the rights and privileges not only of the people who are potentially looking for employment but also for the people who are actually employing and creating jobs in this country and penalizing them somehow because of an unsubstantiated reasoning that you are giving this committee today that people are using this process to somehow circumvent laws that are already in place. It is already against the law, and if someone believes that they were turned down for employment because of their race, they have an avenue to do that. It doesn't matter if it was because of the way they filled out the application or a reference check or their

credit report. It is against the law to do that, and we don't need any more laws.

Chairman GUTIERREZ. The gentleman's time has expired.

Would anyone else would like to ask questions?

Hearing no questions of the witness, I just want to enter into the record a report entitled, "Discrediting Workers" by Demos, and specifically pages 3 and 4 where Bank of America was found to have discriminated against African Americans by the very use, by a Federal judge, of using credit reports and disproportionately not hiring African Americans for entry level positions precisely because of using credit reports.

Mr. NEUGEBAUER. And Mr. Chairman, were they prosecuted for that?

Chairman GUTIERREZ. There is a civil case.

Mr. NEUGEBAUER. And so what was the—

Chairman GUTIERREZ. I don't think an individual is going to be sent to jail for this.

Mr. NEUGEBAUER. What was the outcome of it?

Chairman GUTIERREZ. The outcome is that they have to go back and redo the whole thing over again. Because what the Federal court found and the judge found was that there was absolutely no good reason for using the credit report to determine whether or not the person was going to be a good employee, number one, and that even using the same credit scores—imagine, the same credit scores—this group got 700, this group using the same credit scores you still find disproportionate number of people not getting a job based on, unfortunately, the color of their skin. But we will give you a copy of the report.

And the witnesses on the second panel, they will be coming up. So let's go to the witnesses who will speak to Mr. Neugebauer's questions.

Ms. WATERS. Before my colleague leaves, I would like to thank him for giving us this report and having this legislation. It is not easy to talk about discrimination or racism. You get accused of playing the race card every time, and so it has prohibited many folks from moving forward on some of these issues. But I want you to know that I appreciate the fact that you have the courage to do so.

I am a cosponsor of this bill, and I think that we should all work toward making sure that these kinds of actions do not limit the ability of individuals to get a job. I do not believe credit scores have anything to do with whether or not you will be a good employee.

Thank you very much.

Mr. COHEN. You are welcome. Thank you.

Chairman GUTIERREZ. Thank you.

We will go to Mr. Scott.

Mr. SCOTT. For the record, I, too, want to commend the Congressman from northwest Tennessee for taking this on. These are tough times. People are having difficulties, and the one thing that the credit reports determine, it deals with credit, good times, bad times. But the one thing that a credit report's history does not do, it does not determine or predict job performance or have anything to do with that. So it is sort of like measuring somebody but measuring them with the wrong set of measurements. You are attempt-

ing to correct that; and I, too, am proud to be a cosponsor of your bill and want to really just let you know how much we appreciate you taking the lead on this.

Thank you.

Chairman GUTIERREZ. Thank you, Congressman.

We are going to call our first panel.

Mr. COHEN. Thank you, gentlemen.

Chairman GUTIERREZ. The first—I am sorry, the second panel. This is what happens when you have a panel of one.

We are going to introduce Sarah Crawford, senior counsel for the Lawyers' Committee for Civil Rights Under Law. Next, we have Chi Chi Wu, staff attorney from the National Consumer Law Center. Following her will be Donald Livingston, partner of Akin Gump Strauss Hauer & Feld, LLP, representing the U.S. Chamber of Commerce. Next is Adam Klein, a partner of Outten and Golden, LLP. Next is Judy Gootkind, VP of finance and administration for Creative Services and a member of the board of directors of the National Association of Professional Background Screeners. Next, we have Colleen Parker Denston, director of H.R. at Worcester Preparatory School on behalf of the Society for Human Resource Management. And last but not least, Hilary Shelton, senior VP for advocacy at the NAACP.

You are welcome, and we will begin with Sarah Crawford. Please, you are recognized for 5 minutes.

STATEMENT OF SARAH CRAWFORD, SENIOR COUNSEL, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Ms. CRAWFORD. My name is Sarah Crawford, and I am senior counsel with the Employment Discrimination Project for the Lawyers' Committee for Civil Rights Under Law. I am honored to testify here today in support of the Equal Employment for All Act.

In light of research showing the lack of predicted value of credit information, credit checks create an unnecessary obstacle for those seeking gainful employment. Credit checks create barriers for those who apply for a job in order to pay their bills, to support themselves and their families, and to get out of debt. I am here today to comment on the negative impact, particularly for communities of color.

Credit checks are becoming an increasingly prevalent practice in the employment sector, as we have heard. According to a recent survey conducted by the Society for Human Resource Management, approximately 60 percent of its member employers use credit checks as a hiring tool, compared to 35 percent of its members in 2001. Some employers report that they use credit checks in hiring for all jobs. This practice is particularly troubling in light of research indicating that an individual's credit history does not predict job performance or risk of theft or fraud in the workplace.

Contrary to the sales pitch promulgated by credit bureaus that profit from selling credit reports to employers, credit reports do not provide meaningful insight into character, responsibility, or propensity for theft in the workplace. And, as we have heard, a TransUnion official recently testified that there is no research to justify the practice.

Research has shown that credit information does not predict job performance, as demonstrated by a recent study that looked into the credit reports of nearly 200 current and former employees working in the financial services areas of six companies. The study revealed that those with good credit reports were no more likely to receive positive performance evaluations and were no less likely to be terminated from their jobs. In fact, one aspect of the study revealed that workers with a higher number of late payments actually received higher performance ratings. So think about that. It makes common sense that someone who has bills to pay may have an added incentive to do their job well and perform well.

While credit reports show whether bills have been paid on time, they do not reflect the circumstances surrounding debts or reasons for any late payments. For example, a credit report will not explain that an individual's credit suffered because she was the victim of identity theft, that her credit suffered as a result of divorce or death of a spouse, that she lost her job unexpectedly because her employer went out of business, or that she lost her health insurance coverage and incurred substantial medical bills.

Indeed, credit reports fail to provide context and fail to provide information that can be easily interpreted for employment purposes, and I encourage you to review the credit report that was provided as an attachment to my testimony that was submitted here today and try to determine for yourself if that person is a good employee or a bad employee. It is very difficult to use the information in the credit report and make any kind of judgment about whether that person will be a performer.

The medical debts reflected in credit reports raise particular concern. Medical debt often arises due to circumstances outside of an individual's control and can have a catastrophic impact on personal finances. Seventeen percent of our citizens are uninsured, including 12 percent of Whites, 21 percent of Blacks, and 32 percent of Hispanics. And what happens when the uninsured face a major medical illness? Often, they incur medical debt; and further, a significant portion of those with health insurance face medical debt due to medical procedures that are not covered. Although most employers report that they do not base hiring decisions on medical debt, the impact of medical bills could be reflected in outstanding judgments, bankruptcies, foreclosures, and other forms of debt that employers may take into consideration. Indeed, over half of accounts in collection arise from medical debt.

Credit background checks negatively and disproportionately impact communities of color and the poor. Unemployment has skyrocketed in recent years, and the effects of the recession have fallen most harshly on minorities. Currently, 16 percent of Blacks and 12 percent of Hispanics are unemployed, compared to 9 percent of Whites. Twenty-five percent of Blacks and Hispanics live in poverty, according to a recent report.

Credit checks only compound this crisis. Because minorities are significantly more likely to have poor credit, credit checks screen out disproportionate numbers of minorities from job opportunities.

In addition, I think, as most of you know, credit reports are rife with errors. One study found that most consumer credit reports surveyed contained some kind of error or mistake.

I will just conclude by saying that this practice is based on flawed assumptions that have detrimental effects on those who simply want to work so that they can pay their bills and escape the vicious cycle of debt and unemployment.

[The prepared statement of Ms. Crawford can be found on page 51 of the appendix.]

Chairman GUTIERREZ. Thank you so much.

Next, we will have Ms. Chi Chi Wu, who is staff attorney for the National Consumer Law Center. You are recognized for 5 minutes.

STATEMENT OF CHI CHI WU, STAFF ATTORNEY, NATIONAL CONSUMER LAW CENTER (NCLC)

Ms. WU. Thank you, Mr. Chairman. Thank you, Representative Neugebauer, and members of the subcommittee, for inviting me here today.

My name is Chi Chi Wu. I am testifying on behalf of low-income clients at the National Consumer Law Center. Mr. Chairman, thank you for holding this hearing regarding H.R. 3149, the Equal Employment for All Act.

The use of credit reports in employment is a practice that is both harmful and unfair to American workers. For this reason, we strongly support H.R. 3149 and thank the chairman and Congressman Steve Cohen for introducing it.

This bill would restrict the use of credit reports in employment to only those positions for which it is truly warranted, which is those requiring a national security or FDIC-mandated clearance.

We oppose the unfettered use of credit histories and support this bill for a number of reasons.

First is the absurdity of the practice. Considering credit histories in hiring creates a vicious catch-22 for job applicants. A worker who loses her job is likely to fall behind on her bills due to lack of income. She can't rebuild her credit history because she doesn't have a job, and if she can't get a job, she has bad credit. Commentators have called this a financial death spiral.

Now, opponents of H.R. 3149 have argued there is no catch-22 because employers use credit checks strategically and take into account the circumstances for a worker's financial difficulties, but we can't assume all employers are going to be this wise and fair. Yes, some employers may review credit histories carefully and thoroughly, but others may automatically screen out all applicants with a weak credit record. After all, it is easier and quicker to make a yes or no decision based on credit, especially in a competitive market where there are lots of applicants. Why take the trouble of being so careful? In fact, as Representative Neugebauer mentioned himself, that is a tipping point. If you have a bunch of candidates in front of you who are equally good, just get rid of the one with the bad credit record.

That is what happened to Robert Mendez, an IT worker featured just this Tuesday on the PBS Nightly Business Report. He lost his job over a poor credit record, even though he explained it was the result of a layoff and was told it wouldn't be a problem, but it was.

And, by the way, having provisions for consent in this bill wouldn't do any good for American workers who are hurt by this practice because the Fair Credit Reporting Act already requires the

employee's consent to pull their credit record, and employees have to give it. If they want to be considered for the job, they have to consent. We already have that. It hasn't been effective in protecting workers.

The use of credit history for job applicants is especially absurd when we have massive job losses and an unemployment rate of 9.6 percent and nearly 15 million workers looking for a job. It presents another barrier for economic recovery. It is the proverbial process of kicking someone when they are down.

Combine job losses with foreclosures and other fallouts of the economic crisis and what we have seen is plummeting credit scores and damaged credit records. Fair Isaac reports that over one-quarter of consumers have a credit score under 600, considered a poor credit score, a 10 percent increase than before the recession. That means one-quarter of American workers are at risk of losing a job opportunity or even being terminated over their credit history.

This is now exactly the wrong time to be permitting this unfair and inaccurate practice. Passing H.R. 3149 isn't just the right thing to do; it is an economic recovery measure.

As we have heard, the use of credit histories also discriminates against African-American and Latino job applicants. We have had study after study documenting how they as a group have lower credit scores which are supposed to reflect their credit records. These groups have also been disproportionately affected by predatory credit practices, such as the marketing of subprime mortgages and overpriced auto loans and, as a result, have suffered higher foreclosure rates, all of which damaged their credit history.

Despite all this harm to American workers, there is no evidence that credit history benefits employers by predicting job performance. We have heard that studies on this issue haven't found a correlation. Even industry representatives have said there is no correlation.

Opponents to H.R. 3149 have cited a report noting that one of the warning signs exhibited by some fraudsters is financial difficulties or living beyond their means. Now, just because some fraudsters had financial difficulties doesn't mean that any worker with money problems is predisposed to theft. That is implying that 25 percent of American workers are likely thieves.

The same study found that men are responsible for twice as much fraud as women. Workers over 50 incur losses that are twice as high, and another warning sign for fraud is divorce. No one is suggesting screening out men, older workers, or divorced workers because they are supposedly prone to committing theft.

Also, some of the most frequent users of credit checks, such as health care or social service providers, aren't industries that handle large amounts of cash. Why are they screening the credit histories of day care workers, administrative assistants, and nurses?

Finally, as we have testified many times here before, the credit reporting system has highlighted high rates of inaccuracies and a lot of flaws, rates that are unacceptable for purposes as important as use in employment. Some 3 percent to 12 percent to 37 percent—

Chairman GUTIERREZ. Ten seconds to wrap up.

Ms. WU. In conclusion, the issue is whether workers are fairly judged on the ability to perform a job or discriminated against. I urge Congress to pass H.R. 3149.

[The prepared statement of Ms. Wu can be found on page 86 of the appendix.]

Chairman GUTIERREZ. Next, we will hear from Mr. Donald Livingston for the U.S. Chamber of Commerce.

STATEMENT OF DONALD R. LIVINGSTON, PARTNER, AKIN GUMP STRAUSS HAUER & FELD LLP, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Mr. LIVINGSTON. Thank you for inviting me to testify today on behalf of the United States Chamber of Commerce.

My name is Don Livingston. As you said, I am a partner with Akin Gump. I am also a former general counsel of the United States Equal Employment Opportunity Commission, where I directed the country's litigation in cases of employment discrimination.

H.R. 3149 addresses concerns that the use of credit history information for employment decisions cannot be justified in many circumstances, and it addresses the concern that the adverse consequences of using credit history information falls more heavily on minorities. Plainly, these are important concerns, but these are concerns that we believe have been effectively dealt with by Congress under existing laws.

Since at least 1973, employers have understood that they cannot use credit histories unless they can demonstrate that the practice is predicated and supported by considerations of business necessity. It was in 1973 that the EEOC issued a decision requiring that an employer's credit policy be job related if the burdens of the policy fall more heavily on minorities. The courts have agreed with the EEOC. Employers can use credit history information only when the employer can show it is job related for the job in question.

H.R. 3149 differs from this approach. H.R. 3149 would not allow an employer to use job-related credit information except for specific categories of jobs. These are public-sector jobs, jobs requiring national security or FDIC clearances, and jobs at financial institutions.

H.R. 3149 would eliminate the opportunity that employers have under existing law to demonstrate that the use of credit histories to assess the qualifications of applicants for other jobs is job related for those jobs. It cannot reasonably be argued that the existing job relatedness standard is not stringent or that it is not a powerful deterrent to an employer's broad use of credit history information.

My written testimony provides several examples where courts have enjoined the use of credit information because the employer was unable to demonstrate that the information was job related for the specific jobs for which it was used, and I believe that the chairman has noted a more recent case where something similar occurred under employment discrimination laws.

The job relatedness requirement under equal opportunity law has served well. The proposed legislation would serve less well because, except in narrow circumstances, it would prevent employers

from using credit histories that they can justify by job relatedness and business necessity.

I hope that my testimony proves helpful to the committee.

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

Chairman GUTIERREZ. Thank you so much.

Next, we will hear from Adam Klein.

Mr. Klein, you are recognized for 5 minutes.

STATEMENT OF ADAM KLEIN, PARTNER, OUTTEN & GOLDEN LLP

Mr. KLEIN. Thank you. Good morning, and I appreciate the opportunity to come before the committee this morning.

I am a plaintiffs' side civil rights lawyer working in the field of employment discrimination law. I think it is very fortunate that I can respond to the points that Mr. Livingston has made here.

My practical experience and that of my firm and generally on the plaintiffs' side employment bar is that the problem or use of credit as a screen for employment is largely undetectable. The reality is that applicants who seek employment are not told that they are denied employment based on their poor credit history. What they may find out is they didn't get the job, but what they will not find out is why, and it makes logical sense. Why would a prospective employer tell an applicant the reasons that they did not get hired? It is obvious that, for the most part, in the overwhelming majority of cases or instances where applicants are denied employment, they are not going to have any idea that the use of credit was a factor in the decision.

And you ask, isn't there at the Equal Employment Opportunity Commission the laws that Mr. Livingston mentioned, the Civil Rights Act of 1964 which, in fact, has banned use of credit if it has adverse impact and cannot be justified? Yes, but the EEOC is a charge-driven agency, meaning the applicants who are denied employment, who had their rights violated, need to know that in order to file a charge of discrimination. It is not enough to tell the EEOC that an African American or Latino, I wasn't hired and that I think that is suspicious. That isn't sufficient information for the EEOC, a charge-driven agency, to take action.

Moreover, there are many other reasons that can come about why an applicant isn't hired, including the fact of the matter is that, by and large, it is a common-day event that people apply and don't get hired. That is not suspicious to a lot of people who go through that process. I am sure we have all not been hired over the course of our lives. So this is not an event that raises suspicion.

What happens in my experience—in my firm's experience, I think generally, is that the isolated examples where there has been enforcement is in the rare circumstance where an employer inexplicably tells the applicant they were denied the job because of poor credit. We have had a couple of examples like that, where the employer sends a letter to the applicant saying you are conditionally hired subject to a background check and subsequently told, after they were conditionally offered the job, that I am sorry, we can't actually hire you because you failed our background check.

That is the rare, rare instance. It is an exceptional circumstance where an applicant would be told that information.

And so while there is enforcement provided by the Civil Rights Act, it is extremely difficult to detect this practice and for the EEOC to take effective action. I think that has historically been the case. It is why we see so few of these cases out there.

It also is obvious when you look at the statistics that 60 percent of employers are using this practice. If no one seriously argues that there is adverse impact, that racial minorities will be harmed by this practice, and yet there is no or very little enforcement action, there is a reason for that. So the problem is detection. The problem is employers are smart enough not to tell applicants why they were denied employment, and without that critical piece of information there is no enforcement available to the EEOC because EEOC is not going to be put on notice to a charge that this is a practice that is happening in the workforce.

Another problem is that even if you have an applicant who receives disclosures that credit was used for a decision, under the Fair Credit Reporting Act oftentimes the information that is provided is unhelpful. It just provides information that you can challenge the credit report. It doesn't say what the information was used for. It doesn't provide any context. Oftentimes, we don't receive that, it has been our experience.

Moreover, if you look at the information provided in the credit reports, they are highly inaccurate. I would suggest, and I say this, pull your own credit history. Take a look at it. See if it is accurate. See if you can determine, if there is a negative entry, what that means, where that came from. Oftentimes, it is a collection agency or something that is indecipherable. That is the information employers are using to decide whether someone should be employed or not.

It doesn't make any sense. If it came to light, if employers are forced to disclose they used this information, it would clearly violate Federal civil rights statutes, and they would be targeting enforcement based on that.

So I would urge this committee to pass H.R. 3149. I think it is long overdue and would have a major impact on the U.S. economy.

Thank you.

[The prepared statement of Mr. Klein can be found on page 71 of the appendix.]

Chairman GUTIERREZ. Thank you so much.

Next, we will have Ms. Judy Gootkind, please, for 5 minutes.

STATEMENT OF JUDY GOOTKIND, VICE PRESIDENT OF FINANCE AND ADMINISTRATION, CREATIVE SERVICES, AND MEMBER, BOARD OF DIRECTORS, NATIONAL ASSOCIATION OF PROFESSIONAL BACKGROUND SCREENERS (NAPBS)

Ms. GOOTKIND. Chairman Gutierrez, Ranking Member Neugebauer, and members of the committee, thank you for this opportunity to testify.

My name is Judy Gootkind, and I appear here today on behalf of the National Association of Professional Background Screeners, NAPBS. I am member of NAPBS' board of directors. My company, Creative Services, Inc., located in Mansfield, Massachusetts, is a

founding member of NAPBS, and my role at my company is vice president of finance and administration.

NAPBS is a trade association founded in 2003 which represents over 700 companies engaged in employment and tenant background screenings across the country. Our membership includes a range of companies from Fortune 100 to small worker businesses. In fact, the majority of our regular members are small businesses with 12 or less employees. Collectively, we conduct millions of employment and tenant screening checks each year.

In the employment context, we provide background checks for private employers, volunteer organizations, nonprofits, government, public utilities, health care, higher education, and publicly held corporations. NAPBS seeks to promote ethical business practices, promote compliance with the Fair Credit Reporting Act and State law analogs, and foster awareness of issues related to consumer protection and privacy rights within the background screening industry.

Our industry is highly regulated both by the Federal Trade Commission and the newly created Bureau of Consumer Financial Protection. Our ability to provide our employer end users with consumer reports is driven by consumers' consent for such reports to be generated when they apply for employment or seek a promotion.

Before responding to the committee's questions, I would like to point out NAPBS' concerns with H.R. 3149, the Equal Employment for All Act. We believe the legislation too narrowly restricts the use of credit reports for employment purposes and all but prohibits them in the private employment space. Our specific concerns are as follows:

The legislation would limit the use of credit reports in private employment to certain positions at financial institutions, a narrowly defined term under the Fair Credit Reporting Act.

The legislation would prohibit the requesting of credit reports for the following types of positions: lawyers, mortgage lenders, property managers, cashiers, pharmaceutical representatives, pharmacists, asset management and financial planners, jewelers, health providers, NBA referees, executives in nonfinancial institution employers, accounting employees, finance employees, information technology employees, procurement employees, and academic financial aid employees.

Some would say that credit reports are reputation collateral, and for many consumers their credit history may be a good thing. NAPBS feels that there are instances beyond those which H.R. 3149 would allow in which it would be important and/or necessary to our employer end users to request a credit report, either as a risk mitigation or a verification tool.

I will turn now to the questions posed by the committee, and in the interest of time, I have shortened your questions.

How do we develop the reports that you provide to employers?

Each company who provides consumer reports to a third party is defined under the Fair Credit Reporting Act as a consumer reporting agency, or a CRA. We provide consumer reports to third party end users for a variety of permissible purposes under the Act, including for employment purposes. The FCRA specifically lists those permissible purposes for the use of such reports in Section 604.

One such permissible purpose is for employment, which is defined in the law as a report used for the purpose of evaluating a consumer for employment, promotion, reassignment, or retention as an employee. A consumer report could include information from a variety of sources, including a credit history report, employment verification, or education verification.

It is important to mention that, in the context of employment checks, a credit score is never included. The three major credit bureaus do not sell credit scores for employment purposes, nor are CRAs able to report such scores if the purpose of the consumer report is for employment.

Question: Has the use of credit reports for employment increased over the past decade?

NAPBS does not keep such data. From personal experience, I can tell you that at my company the request for credit reports from our end users has decreased.

Question: Do you add any information in the reports you receive from credit bureaus?

No. As a reseller of credit reports, most CRAs merely pass through the credit reports they receive from the credit bureaus.

What kind of information is included in credit reports?

We have provided a sample of a report as a part of our written testimony.

Do you have any proof that a credit record is an indicator of someone's ability to successfully perform the duties of a job?

CRAs are the providers of the information to end users when they are requesting background information, be it education or employment references or verification, credit history or criminal history. We believe the committee is better served by facts, rather than our personal views.

Thank you for the opportunity to testify.

[The prepared statement of Ms. Gootkind can be found on page 63 of the appendix.]

Chairman GUTIERREZ. You are welcome.

Colleen Parker Denston, please, you are recognized for 5 minutes.

STATEMENT OF COLLEEN PARKER DENSTON, DIRECTOR OF HUMAN RESOURCES, WORCESTER PREPARATORY SCHOOL, ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT (SHRM)

Ms. DENSTON. Chairman Gutierrez, Ranking Member Neugebauer, and distinguished members of the subcommittee, my name is Colleen Denston. I am the director of human resources at Worcester Preparatory School located in Berlin, Maryland. I am also a member of the Society for Human Resource Management, otherwise known as SHRM. I thank you for the opportunity to appear before the subcommittee today to discuss the use of credit background checks in employment, and the Equal Employment for All Act.

