PREPARED STATEMENT OF

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Use of Credit Information Beyond Lending: Issues and Reform Proposals

Before the

SUBCOMMITTEE
ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT
HOUSE COMMITTEE ON FINANCIAL SERVICES

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Chairman Gutierrez, Ranking Member Hensarling, and members of the Subcommittee, I am Anne Fortney. I am a partner in the Washington, DC office of the Hudson Cook law firm. My practice concentrates on compliance issues under the federal and state consumer protection laws, primarily for the consumer financial services industry. I appreciate the opportunity to appear before you to discuss the use of credit information beyond lending and issues related to this use.

Background and Experience

I have practiced law for more than 40 years. After a couple of years in private practice, I joined the Federal Trade Commission ("FTC") where I served as an attorney-advisor to Commissioner Mary Gardiner Jones and as a staff attorney in the Division of Marketing Practices. I first began working on consumer financial services matters when I was in the Washington, DC legal office of the JC Penney Company in the late 70's and early 80's – a time when Penney was one of the largest credit card issuers in the country. My principal responsibilities involved legislative and regulatory issues affecting Penney's credit card operations.

I returned to the FTC in 1982, as the Associate Director for Credit Practices. In that capacity, I directed the nationwide enforcement of the consumer financial services laws with respect to finance companies and other creditors within the FTC's jurisdiction. I was also responsible for the development of the FTC's Commentary on the Fair Credit Reporting Act ("FCRA"), the final version of which was published after I had left the Commission. I have been in practice since 1986, concentrating in consumer financial services law compliance, regulation and litigation. From time to time I serve as an expert witness in litigation involving the FCRA and related consumer protection laws.

Thus, my testimony draws on many years of consumer protection practice, in both the public and private sectors. I believe my depth of experience in this regard enables me to comment upon legislation from the perspective of consumers, as well as the industry.

Non-Lenders' Use of Credit Information

Although most of my practice involves creditors and consumer reporting agencies, I am aware that under certain circumstances, credit information is used as a factor in predicting risk other than consumers' default on credit obligations. For example, financial institutions use credit information along with other empirical data in considering consumers' applications for checking and other deposit accounts. As others will testify, this information has also been proven to be a valuable factor in property and casualty insurance underwriting. In addition, credit information may be useful, and under certain circumstances essential, to employers when screening prospective employees or in monitoring suspicious activity. Landlords and property managers use credit information as a factor in evaluating rental applications. In each of these instances, these non-creditors use credit information in conjunction with other information because it has been proven to be a useful and reliable tool in predicting the user's risk associated with a transaction or other relationship with a consumer. In my experience, non-creditors do not use credit information alone in making these risk assessments. Rather, credit information is used as one factor along with other empirical information.

There are two important considerations resulting from the fact that credit information is rarely the only factor in a non-credit transaction. The first is that a consumer's credit history is considered only to the extent that it is valuable in making the risk assessment in question. The second consideration is that the removal of, or non-

empirical restriction on, the use of credit information necessarily renders less accurate a non-creditor's prediction of risk. The elimination or reduction of credit information will, therefore, diminish the ability of the non-creditor to assess risk and the resulting decisions will be less efficient and less fair for consumers. For example, if an insurer cannot use credit information as a factor in assessing risk in the case of property or casualty insurance, the insurer's ability to price effectively for risk will be diminished. The inevitable result will be higher premiums for most consumers and less availability of insurance for marginal insurance risks. It is important to keep in mind that when credit information plays a role in insurance availability and pricing, a consumer who is denied insurance or who is required to pay a premium increase will receive a notice and have the opportunity to ensure that information in the consumer report is accurate.

Employment screenings, including screenings that use credit reports, are an important tool used by businesses to ensure employee safety and avoid employee theft.[1] If an employer cannot use credit information in those circumstances where that information has been proven to be valuable, then a consumer who is the stronger candidate based on background and experience for a job may lose a position to a less reliable applicant. If employers cannot use credit information as a factor in assessing potential fraud or other misconduct, then the employer will run the risk of loss that otherwise could have been avoided. In some cases, that risk could directly harm other