SHRM appreciates the heightened relevance of today's issues in the current economic environment. To be clear, we believe that employment decisions should be made on the basis of an individual's qualifications such as education, training, professional experience,

reliability, and integrity, and not on factors that have no bearing on one's ability to perform job-related duties.

However, SHRM does believe there is a compelling public interest enabling our Nation's employers to take a full assessment of potential hires. This is because the consequences of making a poor hiring choice can be great. Consequences include financial or property losses for the company or employees, legal liability in the form of negligent hiring, identity theft, and physical harm to employees, customers, and property.

To mitigate the potential of these threats in the workplace, the H.R. Department may conduct a background check on the final candidates or candidate. Some State laws even require employers to conduct background checks for certain positions such as licensed health care professionals, day care providers, and teachers.

The background check process is described in detail in my written testimony. Under the Fair Credit Reporting Act, an employer that uses a third party or consumer reporting agency in a background process must notify the potential employee in advance, and it must obtain the applicant's approval to have his or her background checked by the provider.

Before taking any adverse action based on that background report, such as deciding not to hire the individual, the employer is first required to give the applicant a copy of the background report and also a copy of a summary of your rights under the Fair Credit Reporting Act, which is a document prescribed by the Federal Trade Commission.

As noted in my written testimony, employees are already afforded Federal protections from the misuse of credit background reviews. Beyond the Fair Credit Reporting Act, employers are barred by the Civil Rights Act of 1964 from using background checks to screen out protected job applicants. We are, therefore, very concerned that the Equal Employment for All Act, as currently drafted, would nullify the right afforded to most private organizations under the Fair Credit Reporting Act to consider credit information and many other factors in making employment decisions.

Additionally, the legislation effectively concedes that it is appropriate for some employers to conduct credit checks, as evidenced by the bill's exceptions for national security or Federal Deposit Insurance Corporation clearance positions, State and local government positions, and supervisor or managerial position or executive positions at financial institutions. However, this is hardly a complete list of positions for which the public may have an interest in the integrity of its applicants, specifically those with the responsibility for managing money, property, personal identity, or financial information and other critical resources.

Earlier this year, SHRM released one of the most complete surveys of employer background screening practices. The report found that the employer use of credit checks has not increased in recent years. Sixty percent of respondents said they conduct credit checks at least on some candidates, compared to 61 percent that conducted credit checks in a similar report done in 2004.

Most organizations do not do credit checks at all: 4 out of 10 organizations reveal that they do not conduct credit checks. Employers generally conduct credit checks only for certain positions. Those

positions include ones with financial responsibility, senior executive positions, and ones with access to highly confidential employee information. Employers overwhelmingly use credit checks at the end of the hiring process, not to screen out applicants. At least 87 percent of organizations initiate credit checks only after a contingent offer is made—that was 57 percent—or after the job—which was 30 percent.

In summary, employer reviews of credit information are one small but important part of the overall hiring process. Current Federal laws already safeguard employees, and job applicants from discrimination and background investigation and preserving employer's right to review credit information ensures the integrity of their work forces and helps protect employees, consumers, and businesses of all size.

Thank you for your invitation to participate in today's hearing, and I welcome any questions you may have.

[The prepared statement of Ms. Denston can be found on page 56 of the appendix.]

Chairman GUTIERREZ. Thank you so much. Now, we have Mr. Hilary Shelton, Senior VP for NAACP. You are recognized for 5 minutes, sir.

STATEMENT OF HILARY O. SHELTON, DIRECTOR, NAACP WASHINGTON BUREAU

Mr. SHELTON. Good morning, Mr. Chairman. My name is Hilary Shelton, and I am the director of the NAACP's Washington Bureau. The Washington Bureau is the Federal legislative and national public policy arm of our Nation's oldest and largest grassroots-based civil rights organization.

I would like to begin by thanking Chairman Gutierrez and Ranking Member Hensarling for calling this important hearing, and I would also like to give special thanks to Chairman Gutierrez for cosponsoring this very crucial legislation.

Also, finally, I would like to thank our good friends, Congressmen Cleaver, Green, Watt, Waters, Scott and others for their leadership on these crucial issues on financial services concerns.

And finally, I would like to extend a sincere appreciation of the NAACP to our good friend, Congressman Cohen, for introducing this crucial legislation.

The NAACP strongly supports H.R. 3149, the Equal Employment for All Act and urges its swift enactment. We continue to oppose the use of credit reports by employers when considering potential employees, as credit reports have proven to be racially biased and in most cases are irrelevant to the positions for which the individuals are being considered.

Mr. Chairman and members of the subcommittee, as you know, our Nation is going through one of the most difficult economic times in recent history. The most recent numbers indicate that almost 15 million Americans were unemployed in August of this year, which has resulted in a national unemployment rate of about 9.6 percent. At the same time, the unemployment rate among African Americans was 16.3 percent, and among Latinos was 12 percent. As we all know or can imagine, these high employment rates have led millions of Americans to postpone paying back their credit

card debt, to borrow, to charge their credit cards to the limit, or to make difficult financial decisions they would not ordinarily face if they indeed had a job. As a result, their credit ratings may be more reflective of their current unemployment situation than the type of employees they may very well turn out to be. And since African Americans and other racial and ethnic minorities are disproportionately unemployed, their credit reports are going to be disproportionately negatively affected.

Furthermore, African Americans and other racial and ethnic minorities were targeted for decades by unscrupulous predatory lenders and are now facing or have gone through a foreclosure at unprecedented and highly racially disparate rates.

And now we enter into the Catch-22. With more potential employers using credit reports than ever before to assess potential employees, those with checkered credit histories are going to be the first eliminated from the potential job pool, despite the fact that many of them are the very people who most need a job in order to bring stability to their financial lives and otherwise.

Are employers using credit reports more now than ever before? Studies suggest that they are. More than 47 percent of employers admitted to using credit checks in 2009 at least sometimes, up from 25 percent in 1998. So the trend continues.

In addition to disproportionate unemployment rates, the disparately high foreclosure rates due to years of systematic targeting, there are several other reasons that credit reports and similarly credit scores for that matter, which often are used for the same information, appear to be an unfair and racially biased means of screening potential employees.

If I might digress for just a moment, I say appear to be because, as I testified before this committee in 2003, we do not know exactly what these reports have in them. In essence, a basic piece of information is shared, but most of it is considered proprietary. What was clear at that time and what continues to be evident and for more studies are conducted and released, is that racial and ethnic minorities consistently have disproportionately lower credit scores and worse credit reports and than their Caucasian counterparts. Because we are sure that credit reports and credit scores are often based on similar information, it is fair to conclude that the problems with one are indeed the problems with the other.

In 2007, the Federal Reserve Board report to the Congress on a credit scoring and racial disparities analysis analyzed 300,000 credit files. Not surprisingly, the study found significant racial disparities. In fact, the average credit score for African Americans was approximately half that of White non-Hispanics, with Hispanics faring slightly better.

There have also been several other well documented studies by respected governmental, quasi-governmental private organizations, and academia, all of which come to the same conclusion. Racial and ethnic minorities have lower credit scores than their White counterparts.

Taking the next logical step to go to credit scores, we go to credit reports. So if credit scores and credit reports are disproportionately unfair to racial and ethnic minority Americans, why are they being

used by more potential employers than ever before? Frankly, I do not know the answer to that question, as it makes no sense.

With a few obvious exceptions, there is no credible evidence that credit reports are an accurate indicator of a potential employee's ability to perform the assigned duties, propensity to commit a crime, or even their trustworthiness.

It is the contention of the NAACP that a resume, job references, and a face-to-face interview are much more reliable in telling a potential employer more about a job applicant without distortion. This will allow an individual to be judged on his or her ability to get the job done, not on irrelevant facts or unsubstantiated numbers.

Mr. Chairman, I thank you for the opportunity to participate in this important hearing. I appreciate the subcommittee holding this hearing, and I look forward to your questions on this matter. Thank you very much.

[The prepared statement of Mr. Shelton can be found on page 83 of the appendix.]

Chairman GUTIERREZ. Thank you so much.

I want to go to this report by Demos, "Discrediting Workers," and I just want to read a couple of paragraphs I think might be enlightening from the report:

"Earlier this year, the U.S. Government won a case brought by the Office of Federal Contract Compliance Programs in which Bank of America was found to have discriminated against—

Mr. MOORE OF KANSAS. Mr. Chairman, could you tell us what page you are on, please?

Chairman GUTIERREZ. I am on page 3.

Mr. MOORE OF KANSAS. Thank you.

Chairman GUTIERREZ. I am on page 3, the last paragraph, "was found to have discriminated against by using credit checks to hire entry level; that is, tellers, clerical and administrative. The percentage of candidates excluded because of a credit check was significantly higher for African Americans, 11½ percent, than for Whites, 6.6 percent. Generally, civil rights law requires employers to justify appropriateness of an employment practice if it creates such a disparate impact on a group historically subject to job discrimination."

So there is a disparate impact, and we should figure out why.

Despite the clear disparate impact of the policy on African Americans, Bank of America conducted no study to determine whether credit reports were actually a predictor of job performance and had not investigated the issue. That is, the company never went about the business of saying, let's see, let's do a study. Is this a good program that we should use, and does it really tell us anything?

An expert cited in the court's decision found the bank's review of credit reports to be highly subjective with no specifications about what thresholds had to be met for what indicators. The judge concluded, "There is no evidence of any criteria used by the recruiter in using credit report information to disqualify applicants." In the end, the bank was unable to offer evidence supporting its main justification for the practice, which was the credit reports were required for security and bonding purposes. Americans of color have

comparatively weak credit profiles due in large part to public policies and lending practices.

And then it goes on to make a statement.

So, that has been shown. And I just want to say that I thank everybody for putting the issue of consent. But the fact is, the way lawyers have told me, if I go for a job and they say can we have, sign for your credit report and I say no, you can just tell me you are not hired. Thank you. But you are not getting a job here. So I actually have fewer rights. I should sign, get it, because I might have a right to sue later on that you discriminated against me based on that credit report.

So the whole thing of consent I think is really false here. You can't get the job if you don't consent. As a matter of fact, they can discriminate against you by simply telling you you do not have this job; thank you very much. You didn't sign for the consent. So you are even in a worse position.

And then there are just jobs that, we had testimony in Chicago from people who literally mop floors and clean bathrooms who because they have bad credit reports—I don't quite get it. It is a vicious cycle. We are here to help Americans. Everybody lifts themselves up by their boot straps. How do you lift yourself up by your boot straps if you are in economic turmoil in your credit report?

Credit reports? They have so many errors in them, so many mistakes. I don't think anybody here would like to be judged by a third party who makes lots of mistakes. And I would just ask all my colleagues, since you get free credit reports, just get your credit report. You are going to find a lot of mistakes and a lot of bad information on those credit reports. I know I have done it, and I have to be very, very careful and continue to look at it and to look at it and to look at it to make sure that we are there.

And lastly, look, there are historical measures here. Just drive. I can drive down Cicero Avenue and I can start, I don't know, around Roosevelt and go to North Avenue and drive down. Cicero Avenue is a major street. And you can drive for nearly 3 miles through an African-American neighborhood down Cicero, and you know what, and I just looked at it the other day because I was just driving, and I didn't see a major bank, not one major bank. Even the gasoline stations were like Thrifty gasoline stations. I didn't see Walgreens or an Osco or a CVS open anywhere. How would I say it? I went and I said oh, there must be a big grocery store because Black people have to go eat, they have to go buy groceries, right? There were no Jewels, no Dominics, none of the major franchises. So the things that we see advertised on TV, it is almost, I think sometimes if you are African American you see things on TV and say I wonder where those stores are at because they are not open in my neighborhood. Wonder where that bank is, because it is not open in my neighborhood. So there are conditions.

Now why is it that those neighborhoods are excluded from those opportunities? And those opportunities have disparate impact on those communities. And I just want to tell you, you can go Roosevelt south and you can go North Avenue north and you find all those wonderful institutions on that same Cicero Avenue. The only thing that changes is the color of the skin of the people who live

adjacent to that avenue. That is why I think it is important to look at historical conditions.

And yes, it isn't that people just cry discrimination, discrimination, discrimination the fact is that if you just open your eyes you see it.

So I thank all of the witnesses.

And Mr. Neugebauer, you are recognized for 5 minutes.

Mr. NEUGEBAUER. Thank you, Mr. Chairman. It has been a little difficult sometimes to understand exactly what the title. I had to go back and look at what the title of this hearing was. We have talked about a lot of different issues here.

I want to go back to one of the things that the chairman was talking about, was the lawsuit that was filed against that bank. And I don't know whether it was appealed or not, but I think what it does show is that there are existing laws and that a case was brought against this bank. They evidently had hiring policies in that bank that the judge found troubling, and so the system worked. And we didn't even have this piece of legislation in place.

I was glad to hear some of the other panel understand and recognize the value of having somewhat of an idea about the background of the individuals that are applying for these jobs. And I also agree with everybody on the panel that discrimination is unacceptable, and I think we have gone a long way in removing some of that discrimination in this country. Have we completely eliminated it? No, but you know there are a lot of different forms of discrimination in this country.

But really, I think what maybe was the intention of this legislation, and I have heard some of my colleagues allude to it as well, is about the economy and about jobs and about families that are having a hard time across this country. And all of us are concerned about that when we have almost 15 million people out of work in this country, almost 10 percent. And when you look at the U6 number, which is those people who took a lesser job and maybe gave up looking for a job, it is almost 17 percent. So we have a real problem in our country.

But really what we ought to be spending a lot of our time on instead of whether employers ought to have the right to run credit reports or not, we ought to be down on the Floor of this House of Representatives extending tax breaks for small businesses all across this country. Those are the people who do create the jobs. Those are the people that we are talking about here today who will provide opportunities for minorities and people of all races and color to be able to have an opportunity to have jobs in this country and so if they do have jobs, that they don't have bad credit scores.

And the reason some people have bad credit scores, by the way, wake up to the real world, is not because they don't have jobs or good jobs. I know a lot of people who have good paying jobs that have very bad credit scores. And so just being poor doesn't mean that you have bad credit and just being rich doesn't mean you have good credit.

But we ought to stop all of these job-killing things that this Administration is doing. I was back in my district in August and time and time and time again they said, Congressman, I could hire some additional people. I could buy an additional piece of machinery that

I could use in my business. But you know what? There is too much uncertainty. We don't know what this new health insurance plan is going to cost us. We don't know what EPA is going to do with greenhouse gases. We don't know what the tax environment is going to be. And every time we turn around, we look at Congress spending money that it doesn't have and borrowing money from foreign countries and it has created some uncertainty so we are not doing anything.

And so really, if we really want to help people in this country have better credit scores, then what we ought to really be doing is helping people to have better jobs in this country. And the way we help people have better jobs in this country is we get this Congress off high center here and quit worrying about the politics of if we increase taxes for this group or we don't, what we ought to do is be leaving the money back in the economy of this country so that we can create jobs in this country.

Government doesn't create jobs and we have seen that. We have thrown trillions of dollars at programs, and we are going to be down on the Floor again this afternoon, another attempt at letting the government try to create jobs and do incentive type activities that don't work. They don't work, the President said they were going to work. And what has happened since then is we have lost over 2½ million jobs in this country.

And so I would hope that our efforts really would be to help these families and help get America back to work instead of trying to limit the rights of people to provide opportunity and documentation to get a job and to limit the ability for employers to make good hiring decisions so that we can move this country forward.

With that, I yield back my time.

Mr. CLEAVER. [presiding] I recognize the gentlewoman from California, Ms. Waters.

Ms. WATERS. Thank you very much, Mr. Chairman. I would like to try and get a couple of questions in. My first question would be to Mr. Don Livingston. You were, you directed our country's litigation in cases of employment discrimination over at the EEOC. Did you direct any cases relative to discrimination based on credit checks at all? Did you ever have any of those cases?

Mr. LIVINGSTON. I can't say. I just can't say. We had, we brought about 500 cases a year and I was there for 3 years.

Ms. WATERS. You don't remember any?

Mr. LIVINGSTON. No, ma'am.

Ms. WATERS. Okay. Thank you. Let me also move quickly to Ms. Gootkind. You are the Chair of NAPDS. You have a board. Now let me just ask. You have a board of directors. They are making policy decisions for this organization for your company, is that right?

Ms. GOOTKIND. We have a board of directors that directs the activity on behalf of the members of the company.

Ms. WATERS. So, and all of these people, you checked their credit backgrounds?

Ms. GOOTKIND. The different consumer reporting agencies that are members of our foundation would have their particular practices. I can tell you that in my company, we do background checks, yes.

Ms. WATERS. Do you know if the credit, have they checked credit on all of these directors?

Ms. GOOTKIND. I don't have the information on every particular member company of the association. I can speak to my company. We do national security background checks and so everyone who is a member of my company, an employee in my company does have to have a credit check done because it is required by the industry.

Ms. WATERS. But you don't know if the board of directors are credit checked?

Ms. GOOTKIND. I don't have that information here today.

Ms. WATERS. Sometimes, it is instructive and very helpful if boards are representative of all of the people that they are making decisions about. Do you think that this board is representative?

Ms. GOOTKIND. I would say yes.

Ms. WATERS. Why do you think it is representative?

Ms. GOOTKIND. Again, we are members of the consumer reporting industry. What we do is we deal with best practices. We deal with legislative initiatives. We have a brand, it is a relatively new organization.

Ms. WATERS. Do you have diversity on your board?

Ms. GOOTKIND. Pardon me?

Ms. WATERS. Do you have diversity on your board in racial make up and—

Ms. GOOTKIND. Diversity in the member organizations.

Ms. WATERS. The board of directors. I am looking at and we have been checking a little bit. And my question is, the Chair-elect is Theresa Preg.

Ms. GOOTKIND. Correct.

Ms. WATERS. You have the treasurer, Mr. Fred Giles.

Ms. GOOTKIND. Correct.

Ms. WATERS. Noelle Harling is the secretary. Dan Shoemaker is your past Chair, Bruce Berger, Judy Gootkind, that is you, Julie Hickman, Nancy Ann Roberts, Christine Cooney, Don Standwick, Carl McManns, and Dean Corris. Do you have any African Americans on this board?

Ms. GOOTKIND. We do not.

Ms. WATERS. Do you have any Latinos on this board?

Ms. GOOTKIND. We do not.

Ms. WATERS. Do you have any Asians on this board?

Ms. GOOTKIND. We do not.

Ms. WATERS. How then is it representative of the people that you are making decisions about?

Ms. GOOTKIND. Again, these are elected to the board, individuals who are representative of the consumer reporting agencies that make up our reporting organizations.

Ms. WATERS. So the consumer reporting agencies that make up your board have sent you representatives who are basically all White?

Ms. GOOTKIND. That is correct.

Ms. WATERS. I can't hear you.

Ms. GOOTKIND. That is correct.

Ms. WATERS. And we are here today talking about the problems that are created with the policies of credit checks for employment.

But you have nobody on your board who represents any of those classes that we are so concerned about; is that correct?

Ms. GOOTKIND. That is correct.

Ms. WATERS. Thank you very much.

I yield back the balance of my time. How much time did I have left?

Mr. CLEAVER. You have about 25 seconds.

Ms. WATERS. Okay. Then I yield back. Thank you.

Mr. GREEN. I will yield my time.

Mr. CLEAVER. Mr. Green is yielding whatever time.

Ms. WATERS. Thank you very much. I will just take a minute here. One of the big three credit bureaus, Experian I think it is pronounced, touts in its Web site that its employment screening product, Employment Insight, helps you make better employee hiring decisions by quickly and cost effectively providing objective and factual credit information. Credit information provides insight into an applicant's integrity and responsibility toward his or her financial obligations.

Do you agree with this statement that credit information provides insight into an applicant's integrity? Mr. Livingston?

Mr. LIVINGSTON. In some circumstances, sure. But I think we all tend to think about just certain paradigms. But if we were, for example, doing a background investigation on someone who is a candidate for a, say, chief financial officer, and we were to find that this person was routinely late in making payments, then that might be a factor.

Ms. WATERS. Yes, but the question that I am asking is about the statement of Experian. Do you buy that statement? Do you concur with that statement?

Mr. LIVINGSTON. I don't know that company, and I would think in many circumstances the statement would not be—

Ms. WATERS. Ms. Gootkind, what about you?

Ms. GOOTKIND. Can you read it again to me, please?

Ms. WATERS. One of the big three credit bureaus, Experian, touts in its Web site that its employment screening product, Employment Insight, helps you make better employee hiring decisions by quickly and cost effectively providing objective and factual credit information. Credit information provides insight into an applicant's integrity and responsibility toward his or her financial obligations.

Do you—

Ms. GOOTKIND. If I could comment, I think that credit reports are one component of the background investigation.

Ms. WATERS. So you don't believe in this statement the way they have put forth?

Ms. GOOTKIND. I would say that the credit report is a risk mitigation tool, but it is also a verification tool that is used by consumer reporting agencies.

Ms. WATERS. Thank you. Ms. Denston?

Ms. DENSTON. Yes, Congresswoman. I don't know that I agree with the statement as it is just for credit reports. But I do know that it is used as a tool.

Ms. WATERS. I am just asking about what they say. They said credit information provides insight into an applicant's integrity and

responsibility toward his or her financial obligations. Do you believe that?

Ms. DENSTON. Not so much integrity, but responsibility, yes.

Ms. WATERS. Okay. So you don't believe it. Thank you. And thank you very much for the time. I yield back.

Mr. CLEAVER. The Chair recognizes the gentleman from New Jersey, Mr. Lance.

Mr. LANCE. Thank you, Mr. Chairman. And good morning to you all. To Mr. Livingston, I am reviewing your testimony. As I understand the bill, and based upon your written testimony, exceptions would be provided for those holding jobs with State and local governmental agencies, national security, supervisory, managerial, professional or executive responsibility at financial institutions or when otherwise required by law.

Number 4 impresses me as being broad in nature. Do you have any understanding, sir, what that might be criterion for?

Is it your understanding that the current law prohibits employment discrimination based upon race, religion, creed, national origin, and other bogus criteria?

Mr. LIVINGSTON. Yes, sir. The answer is yes. Federal law prohibits discrimination on the basis of race and those other factors.

Mr. LANCE. Are there other irrelevant criteria?

As I read these various categories, if one were to seek a position as the chief financial officer of a hospital, for example, it does not impress me as coming within any of the exceptions that I am reading based upon your testimony. Would that be your understanding as well?

Mr. LIVINGSTON. Yes, sir. That would, to look into the credit history of someone seeking that job would be unlawful under this legislation.

Mr. LANCE. I have, of course, several hospitals in the district I represent, as do all Members of Congress. And certainly, if I were on the board of a hospital, as my twin brother is, I think it would be perfectly legitimate to seek the credit history of someone applying for the position of the chief financial officer of a hospital. Can you give me other examples where it would become illegal to look at the credit history of a person, other examples, perhaps if not in the nonprofit sector, in the private sector?

Mr. LIVINGSTON. Ms. Gootkind had an extensive list in her testimony. I was impressed by the number of categories that she used.

Mr. LANCE. Thank you. I therefore defer to Ms. Gootkind. What were some of those categories?

Ms. GOOTKIND. We feel that there are industries that use background checks as well as individual positions that are being hired for that have responsibility to cash information, consumers information and things of that nature. I would be happy to read the list to you again if you want.

Mr. LANCE. If you would just briefly highlight several of the categories.

Ms. GOOTKIND. Lawyers, mortgage lenders, property managers, cashiers.

Mr. LANCE. Thank you. So, for example, I am an attorney. If I were to apply for a position in a law firm, it would be illegal for

that law firm to examine my credit history under the provisions contained in this potential legislation?

Ms. GOOTKIND. That is correct.

Mr. LANCE. Other members of the panel, would you think it appropriate to use credit as one of the criteria for a chief financial officer of a hospital or for employment in a law firm? And I would open it up to the entire panel. Mr. Shelton, good morning.

Mr. SHELTON. Good morning. If you will repeat the question specifically.

Mr. LANCE. Of course, sir. If I were to apply for the position of the chief financial officer of a hospital.

Mr. SHELTON. Yes, can you establish the need? Why indeed would you need that kind of background information? Would it be nothing more than just another device to actually exclude many from consideration? Quite frankly, when I think about our conditions today and what affects our credit ratings and, quite frankly, what affects our financial disclosure, we are also thinking about those of us who took out multiple student loans to be able to finish our degrees and get our levels of higher education achieved. And very well indeed what you would be doing is locking out many who struggled to get from the bottom to be able to be considered for important positions like this. I don't see any basis for the need for that kind of information.

Mr. LANCE. So it is your position that you do not see a need for consideration for the position of chief financial officer of a hospital?

Mr. SHELTON. I would want to know, quite frankly, if they have the skills to be able to carry out those responsibilities. I would not like extraneous diversions from the real issues and concerns of that person's integrity, ability, and that person's background to be able to fulfill the responsibilities for these positions. And certainly, I don't see where this kind of information is helpful at all.

Mr. LANCE. Thank you. I appreciate your answer to the question. I respectfully disagree.

Thank you, Mr. Chairman.

Mr. CLEAVER. The Chair recognizes the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. We quite often sit in these hearings and markups and legislative sessions and marvel at the difference in the backgrounds that people bring to these deliberations. I don't think I have seen many that reflect that difference more than this morning's discussion between the folks on one side of the aisle and the folks on the other side of the aisle who come from different backgrounds, live in different worlds, and don't understand the realities of how things work in the real world that we live in, at least. Maybe they understand it in the world they live in.

It doesn't take much for me to relate to the need for this kind of legislation, even based on my own personal experiences going back to high school when I got a summer job in a small warehouse, and there were four people working in that warehouse, all making very, very low wages, but the hardest-working people I had ever seen in my life. And they were always in some kind of credit crunch that would ultimately show up on their credit report, but had nothing to do with their commitment to the job that they were

doing every day for virtually minimum wages, showing up on their credit report because they were making virtually minimum wages, and it was virtually impossible for them to make ends meet.

Fast forward to the time that I practiced law in the law firm that was litigating *Griggs* v. *Duke Power,* which established the job-relatedness requirement when employers were taking the same position that some of the witnesses on this panel are taking, that employers ought to be able to establish whatever criteria they want to establish, whether it had any justifiable relationship to the employment that they were hiring people or not, and the result was that systematically, Blacks were ending up in the lowest categories, and others were ending up in the higher categories.

I dare say, Ms. Gootkind, the striking thing about Ms. Waters' line of questioning, although I thought it was very personal, I dare say there is not a person on that board who got on that board having to have had a credit check. That is just a difference in the worlds that we live in.

So this is something that is hard for me to relate to this discussion without understanding that we come from different worlds here.

And so a number of us have been strong advocates for doing away with this, these credit reports that have adverse impacts on people's ability to do, to get jobs, have adverse impacts on their ability to get insurance. I, for the life of me, can't understand why, how somebody's credit report impacts their driving ability and their car insurance rates, or the likelihood that they would have a fire at their home. So it adversely impacts the rates on their homeowners insurance policies. There is no relatedness there.

It is just a vicious cycle that takes you back to the very thing that Mr. Cohen testified about in his opening statement: That is the way we have always done it, and therefore, we justify it because we have always done it that way.

And I dare say, just fast forwarding a little bit further, now that I am in Congress and have Bank of America as one of my prime corporate constituents, and having heard them be discussed here in an adverse way, they are probably better off with this bill because they don't have to worry about whether they go out and look at some irrelevant criteria that doesn't have any application to whether they can hire a janitor or a mail clerk or whatever.

So I am sorry. I didn't mean to get on a soap box here. I just wanted to—

Mr. CLEAVER. If someone wants to yield another—

Mr. WATT. No. I don't want to take anybody else's time because I would just further pontificate on these different worlds that we come from. It is striking.

I yield back, Mr. Chairman.

Mr. CLEAVER. The Chair recognizes the gentleman from Georgia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Livingston—

Mr. LIVINGSTON. You understand, Mr. Scott, that I am a Georgian.

Mr. SCOTT. Oh, very good.

Mr. LIVINGSTON. I hope that will provide me some—

Mr. WATT. We will probably hold that against you.

Mr. SCOTT. That is all the more reason for me to attempt to illuminate a little on this issue.

First of all, I think we have to understand and look at this credit report as a discriminatory tool. There is no other way you can look at it as that. First, I am not necessarily talking about racial discrimination. Not first. But just by the very nature that here is a tool in the hands of an interviewer, prospective employer whose sole purpose is to make a discriminatory conclusion for a job for which this tool has no, is no indicator of how successful the individual would be at performing that job. That is the first part of the discriminatory tool.

The second one is that it is not required—I don't know, maybe you can correct me—that everyone who sits before this interviewer, that this credit card issue, this credit report is utilized.

The first question then would be, to you, how heavily do employers typically weigh the credit scores in employment? And do they use it judiciously, or do they not use it discriminatorily? For example, this person who sits before them, they may use the credit report as a tool. Another person coming before them, they may not. It is all subjective. So when you look at all of the ramifications of why this is so wrong, it is a discriminatory tool on so many different levels that it is paramount, the paramount reason why we feel it is so unjustified and so unfair.

So specifically, my first point to you is, how heavily do employers weigh credit scores in employment? What do they do with this when they get it?

A man got behind on his payments and got into a little trouble. What do they do with this? How does that weigh in the decision?

Mr. LIVINGSTON. It depends on the job. The employers who are members of the U.S. Chamber put in safeguards to try to protect the applicant or the employee from purposeful discrimination, from disparate treatment, from decisions which are made based upon the protective classification to make sure that everybody similarly situated is treated the same way with respect to their credit history information.

The difficulty, the primary difficulty that I have with the bill is that it just doesn't address only the janitor that Mr. Watt was referring to. It also throws out the employer's ability to look into the way that the potential CFO has managed his or her own finances. The hospital that doesn't want someone managing the finances of the hospital who has already proved to be irresponsible in managing their own money.

Mr. SCOTT. But isn't the decision to use this criteria done on a case-by-case basis? Does every single person coming before for employment go through this?

Mr. LIVINGSTON. No. There are actually two parts to that. I think that one of the panelists has already testified, consistent with my own experience, that the background investigation occurs after the individual has already received a conditional offer of employment. So not every applicant would be subject to a credit screening. And then, based on my own experience, only with respect to those positions for which a credit screening might be relevant. Lots of the positions that we have talked about here today, in my experience, are not subject to a credit screen. When the position itself is subject to

a credit screen, then everyone who receives a conditional offer of employment for that position gets the screen.

Mr. SCOTT. But doesn't it vary between that—my time?

Mr. CLEAVER. We have two additional persons to ask questions, and because we have a small group here, if it would please the members and if the witnesses are willing to wait around, we could go through one more round of 2½ minutes.

Mr. SCOTT. You are the chairman, Mr. Chairman.

Mr. CLEAVER. The Chair recognizes the gentleman from Texas, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman. I thank the witnesses for appearing today. And it is a difficult subject for those of us who have sat in the back of the bus, had to go to the back door, were forced to sit in the balcony of the movie, last hired, first fired. It is a difficult topic for us to embrace without some degree of emoting. If you only knew what we think, and I thank God that our thoughts are private. That is one of the great gifts that God has given humankind, the ability to secret your thoughts.

So, I have a question: Does anyone really think that African Americans and minorities are inherently persons who merit poor credit scores? If so, would you kindly raise your hand? We will call this the voir dire or voir dire portion of this hearing, depends on where you are from. It is a French term, and lawyers know that it means to speak the truth. Does anyone really think that there is an inherent factor here that causes minorities and persons of color to have bad credit scores?

I didn't think anyone did.

So then the question becomes, why do they seem to have credit scores that are higher or lower and in this case lower? Why are they lower? Why are they consistently lower? What has happened in their lives to cause their scores to be consistently lower? What happened?

Are they just bad people who don't care about credit? I think not, and I am confident that you would agree with me. So what happened?

I am going to ask my friend, the lawyer from Georgia, what happened to Black people? Why is it that their unemployment rate is always twice that of White unemployment? Consistently. Check the numbers. Consistently twice or more than White unemployment. What happened to them? What happened, sir? Help me.

Mr. LIVINGSTON. Mr. Green, I think that the majority of persons who are denied employment based upon credit screenings are White. Now, I believe that—

Mr. GREEN. If I may intercede—

Mr. CLEAVER. Let me interrupt everybody. Please move the microphone. Our technician is having difficulty picking up your voice.

Mr. GREEN. Excuse me, since I control the time, and I beg your indulgence. But you see, unfortunately, I too have been trained, and when you say the majority, I immediately understand that we are not talking about majority as much as we are talking about percentages of a given group.

Mr. LIVINGSTON. Right. I am not trying to be clever. I am just trying to—

Mr. GREEN. Whether you are trying to be clever or not, the answer is one that has to be addressed. You see, "most" does not mean that the higher percentage exists compared to the number of Whites in the country.

Mr. LIVINGSTON. Indeed. Generally, a higher percentage of Blacks, as compared to—

Mr. GREEN. And that is what we are talking about. Listen now. We are both going to acknowledge our intelligence today. On this day, you and I are going to acknowledge that we both understand how to use the king's language.

Mr. LIVINGSTON. Indeed.

Mr. GREEN. And it was imposed on me, but I still embraced it. And I am ready to do battle with whomever comes forward, and you and I are here today, my brother. So explain to me, why are Black people in this shape that they are in with credit, with reference to their credit scores.

Mr. LIVINGSTON. I couldn't explain that to you, Mr. Green. But I do say that you have no argument with me over this issue.

Mr. GREEN. Let me just ask you this, since you say you can't explain. Good, I am glad you said that because listen now. Let me just share this with you. Mr. Cohen, whom I must tell you I gained a great amount of respect for today, Mr. Cohen gave us a plausible answer. He used the term "institutionalized racism," a term that many persons of color are reluctant to use because of the way we have to then find ourselves dealing with those who will simply just dismiss us out of hand. But I am glad he said it. He has the "hue" power, if you will, to say it and get away with it. But I want to just—

Mr. CLEAVER. The gentleman's time is up, but he has an extra 1½ minutes because he yielded.

Mr. GREEN. Just listen to this point. He said "institutionalized." "Institutionalized," as dastardly as it is, is not nearly as dastardly and invidious as "legalized." This is legalized, and it has always been the intelligentsia that was able to perpetuate and perpetrate legalized invidious discrimination. Dred Scott was produced by the intelligentsia. This that we try to right today, which is wrong, the intelligentsia perpetuates.

I am just going to beg of you, give some thought to those of us who have had this history. And we don't come here because we just simply want to make things difficult for people. It is a history that you cannot imagine how it has impacted us.

So these hearings are difficult for some of us. And I close with the simple comment to all of you, and I appreciate you. Please understand that we support the same Constitution you support, believe in it the same way you do, except that we can recognize a wrong that ought to be righted, and that is what we are trying to do today.

I will yield back the time that I don't have. And I thank you for being so kind, Mr. Chairman. Thank you.

Mr. CLEAVER. Mr. Lance, we are going to give another 2½ minutes, if you have a question.

Mr. LANCE. Thank you, Mr. Chairman.

Mr. CLEAVER. We don't discriminate, so we want to make sure that both sides have opportunities here.

Mr. LANCE. Thank you. And in my view, Dred Scott was based upon an erroneous decision of Roger Taney and eloquently opposed by Abraham Lincoln.

Regarding the testimony of Ms. Wu, I read with interest and I certainly agree that if there has been erroneous rates of credit, inaccurate rates, that is something that we should address. And as I read your testimony, there is a study ongoing now regarding that?

Ms. WU. The Federal Trade Commission is required under the 2003 Fair and Accurate Credit Transactions Act that amended the Fair Credit Reporting Act to conduct a study of accuracy in credit reports. It is a long study. They have engaged in two pilots already. The data from the two pilots is what is in my testimony, showing error rates in credit reports that I think are significant.

Mr. LANCE. And will there be a final report at some point in the immediate future?

Ms. WU. As I understand it, and this may be a question better directed to the Federal Trade Commission, the study is ongoing. It is nationwide. They do expect to have a final, a statistically significant study in the next few years. I have heard within a few years, but I would be happy to find out more for you.

Mr. LANCE. Thank you. And through the Chair, I think that this is an area that we should investigate and certainly I would like to work in a bipartisan capacity with members of the committee so that the rates of error are reduced or I would hope eventually eliminated, and certainly none of us favors a system where there is significant rates of error.

Thank you, Mr. Chairman.

Mr. CLEAVER. Thank you. We have—Ms. Denston, are you an attorney as well? Are you, Ms. Gootkind? Mr. Livingston, I guess you are.

I want to deal with the issues that my colleague Mr. Green mentioned earlier about when he actually quoted from Mr. Cohen about unintentional but still brutal discrimination, vicious discrimination. You agree that there is discrimination?

Mr. LIVINGSTON. Yes, sir.

Mr. CLEAVER. Okay. Here is—maybe you can look at this. Is it legal to deny a person employment if they have filed bankruptcy?

Mr. LIVINGSTON. I believe that it is illegal to use bankruptcy as a basis for an employment decision. But I don't know for certain.

Mr. CLEAVER. Okay. I know for certain. You cannot exclude a person from employment based on bankruptcy. But it is a moot point. If you file for bankruptcy, the chances are you didn't pay, you were having difficulty paying your bills. You probably didn't have a job. So it doesn't matter. Somebody can say, in an interview, I filed for bankruptcy, or show that they filed for bankruptcy, an employer can say, we absolutely will not discriminate against you because of the bankruptcy. But the employer automatically knows that the credit is bad. Do you agree with me?

Mr. LIVINGSTON. I think that we end up, we ended up in this hearing sort of talking around one another. I agree with most of what has been said.

Mr. CLEAVER. Okay. I don't want to talk around it. So if you can help me, I will go straight to it.

Mr. LIVINGSTON. Some decisions to deny persons employment on the basis of credit history are unlawful under Title VII now.

Mr. CLEAVER. Yes.

Mr. LIVINGSTON. Unless the employer can prove that the decision was job related for the specific job being sought by the applicant. So lots of the examples that I am asked if I agree with, I do agree with. My point is that it is illegal now and that the current law permits for there to be some flexibility so that, as Mr. Lance pointed out, an employer may be permitted to look into the credit background of the person who seeks to be the chief financial officer of the hospital, but might not be able to consider the credit history of someone who is seeking a position as a janitor, to draw two extreme examples.

Mr. CLEAVER. But you used the word earlier, and I wrote it down, "irresponsible."

Mr. LIVINGSTON. If I was using it, I was using it with respect to the CFO example, chief financial officer example, and using, and looking, and asking in some ways rhetorically, wouldn't it be job related for an employer to consider if the candidate for that senior position, managing the finances of the company, was having difficulty managing his or her own finances. I wasn't making that reference with respect to lower level jobs where it would be less likely that the employer could prevail under discrimination laws.

Bank of America is a good example. Bank of America, based on upon what I have heard in this hearing today, lost it under current law, which precluded them from considering the credit histories in whatever job was at issue.

Mr. CLEAVER. So you are concluding that this legislation is completely unnecessary because there is already existing law?

Mr. LIVINGSTON. I said in my testimony that I believe that the existing law works better than what would replace it, which would be this bill, yes, sir.

Mr. CLEAVER. Why?

Mr. LIVINGSTON. Because this bill throws out, it encompasses all situations, including those situations where under current law, an employer may be able to show that the consideration of certain factors in a person's credit history were related to the job that the person sought. And a good example I continue to return to is the example offered by Mr. Lance, Congressman Lance, that dealt with the CFO of a hospital.

Under current law, the employer would have an opportunity to demonstrate that person's credit history was relevant to the position and possibly could win. Under the bill, the hospital would have no opportunity to make that showing. The hospital would not be allowed to consider that information.

Mr. CLEAVER. But do you understand, and Mr. Watt tried, and maybe he failed, so I probably will fail as well. Can you struggle, struggle, struggle to see that there are individuals who are in fact discriminated against, and if you, in the throes of a recession have discrimination, that you would say it is not based on color, but based on their ability to pay on time and not come across as irresponsible. And if you look at all of the statistics, Mr. Shelton was one who testified before our committee. I think it is inevitable that

minorities were pushed towards exotic loans. Do any of you disagree with me? The facts.

Mr. LIVINGSTON. I passionately agree with the principles of equal employment opportunity in Title VII.

Mr. CLEAVER. But then we have to be as aggressively trying to make sure that people are not discriminated against as we are in a number of other arenas. All of a sudden, it is almost like we have solved all of the problems, and there is no discrimination, so let's just keep going the way we are going. That is not the real world that we are in. And there are people, through no fault of their own, today, who are struggling just to make it, some of the 99ers who have gotten off the unemployment benefits and they are just out here in the world. They are not even in the numbers that Mr. Shelton mentioned, the 9.6, the 7.1, the 12.0. They are not even in there. It is probably up in the 20s. And these people are going out trying to get a job. They can't get a job because somebody pushed them into an exotic loan.

My time is way past up. I am going to recognize the gentleman from Georgia.

Mr. SCOTT. Thank you, Mr. Chairman. And I want to just say, Dred Scott was mentioned, and many of you may know that Dred Scott is my great-great-grand uncle. And it is a joy to have his spirit mentioned because it is his spirit that we are dealing with here today.

The great evolving decision that opened up the major wound of this country emanated from the Dred Scott decision as to whether a portion of this country or a State would be free or slave. And that is why I think you hear the passion from us who are descendents of people who have suffered because of the pangs of color shock.

Now, Mr. Livingston, I want to come back to you because I want to give an example of this, why I say we all have to see out of the same lenses in order to grab this picture.

When the chairman asked, why do you oppose this, and I understand because I feel that you are basically understanding of this. But it is very simple to point out something. He asked you that and you responded, let me give you this example why I am against this bill. I think because of a CFO of a hospital. And clearly, in the bill, how the language reads, that there are exemptions in this bill, including jobs that require national security, FDC clearance, jobs with a State or local government agency, that specifically require credit check or employment that is supervisory, managerial, professional, executive level at a financial institution or is otherwise specifically required by law. Almost a loophole in this bill that you could drive 20 Mack trucks through. Surely, within here, a CFO of a hospital—Grady Hospital should have this. You are from Georgia. You know Grady Hospital. You know the trouble we went through.

I agree with you they ought to have checks on that. These are guys who are handling a lot of different money from State, local, and Federal Governments.

So the reason of opposition to this bill is on something else that we were talking about, is the fact that this requirement is a major discriminatory barrier that is a target of people who come auto-

matically there and they saw you coming. That is why I asked you about case by case.

There are certain things, if they see a Black man coming, sitting down, there is a whole different thing going through this person's mind. That is why African-American males right now in the cities of the United States are hovering at 50 percent unemployment. They see them coming. He doesn't have a job. If he doesn't have a job, you know he can't pay his bills. But he's trying to get a job.

And this darn thing is sitting up there for them to use as a discriminatory tool that he can't get the job. He has a bad credit report. He can't pay his bills. He can't pay his bills because he can't get a job. This man said you can't get a job because you can't pay your bills. There is a catch-22, and it needs to be dissected out.

So I wanted to explain that to you so you could see where and how this is a major discriminatory tool. That is why I wanted to ask how much weight you give to this, who it is applied to. But, clearly, if a person has been unemployed for some time, they have trouble paying their bills, and then they get this negative effect of credit scores. This is truly a consideration of credit scores for employment that is counterproductive.

You can see that, can't you? Can't you see that, how it is counterproductive?

Mr. LIVINGSTON. I can see that the use of credit scores in many contexts discriminates on the basis of minorities, and my testimony pertains to the employment arena, which is what we are talking about. There are laws, powerful laws, which currently exist that deal with this issue and they work, while at the same time giving employers flexibility to deal with these more—these other situations that I think we—I think we agree. It sounds like we agree that there should be these other exceptions.

Mr. SCOTT. But I want to make sure that your point is covered within the exemptions here and that the fact that as this bill moves along, if it is not clear, we will make these exemptions clear. The exemptions are clearly—this isn't the purpose of the bill. A man gets to the point where he is being qualified for the top financial officer or CEO of a major hospital—this is going to try to help people who are being discriminated against already, who come to the point of wanting the job they are discriminated against.

Mr. Shelton, I wanted to ask you, because I think that you can get right to it and explain to us how the use of credit scores as a hiring criteria disproportionately discriminates against minorities.

Mr. SHELTON. Let me first start off by saying the biggest challenge that we have is to talk about credit scores. Credit scores are oftentimes a component thereof of a credit report but credit scores separately of a credit report is that you really don't know.

Now the reason I put it in those terms is because whenever we have talked to the FICOs of the world and other credit scoring companies about what exactly goes into the credit scoring process, they are unable to tell us. They are unwilling to tell us. They will state that we can tell you generally that we are looking at your payment history, we are looking at any mortgages you have held, we are looking at your background and so forth. But when you ask specifically, how do you come up with the scoring, they will say we can't

tell you because it is proprietary. In other words, meaning a black box that locks you out of that process.

As a matter of fact, we have also seen very specifically is oftentimes African Americans, with the same background, the same history of payments, the same educational level of attainment, even the same salary ranges find themselves with lower scores than White Americans in the same boat. As a matter of fact, the Center for Responsible Lending and a few others have taken a good look at this issue and very clearly indicated to us there is discrimination in this process.

Again, as you talk to the people who manage this, they will tell you, this is our business and because this is our business we can't tell you exactly how we do the mathematics, but somehow, magically, African Americans score much lower.

Mr. SCOTT. Okay. Thank you, Mr. Chairman.

Mr. CLEAVER. I recognize the gentleman from Texas, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman.

Mr. Livingston, I want to make this conspicuously clear. I love you. I hold no ill feelings toward you. I would be honored if we could have lunch or dinner at my cost. It is not about you.

And, Ms. Gootkind, because you are the person that I would be talking to next, I extend the same invitation to you as well. I love you, too.

Now, Mr. Livingston, before we conclude and I go to Ms. Gootkind, let me just ask you a question. Is there a requirement that you check the credit history of that CEO or that hospital person that we have been talking about? Is there a requirement that you do it?

Mr. LIVINGSTON. Is there a legal requirement? I don't know.

Mr. GREEN. I can tell you. There is no requirement that you check it. You may if you choose; and given that you don't have to check the history, you now put the person who may be discriminated against who had the credit concerns in the position of having to sue to prove that this invidious discrimination took place, and the person, as has been indicated by the testimony I believe of Mr.—I am not sure whether it was—was it Mr. Klein? I can't see. Let me just see your name. Mr. Klein.

People don't know always know they have been discriminated against. It puts them in the rather awkward position of having to do the discovery of some sort to find out they actually have a lawsuit. I guess they can go to the EEOC if they have enough understanding about what is going on to do so. But it is an awful burden. It costs a lot of money to engage in what we call long-term litigation, and that is what it is. It is not resolved overnight or right away.

So you put the person who is being discriminated against in a position of having to expend a large sum of money or find a means by which some lawyer who sees that as his mission or her mission in life to help people to do this. It is a tough position to be in when you have to prove that you have been discriminated against. It really is difficult. Assuming that remedy works, it is a very expensive remedy for people to prove.

Ms. Gootkind, am I pronouncing your name correctly, ma'am?

Ms. GOOTKIND. "Gootkind."

Mr. GREEN. "Gootkind," excuse me.

Ms. Gootkind, I just want to leave you with a thought because you are in a position to go back to your board and say to them we need to take another look at ourselves. You have an opportunity to do some good. Go back to the board and tell them that at this hearing, it was made rather clear to me that there are some people who look upon us with an eye of suspicion because we don't have the diversity that some people think that we should have.

There is something we say around here that might apply to your circumstance. I have heard it stated in many quarters if you are not at the table—and those people who are on your board are at the table—if you are not at the table, you are on the menu. Seems like a lot of what you talk about has to do with people who are not at the table. So they are at least on the agenda which some people call the menu.

So I look forward to either of you accepting my invitation for lunch, and I hope you love me as much as I love you. I yield back.

Mr. CLEAVER. One final question, Ms. Denston. Your testimony caught me by some surprise. I love you, too, Mr. Scott, as you are leaving. Thank you.

Ms. Denston, you said that you didn't know whether or not the use of credit reports for employment purposes has increased over the past decade, which is fine, and you added because you don't track those numbers.

Ms. DENSTON. The use of credit reports has not increased from our survey back in 2004. In 2004, it was at 61 percent of the selected candidates, and the survey that was took place, the one that was released in 2010, was at 60 percent.

Mr. CLEAVER. Okay. Has your industry increased in size in the past decade?

Ms. DENSTON. I am not aware of those figures. I cannot answer that question. I would have no—

Mr. CLEAVER. Has the volume of sales and contracts in your industry increased over the past decade?

Ms. DENSTON. Again, I cannot answer that question. I don't have that information, but we can get back to you on that.

Mr. CLEAVER. Okay. You wouldn't be in business if you had not increased.

Ms. DENSTON. I can only speak—I work for a private individual, and SHRM is an organization I belong to.

Mr. CLEAVER. Okay.

Ms. DENSTON. I don't understand your question.

Mr. CLEAVER. The question is, you were saying that you didn't know if the credit reports for employment purposes had increased, and one of the questions I asked is, has your industry increased the volume of sales and contracts? Because if everything is increasing, then you are hiring more people, and then you are looking at more credit reports.

Ms. DENSTON. Okay. I do understand that question. But I don't have those figures. I cannot answer that question. I do not know. I cannot give you an intelligent answer.

Mr. CLEAVER. Okay. All right. Thank you. Let me thank all of you, all the witnesses. We love all of you.

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

If no other comments, this subcommittee is adjourned.

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

A P P E N D I X

September 23, 2010

Statement by Congressman Luis V. Gutierrez, Chairman, House Financial Services Subcommittee on Financial Institutions and Consumer Credit

Legislative Hearing on H.R. 3149, the "Equal Employment for All Act"

September 23, 2010

The "*Equal Employment for All Act*" was introduced by Representative Steve Cohen on July 9, 2009 and currently has 55 co-sponsors. I am proud to be an original co-sponsor of this bill and to have discussed its importance at hearings, briefings and town hall meetings. This legislation, if enacted, would be a significant step forward in eliminating unfair hiring practices and open up more good jobs to those unemployed Americans who, aside from a poor credit report, are otherwise qualified to do these jobs.

H.R. 3149 would amend the Fair Credit Reporting Act (FCRA) to prohibit an employer from using a consumer report for either employment purposes or for making an adverse action -including promotions, transfers and terminations- if the report contains information that bears upon the consumer's

creditworthiness, credit standing, or credit capacity. This prohibition applies even if the consumer consents to the use or procurement of a consumer report for employment purposes or in connection with an adverse action concerning employment.

The bill provides certain exemptions to this prohibition that we feel are proper, including jobs that require a national security or FDIC clearance, jobs with a state or local governmental agency that specifically require a credit check, or employment that is at a supervisory, managerial, professional or executive level at a financial institution or is otherwise specifically required by law. This legislation does not prohibit the use of background screening for a criminal background, even when it is not required by law.

This subcommittee has held two hearings this year -on March 24th and May 12th- in which we reviewed the methodology, impact of and the use of consumer reports under the Fair Credit Reporting Act (FCRA) and discussed the potential impact of H.R. 3149, along with other reform proposals. We heard from various industry representatives, consumer advocates and others. More recently, on August 30th,

I held a town hall meeting in Chicago that was attended by hundreds who came from Detroit, Boston, L.A. and elsewhere to express their concerns about the increasingly widespread use of credit checks for employment purposes. This practice unfairly hurts the chances of otherwise qualified candidates to get a job.

Credit reports are simply inappropriate for use in most hiring decisions. An individual's credit history is often marred by circumstances beyond their control, such as income loss, medical problems and the breakup of families which often leads to bankruptcy. The Consumer Bankruptcy Project has estimated that 85% of bankruptcies are caused by these issues and a bankruptcy can have a strongly negative impact on your credit report. The industry's own studies indicate that bankruptcy, when noted in a credit report, is something that potential employers take into account when making employment decisions.

Along with many others in Congress, I am concerned that relying upon credit reports will continue to have a harmful impact on many, especially on communities of color as minorities have disproportionately worse credit reports even

when income is taken into consideration. No fewer than 8 separate studies in the past 15 years conducted by the Federal Reserve, the Federal Trade Commission, the Brookings Institution and Fair Isaac itself have documented the disproportionately lower report quality of minorities. The Equal Employment Opportunity Commission has repeatedly expressed their concern that the use of credit reports for employment purposes might violate Title VII of the Civil Rights Act.

Even if there is no overt bias on the part of an employer against an applicant based on their credit report, there is the potential for a subconscious bias against those who have more negative data on their reports versus those who do not.

You simply cannot tell a person's character, integrity or how well they will perform their job by looking at their credit report. A credit report should not be one of the determining factors of whether someone gets hired. The fact that someone has a credit report that is not superior to another job candidate does not make them less able to do the work at an office or a factory nor does it make them more or less likely to steal from their employer.

Four states, including my own state of Illinois, have already passed legislation at the state level that will ban the widespread use of credit reports for employment purposes. Seventeen other states have legislation on this topic pending before them as well. Congress should act to make these sensible protections available to all Americans, not just those lucky enough to live in a state that is willing to protect them from this practice.

We have heard testimony from the Consumer Data Industry Association (CDIA), from Experian, TransUnion and Equifax, from FICO and VantageScore and others about how credit reports are prepared and used. Among other witnesses, today we will hear from the National Association of Professional Background Screeners (NAPBS) about how its members use, prepare and provide background checks and consumer reports to employers. We will also hear from the Society for Human Resource Management (SHRM) about how its members use a current or prospective employee's consumer or credit report to make employment related decisions.

I welcome and thank these and the other witnesses who are appearing with us today.

Statement of Congressman Steve Cohen
"Equal Employment for All Act"
September 23, 2010

- I would like to thank Chairman Gutierrez and Ranking Member Hensarling for holding this hearing on the The Equal Employment for All Act.

- Finding a job in this economy can be very difficult to say the least, however, when some employers use credit checks finding a job can seem impossible.

- The use of credit checks to determine employment is sadly a growing trend and a dangerous one.

- This is especially troubling as our nation's unemployment figures continue to be unacceptably high.

- One in ten people in my district of Memphis, Tennessee are looking for work.

- When so many Americans are struggling to find jobs, credit checks should not be used as a basis to deny employment to otherwise qualified candidates.

- 43 percent of all employers admit to performing credit checks on job applicants, despite the fact that several studies have confirmed that credit history does not predict job performance.

- With the unemployment rate unacceptably high, screening qualified and competent employees by their credit score only worsens applicants' chances of getting back on their feet.

- Among the prospective employees who are getting unfairly screened out, there is a disproportionately high percentage of African Americans and Latinos.

- The overall unemployment in August 2010 was 9.6 percent, with Whites at 8.6 percent, African Americans at 16.3%, and Latinos at 10.4%.

- It is important to take into account the historical context, (such as Jim Crow laws for African Americans), that has made it difficult for some minorities to have the opportunity to build wealth and ultimately has created a disparate impact on the basis of race.

- Furthermore, these groups have been preyed on with sub-prime lending practices, health-care disparities, and other credit-related discrimination.

- Eric Rosenburg, a TransUnion representative, admitted during sworn testimony that his company has zero statistical evidence to document that employees with bad credit are any more likely to steal or commit fraud than workers with perfect credit.

- That's why I introduced HR 3149, The Equal Employment for All Act.

- This legislation would give some of our most vulnerable, "credit challenged" citizens – recent college graduates, divorced women, low-income families, senior citizens, and minorities – the opportunity to begin rebuilding their credit history by obtaining employment.

- According to a recent report, one-third of individuals making less than $45,000 a year have poor credit scores as a result of bankruptcy, home foreclosure, loan delinquency, divorce, medical debt or unemployment.

- Additionally, the "credit challenged" often fall victim to deceptive marketing practices by credit report companies or credit counseling services advertised as a means to rehabilitate credit scores to help with employment.

- In reality, this is rarely the case, and is just another attempt to make money from people who are desperate to improve their finances.

- The Equal Employment for All Act would prohibit the use of consumer credit checks by employers as part of the hiring or firing process, unless the job involves national security, FDIC clearance, or significant financial responsibility.

- I have listened to numerous stories about how the use of credit checks for employment has affected their job opportunities.

- I feel very strongly that a credit score should not be used to judge the character of job applicants.

- Second chances in Hollywood and professional sports occur every day, but not for my constituents who are desperately looking for work.

- Too many Americans are caught in a cycle of debt.

- They have fallen into bad credit and as a result they cannot do what they need to do to climb out: find a job, work hard, pay their bills, and earn a better credit score.

- The legislation has been endorsed by over 25 organizations including the NAACP, National Organization for Women, National Consumer Law Center, Leadership Conference on Civil Rights, National Association of Consumer Advocates, Unite Here, National Employment Law Project, U.S. Public Interest Research Group, AFL-CIO, and Lawyers' Committee for Civil Rights Under Law.

- The Equal Employment for All Act represents simple, tangible and immediate action we can take to provide motivated but unemployed Americans a chance to work their way out of bad credit.

- Again, I thank the committee for holding this hearing on this important issue.

Prepared Testimony of

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Legislative Hearing on H.R. 3149, The Equal Employment for All Act
Before the House Subcommittee on Financial Services and Consumer Credit
September 23, 2010, 10:00 a.m.

Introduction

My name is Sarah Crawford, and I am Senior Counsel with the Employment Discrimination Project of the Lawyers' Committee for Civil Rights Under Law. I am honored to testify here today in support of the Equal Employment for All Act, which would prohibit employers from using credit checks against prospective and current employees. In light of research showing the lack of predictive value of credit information, credit checks create an *unnecessary* obstacle for those seeking gainful employment. Credit checks create barriers for those who apply for a job in order to support themselves and their families, to pay their bills, and to pull themselves out of debt. I am here today to comment on the negative impact of this practice, particularly for communities of color.

Most Employers Use Credit Checks, and the Practice is Becoming Increasingly Prevalent.

Credit checks are becoming an increasingly prevalent practice in the employment sector. According to a survey by the Society for Human Resource Management, approximately 60% of its employer members use credit checks as a hiring tool, compared to 35% of employers in 2001.[1] Some employers report that they use credit checks in hiring for *all* positions.[2] This practice is particularly troubling in light of research indicating that credit information bears no relation to job performance or risk of crime in the workplace.

Credit Information Does Not Predict Job Performance or Risk of Crime in the Workplace.

Contrary to the fear mongering and false promises by credit bureaus that profit from selling credit reports to employers, credit information *does not* predict job performance or risk of theft in the workplace. A TransUnion official recently admitted under oath, "At this point we

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[1] Society for Human Resource Management, *Background Checking: Conducting Credit Background Checks*, January 2010, available at http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundChecking.aspx; Thomas Frank, *Job Credit Checks Called Unfair. Needy hurt most; 5 states eye limits.* USA Today, February 13, 2009, 1A.
[2] *Id.*

don't have any research to show any statistical correlation between what's in somebody's credit report and their job performance or their likelihood to commit fraud."[3]

In fact, research has shown that credit information *does not* predict job performance.[4] In 2004, Dr. Jerry Palmer and Dr. Laura Koppes of Eastern Kentucky University studied the credit reports of nearly 200 current and former employees working in the financial services areas of six companies.[5] The study revealed that applicants with good credit reports were no more likely to receive positive performance evaluations and were no more likely to be terminated from their jobs.[6] In fact, one aspect of the study revealed that workers with a higher number of late payments actually received *higher* performance ratings.

Credit Reports Provide Limited and Often Flawed Information.

While credit reports may show whether bills have been paid on time, they do not reflect the circumstances surrounding debts or reasons for any late payments. A credit report would not explain that a factory worker lost his job when his employer went out of business. A credit report would not explain that a man's credit was destroyed because he was the victim of identity theft or a predatory lending scam.[7] A credit report would not explain that a woman's credit was destroyed as a result of divorce. And a credit report would not explain that a woman lost her job and her health coverage before developing breast cancer and incurring astronomical medical bills.

Medical debts reflected in credit reports raise particular concerns about the practice of employer credit checks. Medical debt often arises due to circumstances out of an individual's control and can have a catastrophic impact on an individual's financial situation. Seventeen percent of our citizens—15 million people—are uninsured, including 12% percent of whites, 21% of Blacks, and 32% of Hispanics.[8] What happens when the uninsured face a major illness? Often, they incur medical debt. Such medical debts are often impossible to distinguish from other forms of debt listed in a credit report. Although most employers report that they do not base hiring decisions on medical debt, the impact of medical debt could be reflected in outstanding judgments, bankruptcies, foreclosures, and other forms of debts that employers may take into consideration. Over half of collections accounts are composed of medical debt, and

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

[4] Society for Industrial and Organizational Psychology, *Credit History Not a Good Predictor of Job Performance or Turnover*, available at http://www.newswise.com/articles/view/502792/.

[5] *Id.*

[6] *Id.*

[7] Blacks and Hispanics are significantly more likely to receive high cost loans. *See* National Community Reinvestment Coalition, *Income is No Shield against Racial Differences in Lending: A Comparison of High-Cost Lending in America's Metropolitan Areas*, 2007, available at http://www.ncrc.org/images/stories/mediaCenter_reports/ncrc%20metro%20study%20race%20and%20income%20disparity%20july%2007.pdf.

[8] U.S. Census, *Income, Poverty, and Health Insurance Coverage in the United States: 2009*, available at http://www.census.gov/prod/2010pubs/p60-238.pdf.

more and more, Americans are being forced to pay for costly medical procedures with credit cards.

Additionally, credit reports are rife with errors. One study found that 79% of the consumer credit reports surveyed contained some kind of error or mistake.[9] This study found that 25% the reports surveyed contained serious errors such as false delinquencies or accounts that did not involve the consumer; 54% of the reports contained personal demographic information that was misspelled, long-outdated, belonged to a stranger, or was otherwise incorrect; 22% of the reports listed the same mortgage or loan twice; 8% of the credit reports were missing major credit, loan, mortgage, or other consumer accounts that demonstrate the creditworthiness of the consumer; and 30% of the reports contained credit accounts that had been closed by the consumer but remained listed as open.[10] Another study found that some accounts showed balances that were not up to date, some creditors reported only negative information, and public records inconsistently reported actions such as bankruptcies and collections.[11]

Furthermore, there is no common standard among employers as to how to interpret credit reports. Human resources officials are given little guidance as to how to interpret technical financial information. Despite the claims of the credit reporting companies, these reports do not provide meaningful insight into a candidate's character, responsibility, or prospective job performance.

Credit Checks Negatively Impact Communities of Color.

Credit background checks disproportionately impact communities of color. Unemployment has skyrocketed in recent years, and the effects of the recession have fallen most harshly on minorities. Sixteen percent of blacks and 12% of Hispanics are unemployed, compared with 9% of whites.[12] Fourteen percent of Americans live in poverty—that is 43.6 million people living in poverty in this country.[13] According to the Census Bureau, this is largest number in the 51 years for which poverty estimates are available. 25% of blacks and Hispanics live in poverty.[14] A recent report revealed that the median wealth for single black

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[9] U.S. PIRG, *Mistakes Do Happen, a Look at Errors in Consumer Credit Reports*, 2004, available at http://www.uspirg.org/home/reports/report-archives/financial-privacy--security/financial-privacy--security/mistakes-do-happen-a-look-at-errors-in-consumer-credit-reports

[10] *Id.*

[11] U.S. General Accounting Office, *Consumer Credit: Limited Information Exists on Extent of Credit Report Errors and Their Implications for Consumers*, 2003, available at http://www.gao.gov/new.items/d031036t.pdf.

[12] Bureau of Labor Statistics, *Employment Status of the Civilian Population by Race, Sex, and Age,* September 3, 2010, available at http://www.bls.gov/news.release/empsit.t02.htm.

[13] U.S. Census, *Income, Poverty, and Health Insurance Coverage in the United States: 2009*, available at http://www.census.gov/prod/2010pubs/p60-238.pdf.

[14] *Id.*

women is only $100 and $120 for single Hispanic women, as compared to $41,000 for single white women.[15]

Credit checks only compound this crisis. A 2007 Freddie Mac study found that 43% of African Americans and 34% of Hispanics had lower credit scores, as compared to 27% of whites. The study found that nearly half of black borrowers and a third of Hispanics have a record of delinquent loans or bankruptcy -- compared with a quarter of whites.

A 2004 Texas Department of Insurance study found that the average credit score for African Americans is 10% to 35% lower than the average credit score for whites, and the average credit score for Latinos is 5% to 25% lower than that of whites.[16] Because minorities are significantly more likely to have poor credit, credit checks tend to screen out disproportionate numbers of minorities from job opportunities.

Credit Checks Can Run Afoul of Existing State and Federal Laws.

Finally, credit checks can run afoul of existing laws. A number of states already have enacted laws to limit employers' use of credit information, including Washington, Hawaii, Oregon, and Illinois, and many others are considering similar legislation.

At the federal level, Title VII of the Civil Rights Act of 1964[17] prohibits employers from using a practice that disproportionately screens out minorities or women, unless the employer has a "business need" to use the practice. Most employers would not be able to meet this standard, because research has shown that credit information does not predict job performance or risk of theft in the workplace. Even if employers could prove a business need for the practice of running credit checks, Title VII requires employers to explore a "less discriminatory alternative" to the discriminatory practice.

In keeping with Title VII's disparate impact provisions, the Equal Employment Opportunity Commission cautioned that "if an employer's use of credit information disproportionately excludes African-American and Hispanic candidates, the practice would be unlawful unless the employer could establish that the practice is needed for it to operate safely or efficiently."[18] The EEOC recently filed a Title VII complaint challenging the use of credit histories and criminal background check histories by a corporate event-planning company.[19]

It is important to note that the Equal Employment for All Act does not impose a blanket restriction on the use of credit checks. The bill would still permit employers to use consumer

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[15] Mariko Chang, *Lifting as We Climb: Women of Color, Wealth, and America's Future*, March 2010, available at http://www.insightcced.org/uploads/CRWG/LiftingAsWeClimb-WomenWealth-Report-InsightCenter-Spring2010.pdf.

[16] Texas Department of Insurance, *Use of Credit Information by Insurers in Texas*, December 30, 2004.

[17] 42 U.S.C. 2000e et seq.

[18] EEOC letter, *Title VII: Employer Use of Credit Checks*, March 9, 2010, available at http://www.eeoc.gov/eeoc/foia/letters/2010/titlevii-employer-creditck.html.

[19] *EEOC v. Freeman Cos.*, D. Md., No. 09-CV-02573, filed September 30, 2009.

reports where there may be a true business need--for example, for positions requiring security clearance; for certain state or local jobs; for certain positions with financial institutions, and when otherwise required by law.

The Equal Employment for All Act Would Provide Much Needed Reform.

Despite the research, despite the disparate impact on communities of color and others, despite errors in credit reports, and despite existing legal restrictions on the practice, credit checks are an increasingly prevalent practice. The practice is based on mistaken assumptions that credit information will ferret out poor performers or those who will steal from their employers. However, research has proven that these assumptions are wrong.

The Equal Employment for All Act will eliminate unnecessary obstacles and put people back to work. This law will eliminate an unjustified hiring screen that disproportionately screens out people of color. This law will enable people to pay their bills and escape the vicious cycle of debt and unemployment.

***

SARAH CRAWFORD is Senior Counsel with the Employment Discrimination Project of the Lawyers' Committee for Civil Rights Under Law. In this position, Ms. Crawford advocates for worker protections and litigates high impact employment discrimination cases at trial and on appeal. Before joining the Lawyers' Committee, she worked as an attorney with the Department of Labor's Office of the Solicitor in the Division of Civil Rights. She serves on the Employment Task Force of the Leadership Conference on Civil and Human Rights. Ms. Crawford received her undergraduate degree and law degree at William and Mary in Williamsburg, Virginia and is admitted in Virginia and Washington, D.C.

STATEMENT OF COLLEEN PARKER DENSTON

DIRECTOR OF HUMAN RESOURCES

WORCESTER PREPARATORY SCHOOL

BERLIN, MARYLAND

ON BEHALF OF THE

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

PRESENTED TO THE

U.S. HOUSE FINANCIAL SERVICES SUBCOMMITTEE ON

FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

THURSDAY, SEPTEMBER 23, 2010

Introduction
Chairman Gutierrez, Ranking Member Hensarling, and distinguished members of the Subcommittee, my name is Colleen Denston. I am Director of Human Resources at Worcester Preparatory School in Berlin, Maryland, and a member of the Society for Human Resource Management (SHRM). I thank you for the opportunity to appear before the Subcommittee today to discuss the use of credit background checks in employment and H.R. 3149, the "Equal Employment for All Act."

The Society for Human Resource Management is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

SHRM has been monitoring the intensifying debate on both the national and state levels regarding legislation that would restrict an employer's ability to access and consider the credit history of applicants and current employees in the employment process.

To be clear, we believe that employment decisions should be made on the basis of an individual's qualifications – such as education, training, professional experience, demonstrated competence, reliability, integrity – and not on factors that have no bearing on one's ability to perform job-related duties. Furthermore, SHRM and its members fully appreciate that our nation's high unemployment rate, foreclosure rate and the overall health of the economy have had a severe impact on countless individuals' credit history. Therefore, this issue has heightened relevance right now.

However, SHRM believes there is a compelling public interest in enabling our nation's employers to assess the skills, abilities, work habits, and integrity of potential hires. Further, SHRM believes the ability to obtain reliable and accurate job performance information about prospective employees has a direct impact on critical business concerns such as quality, workplace safety and customer satisfaction. SHRM also believes that a job applicant has a right to know that he/she has been denied credit or a job as a result of a third-party report, as per current law under the Fair Credit Reporting Act of 1970 (FCRA).

In my statement today, I will explain what background information employers currently seek, present the problem of occupational theft and fraud and its relevance to today's hearing, review results of SHRM research on employment background screening; and outline our concerns regarding legislation, H.R. 3149, pending before the Subcommittee.

The Use of Background Information in Employment
At private and public organizations, large and small, HR professionals are charged with ensuring that each individual hired possesses the knowledge, skills and abilities needed for the organization's success. The consequences of making a poor hiring choice can be great, possibly leading to financial losses or an unsafe work environment. Also, if the employee engages in severe misconduct, customers, shareholders or other employees may incur legal liability in the form of negligent hiring, negligent retention, vicarious liability lawsuits or

other legal claims. As a result, HR professionals strive to make the most informed choices possible when selecting candidates for their organizations.

Once a group of candidates or a finalist is selected for a position, the HR department may conduct a background check on the candidates or candidate. In addition, some states statutorily require employers to conduct specific background checks for certain positions such as licensed health care professionals, day care providers, teachers and athletic coaches, and police officers and firefighters.

While the background check process is often a standard practice for most employers, the process varies, depending on the employer and the position in question. The process may include checking previous work history, personal references, education, professional credentials, motor vehicle history, criminal history and credit history. In addition, employers may place a different emphasis on each element of the process. For example, some employers put a great deal of importance on a steady work history, personal references, and credit history. Others value education and work history above all else.

Furthermore, many employers are compliant with Payment Card Industry Data Security Standards (PCI DSS), otherwise known as PCI Compliance. PCI Compliance is a complex set of network security and business practice guidelines adopted by Visa, MasterCard, American Express, Discover Card, and JCB to establish a "minimum security standard" to protect customers' credit card information. In short, all businesses that accept, handle, store, or process consumer credit card data must be PCI Compliant. The PCI DSS requires employers complete a background check on certain employees who handle credit card information or have access to software code that process credit card information. PCI Compliance is not strictly based on federal law, but is an industry standard designed to facilitate the broad adoption of consistent data measures on a global basis.

A major problem of the current process is that employers are reluctant to provide an accurate assessment of a former employee's work history, strengths, and weaknesses. They fear that an unabridged assessment of a candidate's work background—whether good or bad—could expose them to liability in claims made by the candidate (in the form of a defamation or retaliation lawsuit) or the potential employer (negligent referral) . As a result, most employers provide only the minimum in a reference check – "name, rank, and serial number." They confirm that the candidate had worked for them, his or her title, and dates of employment.

This lack of direct, complete reference information forces many employers to seek additional information about the candidate that can be legally obtained through the use of third-party background check companies. Employers may employ the services of such companies to obtain the most accurate picture of a potential employee's work history, personal references, education and professional credentials, criminal history and credit history. Under the FCRA, an employer that uses a third-party provider or Consumer Reporting Agency (CRA) in the background process must notify the potential employee in advance, and it must obtain the applicant's approval to have his or her background checked by the provider.

Before taking any adverse action based on a background report, such as deciding to not hire an individual, an employer is first required to give the applicant a pre-adverse action notice. That notice must include:

> (1) a copy of the background report; and
> (2) a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act" — a document prescribed by the Federal Trade Commission (FTC).

The individual must then be given a "reasonable" period of time to contact the employer if any of the information in the report is incorrect. This protects an individual from losing an employment opportunity due to incorrect information, such as a transposed Social Security number, or an incorrectly reported date of birth, resulting in "bad" credit information being reported about the wrong individual. It is only after that "reasonable" period that the employer may decide to not hire the individual. In that instance, the employer must provide the candidate with an Adverse Action notice that includes:

> (1) the name, address, and phone number of the CRA that supplied the report;
> (2) a declaration that the CRA did not make the decision to take the adverse action and cannot give specific reasons for it; and
> (3) a notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished, and his or her right to an additional free report from the agency upon request within 60 days.

As explained earlier, credit histories are but just piece of the puzzle used by HR professionals in evaluating job candidates. Credit history information can not only be useful in determining whether a candidate has the skills and responsibility necessary for a particular job, but also whether the individual is qualified to handle money. A stellar credit history may provide evidence of and responsibility, while a poor credit history may reflect irresponsibility or carelessness.

The Problem of Occupational Theft and Fraud in the Workplace

While employee advocates make strong arguments in the credit-check debate, we believe arguments by employers are also compelling. At a time when financial pressures on households are increasing, employee theft is on the rise. The result is a major financial problem for companies. The National Retail Security Survey estimates that the U.S. retail industry lost about $14.4 billion in 2009 due to employee theft.[1] These data show why employers are using every type of screening method they can to avoid making poor hiring decisions.

According to the Association of Certified Fraud Examiners' 2010 Report to the Nation on Occupational Fraud and Abuse, financial pressures are one of the "key motivating factors" behind check tampering, theft, and fraudulent reimbursement schemes by employees, who are usually first-time offenders. The study found that "living beyond financial means" (43

[1] National Retail Security Survey (2010). National Retail Federation and the University of Florida.

percent of cases) and "experiencing financial difficulties" (36 percent) were the two most common warning signs displayed by perpetrators of workplace fraud.[2] A previous report by the association, in 2008, concluded, "Given that financial difficulties are often associated with fraudulent behavior, it would seem advisable for organizations to devote more efforts to conducting credit background checks on new applicants."

SHRM Research on the Use of Credit Checks in Hiring

Recent media reports have implied that *nearly all* employers run credit checks on *nearly all* job applicants, and then use the results to deny employment regardless of the position sought. Many of these publications have even used SHRM data to support this interpretation. In the current economic climate, such stories are particularly compelling. But they also give the public a misleading description of the use of credit reports during the hiring process.

In order to provide a more complete picture of the background check process, SHRM in January 2010, and followed up in a subsequent report in August 2010, released one of the most complete set of data employer background screening practices ever conducted. The resulting report included data from large employers (500 or more workers), medium-sized employers (100-499 employees), and small employers (1-99 employees) from both the public and private sectors.

Here were the survey's key findings:

- **Credit checks on all job candidates is the exception—not the rule.** Only 13 percent of organizations conduct credit checks on all job candidates. While another 47 percent of employers consider credit history, they do so only for candidates for select jobs. Those findings are little changed from SHRM's last survey in 2004, when 19 percent of respondents said they "always" check the credit history of job candidates and a combined 42 percent do so "sometimes" or "rarely."
- **Many organizations do not conduct credit checks at all.** Four out of 10 organizations revealed that they do not conduct credit checks at all.
- **Employers generally conduct credit checks only for certain positions.** Those positions include ones with financial or fiduciary responsibilities, senior executive positions, and ones with access to highly confidential employee information. In other words, HR professionals use credit checks when this information is most job-relevant.
- **Credit history is not among the most important factors in making a hiring decision.** Credit checks ranked the *lowest* among a list of criteria employers typically use in making hiring decisions. In fact, only 9 percent of organizations reported that favorable credit checks were among the most influential factors in their hiring decisions.
- **Employers overwhelmingly use credit checks at the end of the hiring process, not to screen out applicants.** At least 87 percent of organizations initiate credit checks only after a contingent offer (57 percent) or after the job interview (30

[2] Report to the Nations on Occupational Fraud and Abuse (2010). Association of Certified Fraud Examiners.

percent). This finding substantiates other data showing that organizations place relatively more importance on other job-relevant factors in making hiring decisions.

- **Employers regularly go beyond current law requirements and allow candidates to explain their credit history.** The survey showed that 87 percent of organizations allow job candidates, in certain circumstances, the opportunity to explain results of their credit report.[3] Employers are not required by the FCRA to provide individuals such an opportunity.

Concerns with Federal Legislation

Today's hearing is focused on legislation introduced in the U.S. House of Representatives to amend the FCRA. Entitled the "Equal Employment for All Act (H.R. 3149)," the bill would prohibit the use of credit checks on prospective and current employees for employment purposes. H.R. 3149 would not apply to job applicants subject to a national security clearance, people applying for public-sector positions that require a credit check, or candidates for supervisory or managerial positions at financial institutions.

These exceptions appear to concede that credit history is indeed relevant for positions in which a professional is required to manage sensitive information, including financial and security information. But there are many more positions in myriad industries where ensuring employee integrity is in the public interest. Such positions include those with responsibility for managing money, property, personal identity or financial information, and other critical resources. For example:

- Managerial positions at institutions of higher education that manage significant endowments, including taxpayer-funded federal and state grants and appropriations
- Real estate professionals that process financial transactions
- Nearly all positions in airline companies, from customer service representatives to maintenance workers, that provide access to financial or security-related information
- Private security professionals that have access to sensitive physical security information for public facilities
- Human resource positions that have access to Social Security numbers, bank account numbers, and other personal information
- Positions at all organizations that process or store consumer credit card data and must be PCI Compliant

Under current federal law, employees already enjoy significant protections from unauthorized uses of credit checks. First, as noted above, the FCRA requires that an employer give a job applicant advance notice and secure the applicant's signed consent before a credit check can be performed. If an applicant is not hired in part because of a credit report, the employer must also inform the applicant of the decision, plus provide a copy of the report and a statement of the individual's rights under the FCRA.

[3] Conducting Credit Background Checks (2010). Society for Human Resource Management.

A second statute, Title VII of the Civil Rights Act of 1964, prohibits employment discrimination based on race, color, religion, sex, or national origin. It bars employment decisions based on policies, tests, or standards, such as credit checks, that have a "disparate impact" on protected groups, unless those policies, tests or standards are job-related and consistent with business necessity. Disparate impact refers to any test or system that appears to be neutral, but results in a disproportionate impact on specific groups of people protected by the equal employment opportunity laws.

In cases of disparate treatment, employees or applicants must show that intentional discriminatory practices took place. In response, an employer must show a legitimate reason for the practice.

Thus, employers are already barred from using credit background checks to screen out applicants from protected classes. Subsequently, H.R. 3149 would be redundant federal policy.

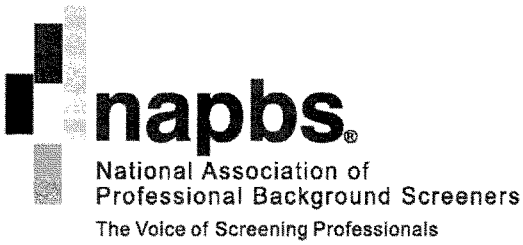
Conclusion

For all these reasons, SHRM continues to have significant concerns with H.R. 3149, the "Equal Employment for All Act." Given current economic pressures, SHRM and its members understand the heightened relevance of the issue of credit history and employment. SHRM believes there is a compelling public interest in ensuring that employers can assess the skills, abilities, work habits, and integrity of potential hires. HR professionals, whether working in the public or private sector, need a consistent set of rules to follow in obtaining background information about applicants during the hiring process.

Those professionals commend the Subcommittee's efforts to balance the needs of both the management and employees of a company. SHRM believes that employees already enjoy significant federal protections from misuse of credit background reviews. The Fair Credit Reporting Act of 1970 requires employers to secure written permission from applicants and employees before conducting a credit check, and to inform applicants if an adverse employment decision was based on a credit-related issue. In addition, employers are barred by the Civil Rights Act of 1964 from using background checks to screen out protected job applicants.

SHRM's research reveals that only a small minority of organizations conduct credit checks on all job candidates, and organizations generally conduct credit checks only for certain positions with responsibilities that affect other employees and consumers. Credit check results are rarely a very influential hiring criterion, but rather one small component of the overall consideration of a job candidate. Overwhelmingly, employers review credit history of applicants only after an interview, not to screen out applicants early in the hiring process. What's more, even in the downtrodden economy of recent years, the use of credit background checks in employment decisions has not increased.

Thank you for your invitation to participate in today's hearing.



Written Testimony of
Judy Gootkind, Member, Board of Directors,
on behalf of the National Association of Professional Background Screeners (NAPBS)
Before the Committee on Financial Services
Subcommittee on Financial Institutions & Consumer Credit
U.S. House of Representatives
on
Legislative Hearing on "H.R. 3149, the Equal Employment for All Act"
September 23, 2010

Chairman Gutierrez, Ranking Member Hensarling and members of the committee, thank you for this opportunity to testify. My name is Judy Gootkind and I appear here today on behalf of the National Association of Professional Background Screeners -- NAPBS. I am a member of the NAPBS Board of Directors. My company, Creative Services, Inc., located in Mansfield, MA, is a member company of NAPBS and I am Vice President of Finance & Administration. Creative Services, Inc. is located in the Fourth Congressional District of Massachusetts, Chairman Frank's district.

NAPBS is a trade association founded in 2003 which represents over 700 companies engaged in employment and tenant background screening across the country. Of this figure, approximately 360 member companies are Regular Members, meaning that they are primarily engaged in the business of providing employment and/or resident background screening services directly to end-users, such as employers, landlords and businesses. The majority of those Regular Members are small businesses, with 12 or less employees. Having said this, our membership does include a range of companies, from Fortune 100 companies to small local businesses. Collectively we conduct millions of employment and tenant screening checks each year.

In the employment context we provide background checks for private employers, volunteer organizations, non-profits, government, public utilities, healthcare, higher education and publicly held corporations. NAPBS seeks to promote ethical business practices, promote compliance with the Fair Credit Reporting Act and State law analogs and foster awareness of issues related to consumer protection and privacy rights within the background screening industry.

Our industry is highly regulated, both by the Federal Trade Commission and the newly created Bureau of Consumer Financial Protection.[1] Our ability to provide our employer end-users with consumer reports is driven by consumers' consent for such reports to be generated when they apply for employment or seek a promotion.

Before responding to the Committee's questions provided to NAPBS, I would like to point out our concerns with H.R. 3149, "The Equal Employment for All Act". We believe this legislation, as drafted, too narrowly restricts the use of credit reports for employment purposes, and all but prohibits them in the private employment space. As drafted, the legislation would limit the use of credit reports for those jobs requiring national security or FDIC clearance, state or local government agency employment, supervisory, managerial, professional, or executive positions at a financial institution, or when otherwise required by law. Our specific concerns are as follows:

- The legislation would limit the use of credit reports in private employment to certain positions at financial institutions, a narrowly defined term under current law. The term "financial institution" is defined in the Fair Credit Reporting Act

[1] The Bureau of Consumer Financial Protection was created by the Consumer Financial Protection Act of 2010 (Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203).

to mean, "...a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person that, directly or indirectly, holds a transaction account (as defined in section 19(b) of the Federal Reserve Act) belonging to a consumer."[2]

- The legislation as written would prohibit the requesting of credit reports for the following types of positions, all of which are examples of actual job applicants for which NAPBS member companies provide credit reports: lawyers, mortgage lenders, property managers, cashiers, pharmaceutical representatives, pharmacists, asset management and financial planners, public safety officers, jewelers, health providers, NBA referees, executives in non-financial institution employers, accounting employees, finance employees, Information Technology employees, procurement employees, academic financial aid employees, Human Resources employees and other positions where employees have access to large amount of cash spending or personal information of other employees or customers.

Some would say that credit reports are reputation collateral and for many consumers, their credit history may be a good thing rather than the negative light in which they are being cast. NAPBS feels that there are instances beyond those which H.R. 3149 would allow in which it would be important and/or necessary to our employer end users to request a credit report. While NAPBS understands that this legislation seeks to limit the use of credit reports so that the credit history has some bearing on a person's job responsibilities and duties, as written, it eliminates many other positions where credit could be at least a potential sign of someone's judgment.

In your letter of invitation, you have asked NAPBS to address particular issues and questions regarding credit reports and employment background checks.

Committee Question -- Please explain the process of developing the reports that you provide to employers, including what types of information is used and how it is filtered. For example, do you alter or modify the information that you receive from the credit bureaus? If so, why and how?

Some background on how we operate is necessary to answer this question. Each Company who provides consumer reports to a third party is defined under the Fair Credit Reporting Act ("FCRA" or "Act") as a "consumer reporting agency". We provide "consumer reports" to third party end-users, for a variety of "permissible purposes" under the Act, including for employment purposes. The FCRA specifically lists those "permissible purposes" for the use of such reports in section 604 which is entitled "Permissible purposes of consumer reports". One such permissible purpose is for employment purposes, which is defined in the law as, "...a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee."[3]

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[2] Section 603(t), FCRA.
[3] Section 603(h), FCRA.

A consumer report could include information from a variety of sources, including a credit report/credit history, public record information such as a criminal report, or employment or education verification. It is important to mention that in the context of employment checks, a credit *score* is never included. The three major credit bureaus do not sell credit scores for employment purposes nor are consumer reporting agencies able to report such scores if the purpose of the consumer report is for employment purposes. In fact, contractual agreements are in place which prohibit our access to, or use of credit scores, in the employment context. Moreover, the bureaus audit end users as well as resellers of credit information for compliance with their agreements. As such, technical measures are in place to ensure that an end user identifies its permissible purpose upon ordering the report, leaving little room for an end user to receive an actual credit score by accident or otherwise.

Important steps in the background screening or consumer report preparation process. Prior to requesting a consumer report, an employer must provide to the prospective employee a written notice stating what information will be requested, the source of the information and the purpose for which it will be used. An employer must also provide a copy of the consumer report, including the credit report, to the consumer upon request, and prior to taking an adverse action in whole or in part based on the credit report. With the report, an employer must also provide a copy of the Federal Trade Commission's document entitled "A Summary of Rights Under the Fair Credit Reporting Act." The employer must then wait a reasonable period of time before making the ultimate decision thereby allowing the consumer the opportunity to dispute any inaccurate information in the report.[4] If an adverse employment action is taken against a prospective employee based on any information contained in a consumer credit report, for instance, the end user must provide the name and contact information for the consumer reporting agency to the consumer. Consumers can also request and obtain all the information about themselves in the files of a consumer reporting agency and they have the right to dispute incomplete or inaccurate information[5]. Furthermore, consumer reporting agencies must correct or delete inaccurate, incomplete or unverifiable information.

Committee Question -- Has the use of credit reports/checks for employment purposes increased over the past decade?

This question is better addressed to the end users of such reports as we do not have such statistical data on hand at NAPBS.

Committee Question -- Do you add any information to the reports you receive from credit bureaus? If so, please explain what, why and how.

Generally, No. As a reseller of credit reports, most consumer reporting agencies merely pass through the credit reports they receive from the credit bureau(s).

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[4] Section 604(b)(3), FCRA.
[5] Section 609(a), FCRA.

Committee Question -- What kind of information is included in the reports you provide to employers?

A credit report includes information about a consumer and their credit experiences, such as name, addresses, employers, social security number, trade accounts, credit limits, balances, payment history, collection accounts, bankruptcies and tax liens. It may also provide additional verification and/or identify discrepancies with regard to the applicant's name, address, social security number and employment history.

Committee Question -- Do you have any proof that a credit record is an indicator of someone's propensity to commit a crime or their ability to successfully perform the duties of the job for which they might be considered? Please explain your views on this particular issue.

As consumer reporting agencies, we are the providers of information to end users when they are requesting background information, be it education or employment references/verification, credit history or criminal history. We believe the Committee is better served by facts rather than our personal views.

One study that may be of interest to the Committee is that conducted by the Association of Certified Fraud Examiners entitled "2008 Report to the Nation on Occupational Fraud & Abuse" which states that "...credit checks were by far the least common form of background check performed by victim organizations. Past research indicates that financial pressures are one of the key motivating factors of occupational fraud, and indeed, in [their] survey [they] found that the two most commonly cited behavioral red flags among fraudsters were 'financial difficulties' and 'living beyond one's means'".[6]

Committee Question -- Please provide the subcommittee a standard, sample credit report for employment purposes that would normally be purchased by your clients. You may redact any personal or confidential information.

A sample credit report is included with this statement.

[6] Association of Certified Fraud Examiners, "2008 Report to the Nation on Occupational Fraud & Abuse" found at http://www.acfe.com/documents/2008-rttn.pdf

BACKGROUND SCREENING REPORT

Address of CRA
City State ZIP CODE
Local: (555) 555-5555 Fax(555) 555-5555
Toll Free: (555) 555-5555
http://www.crawebaddress.com

SUBJECT NAME: **Consumer, Jonathan Q**
SOCIAL SECURITY #: *****-**-9990**

REQUESTED BY: **Requestor Name**
LOCATION: **Account Location**
CLIENT ID: **S0000-00-0000**
REQUEST DATE: **09/20/2010**
REFERENCE CODE: n/a
PHONE: **(555) 555-5555**

Confidential Information Enclosed

CRA Confidentiality Statement Here.

State Disclosures

CRA State Disclosures Here

Credit Report

NAME	DOB
JONATHAN QUINCY CONSUMER	1951
JACK CONSUMER	
JOHN SMITH	
JONATHAN SMITH JONES JR	

ADDRESSES	First Reported	Last Reported	Times Reported	Type
BURBANK CA 91502-1234	6/95	1/98	3	Single-family
SANTA ANA CA 92708-5678	Unknown	2/95	1	Apartment Complex
LOS ANGELES CA 90017-9876	Unknown	9/93		Apartment Complex

EMPLOYERS	First Reported	Last Reported
AJAX HARDWARE 2035 BROADWAY SUITE 300 LOS ANGELES CA 90019	Unknown	Unknown
BELL AUTOMOTIVE 111 MAIN STREET BURBANK CA 91503	5/91	5/91

SOCIAL	VARIATION
***-**-9990	
***-**-7891	*
***-**-6789	*

FRAUD SHIELD SUMMARY

INQ: PHONE ANSWERING SERVICE: ABC ANSWER-ALL 10655 N BIRCH ST BURBANK CA 91502 818.555.1212
FROM 03/01/96 INQ COUNT FOR SSN = 8
FROM 03/01/96 INQ COUNT FOR ADDRESS = 15
SSN issued 1965 - 1966
FILE: COMMERCIAL BUSINESS ADDRESS: J&J INVESTMENTS 2600 BOWSER ST #312 LOS ANGELES CA 90017 213.111.2
CKPT: INPUT SSN RECORDED AS DECEASED
DOB: 01/10/1951 DOD: 03/30/1996

PROFILE SUMMARY

Public Records:	3	Inquries:	3	Tradelines:	10
Install Balance:	$45,037	Inquiries 6 mo:	0	Satisfactory Accounts:	6
Real Estate Balance:	$234,000	Paid Accounts:	2	Disputed Accounts:	1
Total Rev Balance:	$14,657	30 day DEL:	0	Now DEL/DRG:	3
Past Due Amount:	$1,421	60 day DEL:	0	Was DEL/DRG:	0
Sch/Est Pay:	$1,865	90+ day DEL:	0	DRG Months:	0
Real Estate Pay:	$3,128	Total Rev Available:	27%	Old Trade:	1/68

CRA Name Here Consumer, Jonathan Q ***-**-9990

Credit Report

PUBLIC RECORDS	Filing Date	Status Date	Court Code	Amount	Legal Status
SO CALIF DISTRICT COURT	06/20/1994	07/01/1995	1111	$12,450	CO LIEN REL
COUNTY SPR CT SANTA ANA		09/19/1993	9999	$1,200	CIV CL JUDG
U S BANKRUPTCY COURT		02/10/1993	9999	$100,000	BK 13-PETIT

TRADELINES: 10

Account	Status Date	Balance	Past Due	Account Condition	Payment Status	Chargeoff
CREDIT AND COLLECTION	9/94	$250	$0	COLLACCT	COLLACCT	
ACCOUNT INFORMATION DISPUTED BY CONSUMER						
ISLAND SAVINGS	5/96	$0	$0	CLOSED	CURR ACCT	
ACCOUNT CLOSED AT CONSUMER'S REQUEST						
HEMLOCKS	2/95	$1,000	$0	OPEN	CURR ACCT	
CENTRAL BANK	6/96	$11,050	$465	OPEN	30 DAY DEL	
MOUNTAIN BK	12/96	$19,330	$956	OPEN	30 3 TIMES	
BAY COMPANY	5/96	$0	$0	BKADJPLN	DELINQ 180	
ACCOUNT PREVIOUSLY IN DISPUTE - NOW RESOLVED - REPORTED BY SUBSCRIBER						
EMPLOYEES CREDIT UNION	2/85	$6,029	$0	OPEN	CURR ACCT	
HOME FINANCIAL	5/90	$234,000	$0	OPEN	CURR ACCT	
STATE BANK	1/90	$8,628	$0	OPEN	CURR ACCT	
TRAVEL CHARGE USA	12/97	$0	$0	PAID	CURR ACCT	

6 03/30/2002 **#HK# ID SECURITY ALERT: FRAUDULENT APPLICATIONS MAY BE SUBMITTED IN MY NAME OR MY IDENTITY MAY HAVE BEEN USED WITHOUT MY CONSENT TO FRAUDULENTLY OBTAIN GOODS OR SERVICES. DO NOT EXTEND CREDIT WITHOUT FIRST CONTACTING ME PERSONALLY AND VERIFYIN ALL APPLICANT INFORMATION. THIS SECURITY ALERT WILL BE MAINTAINED FOR 90 DAYS BEGINNING 05-01-02.

Testimony of

Adam Klein
Partner, Outten & Golden LLP

Legislative Hearing on H.R. 3149
The Equal Employment for All Act

Before the House Subcommittee on
Financial Services and Consumer Credit

September 23, 2010
10:00 a.m.

Outten & Golden LLP

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New York, NY 10016

212-245-1000

My name is Adam Klein, and I am a partner at Outten and Golden LLP. My law firm represents plaintiffs in employment lawsuits, and we bring individual and class-wide claims to challenge discriminatory barriers to employment opportunity. I am honored to testify today in front of the House Subcommittee on Financial Institutions and Consumer Credit in support of the Equal Employment for All Act. The Act would outlaw the use of credit checks to deny employment to individuals, a practice that has a discriminatory impact on racial minorities and violates the letter and spirit of Title VII of the Civil Rights Act of 1964.

1. Has the Use of Credit Checks in Employment Increased in the Last Decade?

In the last 15 years, the use of credit history checks by employers has increased dramatically. In 2004, a Society of Human Resource Management ("SHRM") study found that more employers were using credit checks in 2003 (35%) than in 1996 (19%).[1] A subsequent SHRM study reported that by January 2010, the percentage had risen to 60%[2]—a majority of all employers.

As a result, in today's era of high unemployment, credit checks pose a hurdle for many job-seekers.

2. Do Employee Credit Checks Have a Disparate Impact by Race?

The use of credit scores to screen out employees has a significant impact on applicants who are people of color. In 2000, Freddie Mac conducted a study that found striking race-credit correlations:

percent of group whose credit record is: [3]

Racial Group	"bad"	"indeterminate"	"good"
African Americans	48%	16%	36%
Hispanics	34%	15%	51%
Whites	27%	12%	61%

These numbers are striking, but the more important question is why they exist. Credit scores are based on a weighted mix of factors:

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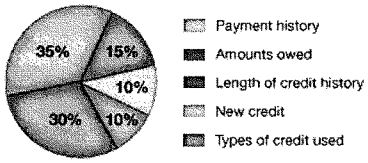
[1] Evren Esen, *SHRM Workplace Violence Survey* (Society for Human Resource Management, January 2004) at 19.

[2] *Background Checking: Conducting Credit Background Checks* 2 (Society For Human Resources Management, Jan. 22, 2010).

[3] Freddie Mac National Consumer Credit Survey (2000).

Factors considered in Calculating Credit Scores[4]



Obviously, the ability to get credit, and the ability to use it effectively, is greatly affected by income. Part of the racial disparity in credit scores is explained by underlying disparities in income. There are dramatic differences by race in median earnings:

Median Annual Earnings[5]

Year	African Americans	Hispanics	Whites
2000	$24,648	$22,748	$30,680
2001	$25,532	$21,684	$31,720
2002	$25,896	$22,048	$32,396
2003	$26,728	$22,880	$33,072
2004	$27,300	$23,712	$34,164
2005	$27,040	$24,492	$34,944
2006	$28,808	$25,272	$35,880
2007	$29,588	$26,156	$37,232
2008	$30,628	$27,508	$38,584
2009	$31,252	$28,132	$39,364

But this is only a partial explanation. Although, statistically, low-income workers tend to have weaker credit scores than higher earners, low-wage workers as a group still have better average credit scores than African Americans, and are about comparable to Hispanics:

Credit Scores by Income[6]

Annual Income	percent of group with "bad" credit
Under $25,000	36%
$25,000-$44,999	33%
$45,000-$64,999	25%
$65,000-$75,000	22%

[4] Fair Isaac, "What's in your FICO score," *available at* http://www.myfico.com/CreditEducation/WhatsInYourScore.aspx (last visited Sept. 20, 2010).
[5] U.S. Bureau of Labor Statistics, Current Population Survey.
[6] Freddie Mac National Consumer Credit Survey (2000).

After all, looking at credit scores by income leaves out the unemployed—a disproportionate number of whom are people of color. These numbers have only grown worse in the recession:

Unemployment Rates by Race[7]

Year	African Americans	Hispanics	Whites
2000	7.6	5.7	3.5
2001	8.6	6.6	4.2
2002	10.2	7.5	5.1
2003	10.8	7.7	5.2
2004	10.4	7.0	4.8
2005	10.0	6.0	4.4
2006	8.9	5.2	4.0
2007	8.3	5.6	4.1
2008	10.1	7.6	5.2
2009	14.8	12.1	8.5

During periods of economic stress like the current recession, some individuals who experience a period of unemployment are able to rely on savings, or can fall back on support from family members as a way to meet credit obligations. Here too, racial inequality has a profound effect on a person's ability to maintain a good credit history. Statistics maintained by the Department of Labor demonstrate that net worth is dramatically lower *in every income quintile* for racial minorities:

Average Net Worth by monthly household income quintile (2002 dollars)[8]

	African Americans	Hispanics	Whites
Lowest Quintile:			
Median net worth	$61	$536	$25,740
Second Quintile:			
Median net worth	$5,657	$6,081	$52,016
Third Quintile:			
Median net worth	$12,334	$12,012	$63,814
Fourth Quintile:			
Median net worth	$34,964	$38,851	$99,573
Highest Quintile:			
Median net worth	$69,864	$78,327	$223,105

Several other factors considered in evaluating credit contribute to the high level of racial inequality. For example, payment history includes information about a consumer's account payments, bankruptcies, judgments, collections, and delinquencies.[9] This poses a problem, as

[7] U.S. Bureau of Labor Statistics, Current Population Survey.
[8] U.S. Census Bureau, Survey of Income and Program Participation, 1996 and 2001 Panels.
[9] Fair Isaac, "What's in your FICO score," *supra* note 4.

"African Americans make up a disproportionate percentage of debtors" in bankruptcy.[10] Taking debt into account also has a disproportionate effect on women of color, almost half of whom (48%) have credit card debt.[11] In addition, consideration of new credit relies on the number of inquiries made, which compounds problems for job-seekers (a disproportionate number of whom are racial minorities, as noted above); their score declines with each credit check conducted by a potential employer.

Further, outright discrimination is often involved in denying opportunities to people of color. Lending discrimination has been observed for years, in which African American borrowers obtain loans (1) far less often and (2) on worse terms. "A 1991 Federal Reserve study of 6.4 million home mortgage applications by race and income confirmed suspicions of bias in lending by reporting a widespread and systemic pattern of institutional discrimination in the nation's banking system": regardless of where the home is located, African Americans are denied loans two to three times more often than whites, even high-income African Americans are denied loans more often than low-income whites, and African Americans who *do* obtain mortgages pay rates 5.4 to 9.2 points higher than whites.[12]

3. Should credit checks be allowed under Title VII?

Title VII was intended to root out both intentional and structural discrimination. Barring the use of credit checks in employment would comport with these goals.

For a given employment practice, it is not necessary to prove intentional discrimination in order to invoke the protections of the statute. "Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[13]

Most employers undertaking credit checks are not likely *intending* to screen out members of racial minorities, but that is the clear *effect* of the practice. Letting financial status dictate employment prospects serves to compound pre-existing trends of financial inequality among the races. This perpetuation of barriers to employment opportunity is precisely what Congress sought to eliminate: "The objective of Congress ... was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor . . . white employees."[14] Where practices have a disproportionate impact on racial minorities and are not shown to be "job related for the position in question and consistent with business necessity," they are prohibited by law.[15] Employee credit checks do not meet this standard, as they have not been shown to

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[10] Kenneth G. Gunter, *Computerized Credit Scoring's Effect on the Lending Industry*, 4 N.C. BANKING INST. 443 (2000) (citations omitted).
[11] Jose A. Garcia, *Borrowing to Make Ends Meet: The Rapid Growth of Credit Card Debt in America,* Demos (2007).
[12] MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 19, 137-142 (1995).
[13] *Griggs v. Duke Power*, 401 U.S. 424, 432 (1971).
[14] *Id.* at 429-430.
[15] 42 U.S.C.A. § 2000e-2(k)(1)(A)(i).

reveal any information about an applicant that is relevant to his or her ability to perform a given job.

4. Is a Credit Record an Indicator of Someone's Propensity to Commit a Crime or Their Ability to Successfully Perform the Duties of a Job?

There is no indication that lower credit scores correlate with a propensity to commit a crime or with job performance. To the contrary, studies have shown just the opposite. According to a 2003 psychological study examining the credit reports of nearly 200 current and former employees working in the financial service areas of six companies, a person's credit history was found not to be a good predictor of job performance or turnover:

> "Credit history had no validity at differentiating between negative (e.g., terminated for dishonesty) vs. non-negative (e.g., sickness, relocation) reasons for leaving, and had no validity at distinguishing these employees from those who remained on the job."[16]

Indeed, there is substantial evidence that the credit records that employers check are based on factors substantially *un*related to any aspect of the performance of any job.

(i) Poor Credit History Indicates Primarily Past Financial Distress Due to Objective Causes, Not Employment-Related Traits

Bad credit is often the result of a variety of factors that bear no relation to employment suitability. An examination of the single most powerful cause of a negative credit record – a bankruptcy filing – illustrates that many of the primary causes of bad credit are factors that could not possibly correlate to the performance of any job. According to the most significant recent study of how and why bankruptcy filings occur, 85% of bankruptcy filings reportedly occur following "income loss, medical problems, or family breakup" – problems that do not trace to simple irresponsible "over-consumption"[17] or any other trait that could be "job-related," much less a matter of "business necessity."

(ii) Credit Record is a Notoriously Error-Laden Measure

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[16] Dr. Jerry K. Palmer & Dr. Laura L. Koppes, *Further Investigation of Credit History As a Predictor of Employee Turnover,* American Psychological Society (Atlanta 2003).

[17] Elizabeth Warren, *The Over-Consumption Myth and Other Tales of Economics, Law, and Morality*, 82 WASH. U. L.Q. 1485, 1510 (2004) (citing *The Consumer Bankruptcy Project*, a study that "relied on a diverse group of a dozen professors from seven different research universities to design and implement the study.... These dozen principal investigators brought expertise from a number of policy areas such as family economics, demographics, employment, health care finance, housing policy, small business, women's issues, law, sociology, business, and economics, as well as specific skills in data collection and analysis."). *See also* Theresa M. Beiner & Robert B. Chapman, *Take What You Can, Give Nothing Back: Judicial Estoppel, Employment Discrimination, Bankruptcy, and Piracy in the Courts*, 60 U. MIAMI L. REV. 1, 3 (2005) ("households with children are more likely to experience bankruptcy than childless households, and most individuals filing bankruptcy are women who depend on their jobs to climb their way out of financial distress") (citing other work by Elizabeth Warren).

For a measure that has such significant effects on people's lives, credit records are notoriously error-laden:

> " [A]ll three national credit bureaus have continuously failed to ensure their data is mistake free. For example, in 1991, TRW, a credit reporting company, wrongly characterized every taxpayer in a small Vermont town as a poor credit risk by enclosing false public record information into their reports. A year later, in a separate case, Equifax was forced to settle with the citizens of Middlesex County, Massachusetts for virtually the same offense." [18]

Thus, credit record is not only unrelated to one's qualifications as an employee, it is also a problematic indicator of qualifications *as a borrower*.

Given its clear lack of any indication of suitability for employment, the use of credit checks by employers and its accompanying disparate racial impact is unjustified. Title VII's mandate to eliminate race-based barriers to employment opportunity requires that this practice be prohibited.

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[18] Kenneth G. Gunter, *Computerized Credit Scoring's Effect on the Lending Industry*, 4 N.C. BANKING INST. 443 (2000) (citations omitted).

STATEMENT OF DONALD R. LIVINGSTON

ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

BEFORE THE HOUSE SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT
OF THE COMMITTEE ON FINANCIAL SERVICES

H.R. 3149, THE EQUAL EMPLOYMENT FOR ALL ACT

September 23, 2010

Thank you for inviting me to testify today on behalf of the United States Chamber of Commerce. My name is Don Livingston. I am a partner at the law firm Akin Gump, and resident in the firm's Washington, D.C. office. I previously served as the General Counsel of the United States Equal Employment Opportunity Commission, where I directed our Country's litigation in cases of employment discrimination.

I am testifying today on behalf of the United States Chamber of Commerce. The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, industry sector and geographical region.

I am here to speak about the proposed Equal Employment for All Act, H.R. 3149. Under this proposed legislation, it would be unlawful for an employer to procure a report that contains information that bears on an applicant's or employee's creditworthiness, credit standing, or credit capacity. Exceptions exist for persons seeking or holding jobs with (1) state or local government agencies, (2) national security or FDIC clearance requirements, (3) supervisory, managerial, professional, or executive responsibility at financial institutions, or (4) when otherwise required by law.

Existing laws give an employer the flexibility to use credit history information when the employer can show the information is "job related for the position in question and consistent with business necessity."[1] H.R. 3149 recognizes the need to retain this flexibility for jobs in the public and financial sectors. It thus acknowledges that these employers should not be deprived of useful tools to evaluate individuals in certain positions for risk of financial fraud and that credit history information is such a tool.

However, H.R. 3149 would forbid other employers, including those in positions similar to jobs at financial institutions, from considering credit history information in all circumstances, even where it can be shown that the information is related to a specific job. This prohibition is too broad. Existing law provides the best method of ensuring that credit history information is used where justified and eschewed where it is not.

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[1] 42 U.S.C. §2000e-2(k)(1)(A)(I).

My testimony will (1) briefly describe how employers typically use credit history information, (2) discuss the current law regarding such usage, and (3) explain why the major arguments for changing existing law lack merit.

Employers use credit history information primarily for executive level positions, or positions that have financial responsibility. Credit history is examined to evaluate whether the individual poses a risk to the business. Typically, a credit check is conducted as part of a pre-employment background screen only for a small percentage of jobs. Usually, these are jobs that provide the job-holder with an opportunity for financial fraud. And, many of these jobs carry responsibilities comparable to jobs at financial institutions. When considering credit history, employers look at the individual's credit experience over a period of time.[2]

Under our current laws, an employer may *procure* a report that contains information that bears on the applicant's or employee's creditworthiness, credit standing, or credit capacity if, and only if, the employer complies with the safeguards and consumer protections enacted by Congress as part of the Fair Credit Reporting Act. I describe some of these protections below.

An employer may *use* this information in deciding whether to hire or retain an employee so long as (1) the employer does not intend to discriminate on the basis of race, sex, age, or some other protected status, or (2) the employer's use does not disproportionately disadvantage one or more of these protected groups.

In the second of these two situations – when the use of credit history information has a "disparate impact" on a protected group – the practice is unlawful unless the employer can demonstrate that it is job-related and consistent with business necessity. Disparate impact analysis is aimed at removing barriers to equal employment opportunity that are not necessarily intended or designed to discriminate – "practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). It applies to all types of employment criteria, including recruitment practices, and hiring and promotion criteria.

Consistent with the purpose of disparate impact analysis, guidance by the federal government and decisions by the federal courts have made it clear that the circumstances under which the "job-related and consistent with business necessity" standard can be satisfied are narrow. Under the EEOC's Guidance on Race and Color Discrimination, if a claimant or plaintiff identifies a specific policy or practice – such as the use of credit history information – that has a disparate impact, the employer "has the burden of demonstrating that the policy or practice is job-related for the position in question." And even if the employer satisfies this burden, the practice still will be unlawful if the person challenging it demonstrates that a less discriminatory alternative exists that meets the business need and the employer has refused to adopt that alternative.[3]

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[2] *See* Report by the Society of Human Resources Management, "Background Checking: Conducting Credit Background Checks" available at: http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundChecking.aspx (Jan. 22, 2010)

[3] 42 U.S.C. §§ 2000e-2(k)(1)(A)(ii) & (k)(1)(C).

Disparate impact claims have been brought to challenge education, performance, experience, and licensure requirements, as well as employment decisions based on the type of military discharge, social status and family history.[4] Since the earliest days of Title VII, disparate impact claims have also challenged the use of credit history information. Where the employer could not justify the policy as related to the position in question, the plaintiff prevailed.

In 1973, for example, the EEOC found that a policy of disciplining employees for garnishment could be racially discriminatory absent a sound business justification for the policy. In EEOC Decision No. 74-27, the EEOC stated:

> [A] policy of discharging an employee solely because his or her wages have been garnished will have an adverse disproportionate impact upon minority group persons as a class. Any employment practice which has a disproportionate effect on minority group persons will be found to be in violation of Title VII unless it can be shown to be demonstrably related to successful job performance and is otherwise predicated and supported by considerations of business necessity.
>
> 2 CCH Empl. Prac.Guide ¶ 6396, at 4061-4062 (1973).

Similarly, in *Johnson v. Pike Corp. of America*, 332 F. Supp. 490 (C.D. Cal. 1971), a court found that the employer's practice of disciplining employees who were subjected to garnishment proceedings had not been shown by the employer to be consistent with business necessity. The court stated:

> The fact that blacks and other racial minorities are so often subject to garnishment action is related to the fact that they are to a disproportionate extent from the lower social and economic segments of our society. . . . The Supreme Court, in *Griggs,* repeatedly stressed that Congress' intention in Title VII was to invalidate all employment practices which in their final effect or consequence discriminate against racial minorities. A policy of dismissing employees whose wages are attached has this impermissible effect.

In *United States v. City of Chicago*, 385 F. Supp. 543, 546 (N.D. Ill. 1974), the court enjoined the use of credit information because the employer was unable to demonstrate that it served the purpose for which it was intended. In *Wallace v. Debron Corp.* 494 F.2d 674 (1974), the Eighth Circuit Court of Appeals ruled that an employer can maintain a policy of disciplining employees for garnishment proceeding only where the employer can show an overriding business justification for the policy.

In light of these decisions, and subsequent authority as well, it cannot plausibly be denied that the job-related standard is a stringent one in the context of the use of credit history information. Indeed, in 2007 another member of this panel told the EEOC that the test for job-relatedness is very difficult for the employer to meet in this context. He stated: "to defend a

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[4] B. LINDEMANN & P. GROSSMAN, Employment Discrimination Law, 4th ed., pp. 228-251.

practice of employee credit checks [under Title VII] an employer would have to prove that it undertook a 'meaningful study' that 'validates' that credit record 'bear[s] a demonstrable relationship to successful performance' – a standard courts have been applying strictly . . . ."[5] He added that there is no evidence that employee credit checks are job-related for any job.

If either statement is correct, current anti-discrimination laws provide a powerful incentive for employees to use credit checks only for sensitive positions involving financial or reputational risks to the business, and where job-relatedness can readily be shown. And, the same laws provide potent tools to the federal government and private individuals to address and remedy abuses if they occur.

In sum, the principles of equal employment opportunity have served well. The proposed legislation would serve less well because, except in an artificially narrow set of circumstances, it would needlessly prevent employers from using credit checks that are justified by business necessity.

Finally, some have objected to the use of credit history information by employers on the theory that, when an applicant is rejected for a job because of information about credit history in a consumer report, the applicant will never know why he or she was rejected. This is incorrect. Congress has enacted safeguards under the Fair Credit Reporting Act requiring that before taking an adverse employment action based on a credit history report, the employer must provide the report to the employee or applicant, along with a notice of the adverse action.[6]

If the employee or applicant believes that the credit information is inaccurate, he or she may dispute the report with the consumer reporting agency, and the dispute resolution process must be completed in 30 days (or 45 days in certain circumstances).[7] If the employee or applicant believes that credit history is not job-related for the position sought, he or she may challenge the decision before the U.S. Equal Employment Opportunity Commission or sue in court.

There are also a series of safeguards to prevent false credit history reports in the first instance. For example, consumer reporting agencies are required to maintain reasonable procedures to assure maximum possible accuracy.[8] They are also prohibited from furnishing data they know or have reasonable cause to believe is inaccurate, and they must correct and update their information.[9] A consumer reporting agency that violates any provision of the credit

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[5] EEOC Commission Meeting of May 16, 2007 on Employment Testing and Screening, Statement of Adam T. Klein, http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/klein.html.

[6] 15 U.S.C. § 1681b(b)(3) and 1681b(m)(a).

[7] 15 U.S.C. § 1681i

[8] 15 U.S.C. § 1681e(b).

[9] 15 U.S.C. § 1681s-2(a)(1) and (2).

reporting laws is subject to a private right of action,[10] and to enforcement actions by the Federal Trade Commission and state attorneys general.[11]

Again, current law is serving well.

I appreciate the opportunity you have given me to appear here today to contribute my perspective. I have learned a great deal from the writings and research of some of the other panelists. They have contributed a great deal toward helping us all better understand the problems in finding employment. I hope that my testimony proves helpful to the Committee.

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[10] 15 U.S.C. §1681n-p.

[11] 15 U.S.C. §1681s(a) and (c).

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STATEMENT OF MR. HILARY O. SHELTON

DIRECTOR

NAACP WASHINGTON BUREAU

ON

H.R. 3149, THE *EQUAL EMPLOYMENT FOR ALL ACT*

BEFORE THE HOUSE COMMITTEE ON FINANCIAL AFFAIRS

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

September 23, 2010

Good morning. My name is Hilary Shelton and I am the Director of the Washington Bureau of the NAACP, our Nation's oldest, largest and most widely-recognized grassroots-based civil rights organization. The Washington Bureau is the federal legislative and national public policy arm of the NAACP; we currently have more than 2,200 membership units in every state across the country.

I would like to begin by thanking Chairman Gutierrez and Ranking Member Hensarling for calling this important hearing and for supporting this bill. I would also like to extend the sincere appreciation of the NAACP to our good friend Congressman Cohen for introducing this crucial legislation.

The NAACP strongly supports H.R. 3149, the *Equal Employment for All Act* and urges its swift enactment. We continue to oppose the use of credit reports by employers when considering potential employees as they have been proven to racially discriminate, and, in most cases, are irrelevant to the position for with the individual is being considered.

Mr. Chairman and members of this subcommittee, as you know our nation is going through one of the most difficult economic times in our history. The national unemployment rate has stubbornly remained unacceptably high, disproportionately so among African Americans and other racial and ethnic minority Americans. The most recent numbers indicate that almost 15 million Americans were unemployed in August of this year, which has resulted in a national unemployment rate of 9.6%. At the same time, the unemployment rate among African Americans was 16.3%, and among Latinos it was 12%.

As we all know or can imagine, these high unemployment rates have lead millions of Americans to postpone paying back their credit card debt, to borrow, to charge their credit cards to the limit, or to make difficult financial decisions they would not ordinarily be faced with if they had a job. As a result, their credit ratings may be more reflective of their current situation than of the type of consumer they are. And since African Americans and other racial and ethnic minority Americans are disproportionately unemployed, their credit ratings are going to be unduly lower.

Furthermore, African Americans and other racial and ethnic minorities, as we all know, were targeted for decades by unscrupulous predatory lenders and are now facing or have gone through a foreclosure at unprecedented, and highly racially disparate, rates.

And now we enter into the "Catch -22". With more potential employers using credit reports than ever before to assess potential employees, those with checkered credit histories are going to be the first eliminated from the potential job pool; despite the fact that many of them are the very people who most need a job in order to bring stability to their lives financially and otherwise.

Are employers using credit reports more now than ever before? Studies suggest they are. More than 47% of employers admitted to currently using credit checks at least sometimes, up from 25% in 1998. Furthermore, this share is certainly on the rise, say career counselors.

In addition to disproportionate unemployment rates, and disparately high foreclosure rates due to years of systematic targeting, there are several other reasons that credit reports, and similarly credit scores, which often use the same information, appear to be an unfair and racially biased means of screening potential employees. If I may digress for a moment, I say "appear to be" because as I testified before this committee in 2003, we do not know how, exactly, credit scores are determined[1].

What was clear at that time, and what continues to be evident as more studies are conducted and released, is that racial and ethnic minorities consistently have disproportionately lower credit scores and worse credit reports than their Caucasian counterparts.

Because we are assured that credit reports and credit scores are often based on similar information, it is fair to conclude that problems with one are true for the other, as well. A 2007 Federal Reserve Board report to Congress on credit scoring and racial disparities, which was mandated by the 2003 Fair and Accurate Credit Transactions Act of 2003 (FACTA), analyzed 300,000 credit files. Not surprisingly, the study found significant racial disparities. In fact, the average

[1] Testimony of Hilary O. Shelton before the House Financial Services Committee, July 9, 2003, on the Fair Credit Reporting Act and Its Impact on African Americans and other Racial and Ethnic Minorities

credit score of African Americans was approximately half that of white non-Hispanics with Hispanics fairing only slightly better[2]. There have also been several other well documented studies by respected governmental, quasi-governmental, private organizations and academia all of which come to the same conclusion: racial and ethnic minorities have lower credit scores than their Caucasian counterparts[3]. Taking the next logical step, as go credit scores, so are credit reports.

So if credit scores and credit reports are disproportionately unfair to racial and ethnic minority Americans, why are they being used by more potential employers than ever before? Frankly, I do not have an answer to that question.

With a few obvious exceptions (such as governmental employees who handle high level information), there is no credible evidence that credit reports are an accurate indicator of a potential employee's propensity to commit a crime, trustworthiness or even perform his or her assigned duties. A credit score, if it is accurate (an assumption to which the NAACP does not necessarily subscribe) is more reflective of a person's employment history, and perhaps shopping habits, than anything else. Has this person had a job in the past year? Has the potential employee lived in the same area, and if so for how long? Does this person have the skills and experience necessary to perform the duties of the job?

It is the contention of the NAACP that a resumé, job references and perhaps a face-to-face interview, are much more reliable in telling a potential employer more about a job applicant without distortion. This would allow an individual to be judged on his or her experience, not on unsubstantiated numbers.

Mr. Chairman, I thank you for the opportunity to participate in this important hearing, I appreciate the subcommittee holding this hearing and I look forward to your questions.

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[2] Board of Governors of the Federal Reserve System, *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit* 80-81 (Aug. 2007).

[3] See: Robert B. Avery, Paul S. Calem, & Glenn B. Canner, *Credit Report Accuracy and Access to Credit*, Federal Reserve Bulletin (Summer 2004); Raphael W. Bostic, Paul S. Calem, & Susan M. Wachter, Joint Ctr. for Hous. Studies of Harvard Univ., *Hitting the Wall: Credit As an Impediment to Homeownership* (Feb. 2004).; Tex. Dep't of Ins., *Report to the 79th Legislature--Use of Credit Information by Insurers in Texas* (Dec. 30, 2004); Fair, Isaac & Co., *The Effectiveness of Scoring on Low-to-Moderate Income and High-Minority Area Populations* 22, Fig. 9 (Aug. 1997); Freddie Mac, *Automated Underwriting: Making Mortgage Lending Simpler and Fairer for America's Families* (Sept. 1996), *available at* www.freddiemac.com/corporate/reports/moseley/mosehome.htm.

NCLC

NATIONAL
CONSUMER
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Advancing Fairness
in the Marketplace for All

Testimony before the

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

regarding

"Legislative Hearing on H.R. 3149, the Equal Employment for All Act"

September 23, 2010

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Testimony of Chi Chi Wu, National Consumer Law Center
Before the Subcommittee on Financial Institutions and Consumer Credit
of the U.S. House Committee on Financial Services
regarding
"Legislative Hearing on H.R. 3149, the Equal Employment for All Act"
May 12, 2010

Mr. Chairman, Ranking Member Hensarling, and Members of the Subcommittee, the National Consumer Law Center thanks you for inviting us to testify today regarding H.R. 3149, the Equal Employment for All Act. We offer our testimony here on behalf of our low income clients.[1]

We wish to thank Chairman Gutierrez and Representative Cohen for their introduction of H.R. 3149, the Equal Employment for All Act, which we strongly support. The use of credit reports in employment is a growing practice that is harmful and unfair to American workers. Despite many good reasons to avoid engaging in this practice, more than half of employers (60%) do so today,[2] a dramatic increase from only 19% in 1996.[3]

It is because of the harms, as well as the absurdities of this practice, that we strongly support H.R. 3149. This bill would restrict the use of credit reports in employment to only those positions for which it is truly warranted, such as those requiring a national security or FDIC mandated clearance.

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

- **Credit checks create a fundamental "Catch-22" for job applicants.**
- **Use of credit checks in hiring could prevent economic recovery for millions of Americans.**

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1 The National Consumer Law Center is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys, as well as community groups and organizations, from all states who represent low-income and elderly individuals on consumer issues. As a result of our daily contact with these advocates, we have seen many examples of the damage wrought by inaccurate credit reporting from every part of the nation. It is from this vantage point – many years of observing the problems created by incorrect credit reporting in our communities – that we supply these comments. *Fair Credit Reporting* (6th ed. 2006) is one of the eighteen practice treatises that NCLC publishes and annually supplements. This testimony was written by Chi Chi Wu, co-author of that treatise, with assistance from Nat Lippert of UNITE HERE.
2 Society for Human Resource Management, *Background Checking: Conducting Credit Background Checks*, Jan. 22, 2010, at http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundChecking.aspx.
3 Matt Fellowes, *Credit Scores, Reports, and Getting Ahead in America*, Brookings Institution, May 2006 at n.3 (citing 1996 data from the Society for Human Resource Management).

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

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

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

Fundamentally, the issue at stake is whether workers are fairly judged based on their ability to perform a job or whether they're discriminated against because of their credit history. Eighteen states and the District of Columbia have recently considered legislation to restrict this practice.[4] Despite the lobbying efforts of the credit reporting industry, Oregon (S.B. 1045) and Illinois (H.B. 4658) recently enacted laws similar to H.R. 3149, and other states are on their way to doing the same.

I. Considering Credit Histories in Hiring Creates an Absurd "Catch-22" for Job Applicants

A simple reason to oppose the use of credit history for job applications is the sheer, profound absurdity of the practice. Using credit history creates a grotesque conundrum. Simply put, a worker who loses her job is likely fall behind on paying her bills due to lack of income. With the increasing use of credit reports, this worker now finds herself shut out of the job market because she's behind on her bills. As one law professor at the University of Illinois puts it "You can't re-establish your credit if you can't get a job, and you can't get a job if you've got bad credit."[5]

Some commentators have even said the use of credit reports to screen job applicants leads to a "financial death spiral: the worse their debts, the harder it is to get a job to pay them off."[6] This phenomenon has created concerns that the unemployed and debt-ridden could form a luckless class. It could affect future generations, as workers with impaired credit continue to struggle financially and cannot build assets to move ahead. These workers move further and further behind, while workers with good credit histories can get the best jobs, the best credit and the best insurance rates. Use of credit reporting in employment could contribute to the widening gap between haves and have-nots.

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4 For a useful listing of state legislation on this issue, please visit the website set up by the National Conference of State Legislatures: <http://www.ncsl.org/IssuesResearch/BankingInsuranceFinancialServices/UseofCreditInformationinEmployment2010Legis/tabid/19825/Default.aspx>

5 Jonathan D. Glater, *Another Hurdle for the Jobless: Credit Inquiries*, New York Times, Aug. 6, 2009, available at http://www.nytimes.com/2009/08/07/business/07credit.html?pagewanted=all (quoting Professor Matthew W. Finkin).

6 *Id.*

II. Use of Credit Histories in Hiring Hampers Economic Recovery for Millions of American Workers

The use of credit history for job applicants is especially absurd in the midst of the Great Recession. Massive job losses, resulting in an unemployment rate of 9.6%, translate into nearly 15 million workers who are searching for employment.[7] These aren't the only workers economically burdened by the recession. The Pew Research Center has found that, since the recession began, more than half of adults in the U.S. say they have either been unemployed, taken a pay cut, had their work hours reduced or have become involuntary part-time workers.[8]

Many of these workers have suffered damage from their credit reports because of unemployment or underemployment, for the reasons discussed in Section I. The use of credit histories presents yet another barrier for their economic recovery – representing the proverbial practice of "kicking someone when they are down" for millions of job seekers. The Great Recession is exactly the wrong time to be permitting this unfair - and as discussed below, inaccurate - practice.

Furthermore, the Great Recession has seen additional damage to worker's credit histories from foreclosures, slashed credit lines on credit cards, and other fallout from the economic crisis. Between unemployment and these other factors, credit scores have plummeted. The credit scoring developer FICO reports that over one-quarter of consumers have credit scores under 600,[9] considered a poor score, as opposed to only 15% of the population before the Great Recession.[10] That means that one-quarter of American workers are at risk of losing out on a job – or even being fired – over their credit histories.

Passing H.R. 3149 isn't just the right thing to do – it's an economic recovery measure, one that will not require any additional funding by the federal government.

III. Use Of Credit History In Hiring Discriminates Against African American And Latino Job Applicants.

There is no question that African American and Latino applicants fare worse than white applicants when credit histories are considered for job applications. For one thing, these groups are already disproportionately affected by predatory credit practices, such as the marketing of subprime mortgages and overpriced auto loans targeted at these

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7 Bureau of Labor Statistics, *Employment Situation Summary*, USDL-10-1212, Sept. 3, 2010, *available at* http://www.bls.gov/news.release/empsit.nr0.htm.
8 Paul Taylor, et al., Pew Research Center's Social and Demographic Trends Project, *How the Great Recession Has Changed Life in America: A Balance Sheet at 30 Months*, June 30, 2010, *available at* http://pewsocialtrends.org/pubs/759/how-the-great-recession-has-changed-life-in-america.
9 FICO Press Release, *FICO Scores Drift Down as Economic Factors Weigh on Consumer Credit Risk*, July 13, 2010, *available at* http://www.fico.com/en/Company/News/Pages/07-13-10.aspx
10 Eileen Connelly, *More Americans' Credit Scores Sink to New Lows*, Associated Press, July 12, 2010.

populations.[11] As a result, these groups have suffered higher foreclosure rates.[12] African Americans and Latinos also suffer from disparities in health outcomes, and as discussed in Section IV of this testimony, health care bills are another source of black marks on credit reports.

Furthermore, African Americans and Latinos have markedly higher rates of unemployment. While the unemployment rate for whites was 8.7% in August 2010, it was 16.3% for African Americans and 12% for Latinos.[13] As discussed above, the simple fact of being unemployed is likely to harm an applicant's credit history because of the loss of income with which to pay bills.

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

- A 2007 Federal Reserve Board report to Congress on credit scoring and racial disparities, which was mandated by the 2003 Fair and Accurate Credit Transactions Act of 2003 (FACTA), amending the Fair Credit Reporting Act (FCRA).[14] This study analyzed 300,000 credit files matched with Social Security records to provide racial and demographic information. While the Federal Reserve's ultimate conclusion was to support credit scoring, its study found significant racial disparities. In one of the two models used by the Federal Reserve, the mean score of African Americans was approximately half that of white non-Hispanics (54.0 out of 100 for white non-Hispanics versus 25.6 for African Americans) with Hispanics fairing only slightly better (38.2).[15]

- A 2007 study by the Federal Trade Commission on racial disparities in the use of credit scores for auto insurance, also mandated by the 2003 FACTA amendments.[16] The FTC study found substantial racial disparities, with African Americans and Hispanics strongly over-represented in the lowest scoring categories.[17]

- A 2006 study from the Brookings Institution which found that counties with high minority populations are more likely to have lower average credit scores than

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11 *See* National Consumer Law Center, Credit Discrimination, §§ 1.1.1 and 8.4.2 (5th ed. 2009) (summarizing studies).
12 United for a Fair Economy, *Foreclosed: State of the Dream 20008* (January 2008).
13 Bureau of Labor Statistics, *Employment Situation Summary*, USDL-10-1212, Sept. 3, 2010, *available at* http://www.bls.gov/news.release/empsit.nr0.htm.
14 Pub. L. No. 108-159, § 215 (2003).
15 Board of Governors of the Federal Reserve System, *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit* 80-81 (Aug. 2007).
16 Pub. L. No. 108-159, § 215 (2003).
17 Federal Trade Commission, *Credit-Based Insurance Scores: Impacts on Consumers of Automobile Insurance* 3 (July 2007).

predominately white counties.[18] In the counties with a very low typical score (scores of 560 to 619), Brookings found that about 19% of the population is Hispanic and another 28% is African American. On the other hand, the counties that have higher typical credit scores tend to be essentially all-white counties.

- A 2004 study by Federal Reserve researchers finding that fewer than 40% of consumers who lived in high-minority neighborhoods had credit scores over 701, while nearly 70% of consumers who lived in mostly white neighborhoods had scores over 701.[19]

- A 2004 study published by Harvard's Joint Center for Housing Studies finding that the median credit score for whites in 2001 was 738, but the median credit score for African Americans was 676 and for Hispanics was 670.[20]

- A 2004 study conducted by the Texas Department of Insurance on insurance scoring finding that African-American and Hispanic consumers constituted over 60% of the consumers having the worst credit scores but less than 10% of the consumers having the best scores.[21]

- A 1997 analysis by Fair Isaac itself showing that consumers living in minority neighborhoods had lower overall credit scores.[22]

- A 1996 Freddie Mac study which found that African-Americans were three times as likely to have FICO scores below 620 as whites. The same study showed that Hispanics are twice as likely as whites to have FICO scores under 620.[23]

Based on this disparity, the Equal Employment Opportunity Commission has repeatedly expressed concern that the use of credit histories in the hiring process could violate Title VII of the Civil Rights Act.[24] The EEOC has sued one company over its use of credit checks[25] and has suggested that it may issue formal guidance on the practice.

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

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

Credit reports were designed to predict the likelihood that a consumer will make payments on a loan, not whether he would steal or behave irresponsibly in the workplace. There is no evidence showing that people with weak credit are more likely to be bad employees or to steal from their bosses. The sole study on this issue, presented to the American Psychological Association in 2003, concluded there is no correlation between credit history and an employee's job performance.[26]

Regulators agree with the conclusion that there is no correlation between credit history and an employee's job performance. Dianna Johnston, assistant legal counsel to the Equal Employment Opportunity Commission, has stated: "Employers seem to be assuming that somebody with a poor credit history is more likely to steal, and I don't think there's any kind of evidence that supports that.[27]

Even TransUnion's representative on this issue, Eric Rosenberg, admitted at a legislative hearing in Oregon: "At this point we don't have any research to show any statistical correlation between what's in somebody's credit report and their job performance or their likelihood to commit fraud."[28] This is significant, as TransUnion has been the credit bureau that has led efforts against legislation restricting the use of credit reports in a number of states.[29]

Opponents to H.R. 3149 have tried to link credit history to job performance by citing an Association of Certified Fraud Examiners report noting that two warning signs exhibited by some fraudsters were living beyond their financial means or experiencing financial difficulties.[30] However, while some fraudsters may have had financial difficulties, it is a far cry to say that any worker with financial difficulties has a propensity to be a thief. This conclusion would imply that 25% of American workers are likely thieves. Note that the same study found that men are responsible for twice as much in fraud losses than women; that fraud from workers over 50 resulted in losses twice as high as fraud by younger workers; and another significant warning sign for fraud is

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http://www.eeoc.gov/laws/practices/inquiries_credit.cfm; EEOC, *E-RACE Goals and Objectives*, at http://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm.

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

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

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

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

29 *See, e.g.*, Press Release, *TransUnion Responds to Congressman Gutierrez's Town Hall Comments,* Aug. 30, 2010, at http://www.marketwire.com/press-release/TransUnion-Responds-to-Congressman-Gutierrezs-Town-Hall-Comments-1311567.htm.

30 *See Use of Credit Information Beyond Lending: Issues and Reform Proposals*: Hearing before the Subcomm. on Financial Inst. and Consumer Credit, House Comm. on Fin. Servs., 110th Congr. (2010) (statement of Stuart Pratt, president and CEO of the Consumer Data Industry Association).

divorce. Yet no one is suggesting screening out men, older workers, or divorced workers because they are supposedly prone to committing theft.

Furthermore, some of the most frequent users of credit checks in employment, such as healthcare/social service providers (18%) and manufacturing (11%), are not industries that handle large amounts of cash.[31] Why would employers need to check the credit histories of day care workers, administrative assistants, information technology workers, and nurses? Yet these are all jobs for which some employers have required credit checks.[32]

Opponents of restrictions on credit checks in employment also use a "sloppy credit, sloppy person" hypothesis to support the practice, arguing that a financial history is a good measure of an applicant's organization and responsibility. As one executive at an employment firm argued "[i]f you cannot organize your finances, how are you going to responsibly organize yourself for a company?"[33] The flaw in this hypothesis is that many people end up with a negative credit history for reasons they can't control. A consumer's financial problems reflected on a credit report may stem from, not irresponsibility, but because of a layoff, divorce, identity theft, or medical bills. A well-known Harvard study found that medical reasons cause about half of all bankruptcies in the U.S.[34]

Indeed, medical debt is a good example of why credit reports have nothing to do whether a worker is responsible or honest. Millions of Americans struggle with overwhelming medical debts because they do not have health insurance, or even when they have insurance. According to the Commonwealth Fund, medical debt plagued nearly 72 million working age adults in 2007.[35] Of those consumers, 28 million were contacted by a debt collector for unpaid medical bills, and thus had the potential of having their credit histories damaged.

Medical debt usually appears on a credit report as an entry by a debt collection agency, not by a hospital or healthcare provider. It is sometimes not readily identifiable as medical debt, especially given the FCRA's requirements to mask the identity of medically-related furnishers of information.[36]

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31 Society for Human Resource Management, *Background Checking: Conducting Credit Background Checks*, Jan. 22, 2010, at http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundChecking.aspx.

32 *Id.*

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

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

35 M. M. Doty, S. R. Collins, S. D. Rustgi, and J. L. Kriss, *Seeing Red: The Growing Burden of Medical Bills and Debt Faced by U.S. Families*, The Commonwealth Fund, August 2008.

36 15 U.S.C. § 1681c(a)(6)(A).

These medical debt collection entries have an enormous and negative impact on the credit reports of American workers. The healthcare industry is the single biggest customer of the debt collection industry, constituting 42% of the collection market, versus only 29% for the banking & finance sector.[37] One stunning statistic from a 2003 Federal Reserve study is that over half of accounts reported by debt collectors and nearly one-fifth of lawsuits that show up as negative items on credit reports are for medical debts.[38] Moreover, often medical debts are sent to debt collectors for reasons completely out of the consumer's control, such as disputes between insurance companies and providers, or even the result of the provider's failure to properly bill the insurer. These problems can ruin a credit record; they should not be permitted to ruin a worker's chances of employment.

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

As NCLC and many other consumer advocates have testified before, the credit reporting system suffers from high rates of inaccuracy. In addition, growing numbers of Americans have their credit reports horribly damaged from identity theft, predatory loans, or other abusive practices. Credit reports should be considered too unreliable to use as a critical (and sometimes determining) factor in whether a worker is able to obtain employment, especially in an environment where joblessness is so high and jobs are so scare. A consumer who has an error in her credit report might be able to later fix it[39] and reapply for credit, but if she loses a good job opportunity, it could doom her financially for months, harm her for years, or even affect her permanently. Very few employers will voluntarily hold up a hiring process for one or more months to allow an applicant to correct an error in a credit report.

In the hearings that led to the 2003 FACTA Amendments, Congress was presented study after study documenting errors in credit reports. For example, a study by the Consumer Federation of America and National Credit Reporting Association documented numerous serious errors and inconsistencies, such as the fact that 29% of credit files had a difference of 50 points or more between the highest and lowest credit scores from the three nationwide credit bureaus (*i.e.*, Equifax, Experian and TransUnion).[40] Members of Congress cited studies from U.S PIRG showing errors in 70% of credit reports, of which 25% were serious enough to cause a denial of credit.[41]

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37 *Our View on Bill Collectors: Firms Employ Questionable Techniques to Collect Debts*, USA Today, Sept. 13, 2010 (Sidebar "Unpaid Bills"), *available at* http://www.usatoday.com/news/opinion/editorials/2010-09-14-editorial14_ST_N.htm.

38 Robert Avery, Paul Calem, Glenn Canner, & Raphael Bostic, *An Overview of Consumer Data and Credit Reporting*, Fed. Reserve Bulletin, at 69 (Feb. 2003).

39 Even the ability of consumers to fix errors in their credit reports is questionable, given the automated and perfunctory nature of the credit bureaus' dispute resolutions systems. See Chi Chi Wu, National Consumer Law Center, *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports,* January 2009.

40 *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs*, 108th Cong. 381 (2003)(statement of Stephen Brobeck, Executive Director, Consumer Federation of America).

41 *Id.* at 351 (statement of Senator Paul S. Sarbanes).

This level of inaccuracy continues after the 2003 FACTA amendments. An on-line survey by Zogby Interactive found that 37% of consumers who ordered their credit report discovered an error, and 50% of those were not easily able to correct the error.[42] A 2004 study by U.S. PIRG showed no improvement, finding that 25% of credit reports studied still contained serious errors.[43] Even the Consumer Data Industry Association (CDIA) has admitted that, out of 57.4 million consumers who ordered their own credit reports in 2003, 12.5 million (or 21.8%) filed a dispute that resulted in an investigation.[44]

As a result of the FACTA debates, the FTC was required to undertake a comprehensive study of errors in credit reports. The FTC is in the midst of this study. In the pilot phase of the study, 53% (16 out of 30) of consumers found an error in their credit reports. Sixteen percent of the consumers found errors that either would have likely had a material effect on their credit score (3 out of 30), or the effect was uncertain (2 out of 30).[45] In the second phase of the study, 31% of participants (40 of 128) found errors in the credit reports, and 12% (15 of 128) found errors that would have a material effect on their credit scores.[46] Note that the FTC has admitted that both of these studies were significantly skewed toward consumers with higher scores, who are less likely to have errors in their credit reports. For example, half of those consumers with a credit score under 610 had a material error but no consumer with a credit score over 790 had a material error. The second study was also skewed to consumers with higher income households (with 34% having incomes over $100,000) and college graduates (66%).[47]

The industry has attempted to rebut these statistics by claiming that fewer than 3% of credit reports are inaccurate; however, it reached this statistic by counting only those credit reports in which the consumer: (1) was denied credit; (2) requested a copy of their credit report; (3) filed a dispute; and (4) the dispute resulted in a reversal of the original decision to deny credit.[48] Thus, the industry's statistic did not include inaccuracies in the credit reports of consumers who did not apply for or were denied credit, had not filed a dispute, or who did not seek a reversal of the original denial of credit.

Error rates of 12% to 37% are simply too high to allow use of credit reports as a screening tool. Americans should not be put at risk of being shut out of the job market by

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42 Zogby Interactive, *Most Americans Fear Identity Theft*, Zogby's American Consumer, April 2007, at 3.
43 Nat'l Ass'n of State PIRGs, *Mistakes Do Happen: A Look at Errors in Consumer Credit Reports* 11 (2004).
44 Federal Trade Commission and Federal Reserve Board, *Report to Congress on the Fair Credit Reporting Act Dispute Process* (Aug. 2006), at 12.
45 Federal Trade Commission, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003* (December 2006), Appendix at 15.
46 Federal Trade Commission, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transaction Act of 2003* (December 2008), at 2.
47 *Id.*
48 Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (Dec. 2004), at 25, *available at* http://www.ftc.gov/reports/facta/041209factarpt.pdf (citing an Arthur Andersen study commissioned by the credit bureaus).

a system that is flawed enough to harm as many as 1 in 3 workers. Even if one were to use the industry's highly questionable statistic of 3%, that leaves over 6 million American workers in jeopardy of being denied employment on the basis of an inaccurate credit report. American workers deserve better.

Conclusion: Congress Should Pass H.R. 3149

TransUnion has stated in a legislative hearing that credit reports are the "de facto economic passport for every individual in this country, whether you like it or not."[49] Workers across the board have suffered wage cuts, layoffs and foreclosures during this economic crisis, all of which have impacted their credit history. As we work to rebuild our economy, we believe that hard work and dedication, not discriminatory and unreliable hiring tools such as credit reports, should be the economic passport for workers in the United States. Congress should act quickly to pass H.R. 3149, Equal Employment for All Act.

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

49 Statement of TransUnion Director of State Government Relations Eric Rosenberg before the Oregon Senate Commerce and Workforce Development Committee, February 8, 2010.

Demos

DISCREDITING WORKERS

How Credit Reports are Distorting the Job Market, Prolonging Unemployment, and Denying Equal Opportunity to Workers

Shawn Fremstad

About Demos

Dēmos is a non-partisan public policy research and advocacy organization. Headquartered in New York City, Dēmos works with advocates and policymakers around the country in pursuit of four overarching goals: a more equitable economy; a vibrant and inclusive democracy; an empowered public sector that works for the common good; and responsible U.S. engagement in an interdependent world.

Dēmos was founded in 2000

About Shawn Fremstad

Shawn Fremstad is an adviser to several national non-profits on social and economic policy issues, and a Non-Resident Senior Fellow at The Workforce Alliance. He worked for many years at the Center on Budget and Policy Priorities in Washington, DC, and before that, as an attorney and policy specialist for legal aid programs in Minnesota. Shawn is a graduate of the University of Minnesota Law School and has studied art and design at the Maryland Institute College of Art and the Corcoran College of Art + Design.

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Introduction

Economic insecurity has become the "new normal" in America. Ten million Americans are out of work, and the vast majority of Americans have seen their incomes stagnate or decline over the past decade. Demos' extensive research on credit card debt among middle- and low-income households has found that most indebted families go into debt to pay for basic expenses: groceries, utilities, child care, and health care.[1] Simply put, Americans are borrowing to make ends meet. Credit card companies' own practices have exacerbated the problem, with well-documented abuses that increase fees, rates and penalties—making it even harder for the average American family to keep a blemishless credit history.

Against this backdrop of troubled family finances, there has been a dramatic increase in the marketing and use of consumer credit reports for a purpose completely unrelated to extending credit: employer decisions to hire or fire workers.[2] Employer surveys conducted by the Society of Human Resources Management (SHRM) suggest that over the last 15 years, employers' use of credit reports in hiring processes has gone from being a marginal practice, one used by less than one in five employers in 1996, to a commonplace one used by 6 out of every 10 employers in 2009.[3]

Key points

- A majority of employers now use credit reports to make some or all hiring decisions.
- Rigorous social science research shows that negative information in credit reports has no correlation to job performance.
- A TransUnion representative acknowledged earlier this year they "... don't have any research to show any statistical correlation between what's in somebody's credit report and their job performance or their likelihood to commit fraud."
- The use of credit checks produces discriminatory hiring and firing decisions that deny equal opportunity to workers.
- Because so many credit reports include erroneous information, even workers who have paid all their bills on time can be harmed by employers' use of credit reports.
- Congress should protect job seekers and employees by prohibiting employers from forcing them to disclose credit information to

This increase in employers' use of credit-history information to make hiring and firing decisions comes despite strong evidence that credit checks have no validity in predicting job performance, and warnings from the Equal Employment Opportunity Commission that the practice results in discriminatory hiring and firing decisions that violate civil rights and deny equal opportunity to workers.

If America is the "land of the second chance" and committed to equal opportunity, it's hard to think of a practice that flies more in the face of this than letting employers deny jobs to people on the basis of their credit history. Congress should act now to end the unfair and arbitrary use of credit reports to make hiring and firing decisions. Especially in today's economy—with a nearly 10 percent unemployment rate and a doubling over the last four years in the share of outstanding debt balances that are delinquent—the stakes for American workers are too high to allow employers to outsource hiring decisions to credit reporting agencies. The following brief addresses key myths that industry representatives have perpetuated in support of this practice and recommends a federal ban on inappropriate uses of credit reports in employment decisions.

Myth #1: Credit History Predicts Job Performance

The one rigorous study of credit checks for employment purposes conducted to date found that credit history information does not measure job requirements in a fair and reliable way. In this study, conducted at the request of and funded by a large employer, Professors Jerry Palmer and Laura Koppes of Eastern Kentucky University sampled 178 employees holding "financial services and collections" jobs.[4] The sample included 108 active employees and 70 terminated employees.

Palmer and Koppes compared each of the specific categories of credit information in the employees' credit reports—for example, the number of past-due accounts--with performance ratings (of the active employees) and termination data. If credit report data predicted employee performance, the performance ratings of employees with poor credit should have been lower than the performance ratings of employees with better credit. Similarly, one would expect employees who were fired to have poorer credit than active employees.

"... we don't have any research to show any statistical correlation between what's in somebody's credit report and their job performance or their likelihood to commit fraud."

-Eric Rosenberg, TransUnion

Palmer and Koppes found no evidence of this. For active employees, none of the categories of credit information were associated with employees' job performance ratings in the expected way. Only one of the categories— the number of times

payments were 30 days late—had a statistically significant correlation with performance, but the correlation was exactly the opposite of what was expected. Higher levels of being 30-days late on a payment were associated with more positive job performance ratings rather than more negatives ones. This makes intuitive sense: a person who is facing financial pressures has an even greater incentive to perform well at work to keep their job and merit a salary increase or even a promotion. Additionally, none of the categories of credit reporting data had a statistically significant association with termination. In other words, the credit of terminated employees was no worse than that of active employees.

Some representatives of credit reporting agencies have acknowledged the lack of evidence showing a relationship between credit-report data and job performance. Most notably, Eric Rosenberg, TransUnion's Director of State Governmental Relations, acknowledged earlier this year that: "... we don't have any research to show any statistical correlation between what's in somebody's credit report and their job performance or their likelihood to commit fraud."[5]

Myth #2: Credit History Predicts Employee Fraud

The second common myth is that screening out workers with weak credit is necessary to prevent employee fraud. In testimony before Congress earlier this year, Stuart K. Pratt, the president and CEO of the Consumer Data Industry Association, a lobbying association that represents the interests of the "big-three"credit reporting agencies—TransUnion, Experian, and Equifax—claimed that credit-report information "shows a correlation between past behavior and future fraud."[6] In support of this claim he cited a 2008 survey conducted by the Association of Certified Fraud Examines (ACFE).[7] This study was based on data compiled from 959 cases of occupational fraud investigated in 2006 and 2007. In about one-third of these cases, investigators reported that the person committing the fraud was experiencing "financial difficulty" at the time of the fraud or "living beyond their means."

However, the ACFE report is not a reliable validation study. The ACFE data provides no evidence that credit checks have any validity in predicting employee fraud, or that, as Pratt claimed, prohibiting the use of credit reports for employment purposes would "undercut fraud prevention." Unlike the Palmer-Koppes study, the ACFE study does not use a random sample methodology or

objective indicators. The ACFE data came from an online survey distributed to fraud examiners who were asked to provide a narrative of the "single largest fraud case" they had investigated in which the investigation was complete and the examiner was "reasonably sure" the perpetrator had been identified. ACFE received usable responses from only 5.8 percent of the investigators that it sent the survey to. Thus, the survey is not representative of employee fraud in general or even of large-scale occupational fraud.[8]

While the Palmer-Koppes study directly tests the link between data in credit reports and job performance, the ACFE provides no test of this linkage because it doesn't draw in any way on data in the credit reports of those employees believed by investigators to have committed fraud. Instead, investigators were simply asked to check boxes on a list of fairly general and often vague behaviors that the investigator believed to be present during the period the fraud was committed. There is no indication that credit reports of the alleged perpetrators included information that indicated they were either experiencing "financial difficulty" or "living beyond their means."

Myth #3: Credit Report Screening is a Fair, Nondiscriminatory

Because of inequitable practices in America's lending market – credit discrimination, community redlining, and most recently, predatory lending – the effects of credit report screening are predictably racially disparate. Economic insecurity is even more pronounced for African Americans and Latinos, who have less household wealth and lower wages to tap to meet unexpected expenses. Furthermore, Demos' research has shown that they pay higher interest rates on credit cards than do white Americans (making debt more expensive and harder to pay off) and are more likely to have been called by a bill collector.[14]

Earlier this year, the U.S. government won a case brought by the Office of Federal Contract Compliance Programs, in which Bank of America was found to have discriminated against African-Americans by using credit checks to hire entry-level teller, clerical and administrative positions.[9] The percentage of candidates excluded because of a credit check was significantly higher for African Americans (11.5 percent) than for whites (6.6 percent). Generally, civil rights law requires employers to justify the appropriateness of an employment practice if it creates such a disparate impact on a group historically subject to job discrimination.

Despite the clear disparate impact of the policy on African-Americans, Bank of America had conducted no study to determine whether credit reports were actually a predictor of job performance, and had not investigated the issue. An expert cited in the court's decision found the bank's review of credit reports to be "highly subjective, with no specifications about what thresholds had to be met for what indicators."[10] The judge concluded that "there was no evidence of any criteria used by the recruiters" in using the credit report information to disqualify applicants."[11] In the end, the bank was unable to offer evidence supporting its main justification for the practice: that credit reports were required for surety or bonding purposes.[12] Americans of color have comparatively weak credit profiles due in large part to public policies and lending industry practices; Congress should no longer allow a new set of policies and practices to unnecessarily block them from employment opportunities as a result.

Myth #4: Credit Reports are Accurate Representations of Financial History that Employers Can Rely On In Making Hiring Decisions

Given the widespread reliance on credit reports for life-determinative decisions, a threshold requirement should be that the reports are accurate and reliable depictions of financial history. Yet, research shows that credit-reporting agencies commonly include incorrect information in credit reports. For example, as cited in the most recent Federal Trade Commission (FTC) report on the accuracy of credit reports, over 40 percent of people who had reviewed their credit files reported errors that they wanted to dispute.[13] The FTC report also provides evidence that individuals with lower credit scores are much more likely to find errors after reviewing their report. In particular, material errors were alleged in half of cases with a credit score under 610 and one-third of cases with a score between 610-689.

Conclusion

Job selection procedures and criteria that are not job-related are not in the interests of either employers or potential employees. For employers, the use of such procedures impose costs without proving any benefits and will have the effect of screening out candidates who could have been considered the best qualified for the job if the hiring process had been limited to job-related considerations. For potential employees, the use of non-job-related criteria means that the denial of employment is due not to their actual abilities and qualifications for the job.

Potential and current employees should not be compelled to authorize disclosure of data in their credit reports in order to obtain or retain employment. If, at some point, social-science consensus develops, based on rigorous empirical evidence, that a specific category or categories of credit information is predictive of occupational fraud in particular job categories, a limited exception to this general rule should be considered that allows employers to access those specific categories of credit information, but not to base hiring or firing decisions on credit-report information alone.

Endnotes

1. Tamara Draut and Jose Garcia, "The Plastic Safety Net: How Households are Coping in a Fragile Economy", Demos 2009, available at: http://demos.org/publication.cfm currentpublicationID=C1B896F4-3FF4-6C82-56F2B3EF557CCFF5

2. See, e.g., Ben Arnoldy, The Spread of the Credit Check as Civil Rights Issue, The Christian Science Monitor, January 18, 2007; Thomas Frank, When 'Bad' Credit Stands in the Way of a Good Job, USA Today, February 21, 2009; Jonathan D. Glater, Another Hurdle for the Jobless: Credit Inquiries, N.Y. Times, August 7, 2009; Andrew Martin, As a Hiring Filter, Credit Checks Draw Questions, N.Y. Times, April 9, 2010.

3. Society of Human Resources Management, Background Checking: Conducting Credit Background Checks, January 22, 2010.

4. Jerry K. Palmer and Laura L. Koppes, Investigation of Credit History Validity at Predicting Performance and Turnover, paper presented at meeting of Society for Industrial and Organizational Psychology, Chicago, Illinois, April 3, 2004.

5. Andrew Martin, As a Hiring Filter, Credit Checks Draw Questions, N.Y. Times, April 9, 2010.

6. Testimony of Stuart K. Pratt, Consumer Data Industry Association, before the House Subcommittee on Financial Institutions and Consumer Credit, May 12, 2010.

7. Association of Certified Fraud Examiners, 2008 Report to the Nation on Occupational Fraud and Abuse.

8. In his written Congressional testimony, Pratt cites the median loss data from the report in a misleading way that suggests it is representative of occupational fraud generally and not just a non-representative sample of the "single largest fraud case" investigated by each respondent to the survey.

9. In the Matter of: Office of Federal Contract Compliance Programs, United States Department of Labor v. Bank of America, Recommended Decision and Order, Case No.: 1997-OFC-16, January 21, 2010. The case involved discrimination alleged to have occurred in 1993 and between 2002 and 2005. Credit checks were used by the bank in 1993, but discontinued.

10. Id. at p. 25.

11. Id. at p. 49, emphasis in original.

12. The judge concluded that there was "simply nothing in the record that even tends to show that an acceptable credit

13. About 11 percent of people in the study reported errors that were categorized as "material" ones. However, material was defined in a way that limited it to individuals with credit score below 760. Thus, errors that were material for someone with a score under 760 were treated as non-material for those with scores above 760. This limited definition of materiality likely excludes errors that are material in the employment context. In employment context, unlike the lending context, it is the specific pieces of information in the report, and not credit scores (which generally are not available to employees), that can have an adverse impact. Thus, even for employees with scores above 760, a single error in a credit report could result in denial of a job offer.

14. Demos, "The Color of Debt Fact Sheet," September, 2009 available at: http://www.demos.org/pubs/TheColorofDebt-FactSheet.pdf

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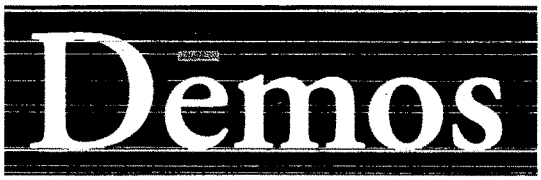


For more information, see
www.demos.org

STATEMENT FOR THE RECORD

THE FINANCIAL SERVICES ROUNDTABLE

for

The House Financial Services Committee, Financial Institutions Subcommittee Hearing on H.R. 3149, the Equal Employment for All Act

September 23, 2010

The Financial Services Roundtable ("Roundtable") respectfully offers this statement for the record to the United States House Financial Services Committee, Financial Institutions Subcommittee Hearing on H.R. 3149, the Equal Employment for All Act.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $74.7 trillion in managed assets, $1.1 trillion in revenue, and 2.3 million jobs.

Oppose H.R. 3149, the Equal Employment for All Act

The Financial Services Roundtable opposes H.R. 3149, the Equal Employment for All Act. This measure, if enacted, would prohibit the use of credit reports in employment background checks. The Roundtable urges you to oppose this bill.

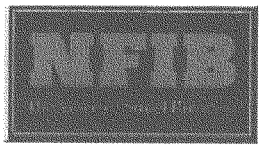
The Roundtable strongly believes that Congress should not take steps that could slow down hiring process. There are a variety of reasonable reasons employers review the credit history of potential employees. Performing a background check, when done responsibly, is not in and of itself a barrier to employment. Employers may check credit history as part of a background check to help them determine whether a prospective employee is a possible risk to the financial safety and soundness of a business or more importantly to their customers.

A responsible review of a potential employee's credit history can provide employers with a "totality of the circumstances" view regarding a potential employees long-term issues that may arise after someone is hired. Further, it also gives potential employees the ability to demonstrate a long-term, stable payment history, and the opportunity to explain away any difficulties caused by current conditions, which can be saved by many years of prior positive credit history. Moreover, it is important to keep in mind that employers do not have access to credit scores and do not use credit scores when evaluating credit history for employment. Credit scores are not sold for employment purposes, and, employers do not use credit scores for such decisions.

Next, according to the Association of Certified Fraud Examiners (ACFE), U.S. based organizations lose 7% of their annual revenue to fraud. This translates into $994 billion dollars a year. That is not to say that all financial difficulties will or could lead to fraud; however, it is simply wrong for Congress to deny financial services companies access to information that could assist them in their fraud prevention efforts.

Finally, there are strong laws in place that protect employees from abuses. Current law strikes the right balance of protections employees and potential employees and the right of business owners to protect the interest of their business. Today, under current law, employees and potential employees must be notified prior to an inquiry into their credit history, they must be provided a copy of the report and the reporting agency, and employers can be penalized for violating the law.

For the aforementioned reasons stated above. The Roundtable urges the House Financial Services Committee, Subcommittee on Financial Institutions, to ***oppose*** H.R. 3149, the Equal Employment for All Act.



September 22, 2010

The Honorable Luis V. Gutierrez
Chairman
U.S. House Subcommittee on Financial
Institutions and Consumer Credit
Washington, D.C. 20515

The Honorable Jeb Hensarling
Ranking Member
U.S. House Subcommittee on Financial
Institutions and Consumer Credit
Washington, D.C. 20515

Dear Chairman Gutierrez and Ranking Member Hensarling:

On behalf of the National Federation of Independent Business (NFIB), the nation's leading small business advocacy organization, we are writing to express our opposition to H.R. 3149, the "Equal Employment for All Act." This legislation would severely restrict an employer's ability to use credit history in making employment decisions.

According to NFIB's National Small Business Poll, over a third of small employers conduct background checks on employees. Credit checks are an important component of a hiring strategy that prevents placement of at-risk or untrustworthy applicants into positions where they could do harm to the business. NFIB members are committed to providing safe and respectful work environments and background checks help create and maintain such workplaces by providing business owners with confidence that they have hired and promoted the most qualified and trustworthy individuals.

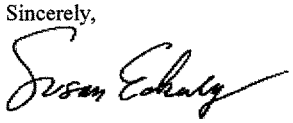
Moreover, existing employer obligations under the Fair Credit Reporting Act (FCRA) already protect applicants and employees from the misuse of credit checks. Under the FCRA, employers must get written permission from individuals before checking credit history and notify individuals if information in a credit report results in a negative employment decision. This lengthy process provides applicants and employees with a fair opportunity to dispute an erroneous credit check and discourages abusive checks by employers.

National Federation of Independent Business
1201 F Street NW * Suite 200 * Washington, DC 20004 * 202-554-9000 * Fax 202-554-0496 * www.NFIB.com

It takes significant time and money to train someone for a position and picking the right individual for a job is critical to a business's bottom line. The inability to verify the veracity of an applicant through a credit check would deter hiring at a time when the country is depending on small businesses to create new jobs.

Small business owners are a crucial component of our country's economy, and we urge your opposition to this bill.

Sincerely,



Susan Eckerly
Senior Vice President
Public Policy

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September 21, 2010

Oppose H.R. 3149, prohibiting the use of credit checks for employment purposes

To Members of the House Financial Services Committee:

The undersigned trade associations, representing millions of employers, are writing to express our opposition to H.R. 3149, the "Equal Employment for All Act," that would in effect prohibit the use of credit in employment background checks in all but extremely limited circumstances—most involving government employment. In this economy, Congress should not take steps that could slow down hiring processes.

Checking credit is done responsibly, and is not in and of itself a barrier to employment

Employers may check credit history as part of a background check to help them determine whether a prospective employee is a possible risk to the financial health of a business or to their customers. Employers use credit checks as part of a background check very responsibly and prohibiting their use in assessing employees makes employers, other employees and customers more vulnerable to fraud and identity theft.

Credit checks are only used in about 15% of all background checks, and when they are used they are used primarily for executive positions, positions that have fiduciary and financial responsibility, or for positions that have access to confidential or proprietary information. When examining credit history, employers look for lawsuits, judgments and accounts in collection, NOT late payments.[1]

Finally, the vast majority of employers do not use credit as a "yes or no" proposition, but to provide prospective employees with the opportunity to explain their circumstances.

When employers check credit, they review several years of history, not a "snap-shot" of the current situation

When looking at credit as part of a background check, employers do not limit their examination to a recent "snap-shot" look at a person's credit, but in fact most look at a 6-year window or longer.[2] This is significant, because it enables employers to see beyond possible short-term problems, and it gives potential employees the ability to demonstrate a long-term, stable payment history, and any difficulties caused by current conditions can be saved by many years of prior positive credit history.

Further, employers do not have access to credit scores and do not use credit scores when evaluating credit history for employment. Credit scores are not sold for employment purposes, and, as the SHRM survey demonstrates, employers do not use credit scores for such decisions.

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[1] http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundChecking.aspx

[2] http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundChecking.aspx

Personal financial health can be an indicator of potential employee fraud

The Association of Certified Fraud Examiners (ACFE) reviewed occupational fraud between 2006 and 2008, and found that the top two red flag warnings exhibited by perpetrators leading up to the fraud were living beyond his or her financial means (present in 39% of all cases, with a median loss of $250,000) or experiencing financial difficulties (present in 34% of all cases with a median loss of $111,000).[3]

That is not to say that all financial difficulties will or could lead to fraud; however, it is simply wrong for Congress to undercut fraud prevention by outlawing use of information that shows a correlation between past behavior and future fraud.

Credit checks of potential employees protects companies, particularly small businesses, from fraud.

Employee theft accounts for more than $15 billion annually, and companies lose a median of 5% of their annual revenue to employee fraud, which is expected to rise further.[4]

Small businesses are particularly vulnerable to financial fraud. For example, according to the ACFE, the median loss suffered by organizations with fewer than 100 employees was $190,000 per incident. This was higher than the median loss in even the largest organizations. Small businesses have fewer internal controls on the back end once they have hired someone to control fraud if it occurs internally.

Consumers have significant protections when employers use credit as part of their hiring process

Existing law tightly regulates the use of consumer reports in employment situations. Under current law:

- Prior to requesting a consumer credit report, an employer must provide to the prospective employee a written notice stating the source of the information and how it will be used.
- The employer must also provide a copy of the consumer credit report to the consumer upon request, and prior to taking an adverse action.
- If an adverse employment action is taken against a prospective employee due to the information contained in a consumer credit report, the user must provide the name and contact information for the reporting agency to the consumer and explain the reasons for the action.
- Under the FCRA, any person who willfully fails to comply is liable to that consumer in an amount equal to the sum of (1) (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or (2) such amount of punitive damages as the court may allow; and (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

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[3] http://www.acfe.com/documents/2008-run.pdf
[4] http://www.acfe.com/occupational-fraud/occupational-fraud.asp

Given these important considerations, we urge you to oppose the consideration of H.R. 3149, and to oppose it if it is brought up for a markup.

Sincerely,
American Bankers Association (ABA)
Apartment Association, CA Southern Cities
Apartment Association of Orange County
Associated Builders and Contractors, Inc.
California Chamber of Commerce
California Grocers Association
California Hospital Assn. (CHA)
California Independent Grocers Association
California New Car Dealers Assn
Capital Associated Industries, Inc.
College and University Professional Association for Human Resources
Consumer Data Industry Association
Employers Coalition of NC
Financial Services Roundtable
Food Marketing Institute
HR Policy Association
Illinois Retail Merchants Association
International Franchise Association
National Association of Professional Background Screeners (NAPBS)
National Association of Convenience Stores
National Council of Investigation & Security Services
National Council of Chain Restaurants
National Retail Federation
Retailers Association of Massachusetts
Retail Industry Leaders Association
Society for Human Resource Management
Western Electrical Contractors Association (WECA)
Wisconsin Grocers Association
U.S. Chamber of Commerce

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