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[1] *An Acxiom White Paper: Background Screening for Retail Employment - Where Privacy Meets Best Practices*, 2007, available at: http://www.acxiom.com/SiteCollectionDocuments/Resources/White%20Papers/AISS_White_Paper__Retail.pdf. ("Ten percent of all applicants for employment have criminal background information that could affect hiring decisions." *See also*, http://risk.lexisnexis.com/screen-applicants (Statistics posted by Lexis-Nexis show that more than 30% of all employment applicants provide false information on their resumes, according to the Society of Human Resource Managers.)

consumers, and the employer could be accused of being negligent for failing to use a readily available screening tool like credit reports. In fact, many states have decided that applicants for a mortgage loan originator license must authorize the release of a credit score so that the state can determine if the applicant poses a risk that will harm consumers. Although there is debate about whether the states should mandate the release of credit information, the fact is that the state regulators believe credit report information is an important assessment tool that will help the state decide whether an individual should be approved for licensing and thus for employment, as a mortgage loan originator.[2]

The FCRA recognizes that it is critical that consumer reports used for employment decisions must be accurate to be predictive. To that end, the FCRA imposes two notice requirements so that the employment decision is not made until the consumer is alerted to negative information and has the opportunity to correct negative inaccurate information. The consumer will also receive a notice if the information in the consumer report formed the basis for the denial of employment or a promotion.

Unless there are compelling public policy reasons dictating the elimination or reduction of the use of credit information in these circumstances, the use should continue to be permitted.

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[2] Starting in 2010, NMLS intends to provide functionality within the system to process independent credit reports from a consumer reporting agency for the purpose of obtaining or maintaining a license in one or more jurisdictions. *See* http://mortgage.nationwidelicensingsystem.org/profreq/credit/Pages/default.aspx, Examples of states that require authorization for release of credit reports include: California, Illinois, Iowa, North Carolina, Pennsylvania, and Texas. These states were identified by a search of the NMLS website, and there are other states that have the same requirement as well.

The use of credit information in property and casualty insurance has recently been challenged in the courts on the basis of an alleged disparate impact on certain protected minority groups. While the ultimate resolution of those challenges should be left to the courts, it is important to understand that the existence of a disparate impact on a protected group would not, standing alone, constitute a violation of the Fair Housing Act or the Equal Credit Opportunity Act. Once such a disparate impact is proven, the burden shifts to the defendant to show a legitimate business reason for the use of a policy or practice that caused the disparate impact. If the defendant can show a legitimate business need for such a policy or practice, the burden then shifts back to the plaintiff to show that there is a less discriminatory means of achieving the same result. Thus, an allegation of a disparate impact alone does not mean that there is, or is not, a violation of the fair lending laws. The process is more complicated, in large part because the courts have recognized that both credit and insurance underwriting involve complicated processes. In addition, the creditor or insurer bears the risk of loss in the underwriting process, and the elimination of any predictive information will impair the risk underwriting process.

Because of the demonstrated public value in the use of credit information as a factor in non-credit determinations, any legislative consideration of the use should not be based on isolated and unverified anecdotes. These kinds of stories may make for good media copy, but they do not reflect an informed assessment of the benefits to society as a whole resulting from the use of this information. Similarly, consumers' concerns regarding the non-transparency of the uses of this information should not be the basis for any legislative action. The users of credit information, not consumers, are in the best

position to assess the ultimate risk of loss and are, therefore, uniquely entitled to determine the value of the information.

Medical Debt Collection Information

My previous testimony before this Subcommittee addressed the use of medical debt collection information in credit histories. As others have testified, this information is a predictive characteristic in credit scoring systems. For that reason, its use benefits consumers, as well as creditors and others that rely upon that information. Because the use results in more predictive and thus reliable risk prediction, the users are able to more accurately predict risk in pricing for credit or insurance or making other informed decisions that benefit consumers in the form of lower prices and/or increased availability of services.

Legislation pending in Congress would restrict the use of medical debt information in credit reports. That legislation is premised on unfounded assumptions and inaccurate statements. For example, the findings and purposes section of H.R. 3421 states: “Medical debt is unique because, unlike consumer debt, Americans don’t get to choose when accidents happen or when their genetic traits will catch up to their health profiles.” To the extent this sentence means that medical debt is unique because it cannot be avoided, the sentence is inaccurate. Medical debts are no different from many other causes of default or delinquency over which consumers have no control – such as death of a spouse, divorce, or job-loss due to lay-off. Moreover, contrary to the findings in H.R. 3421, medical debt collection issues do not affect all consumers, only those that are unable to pay their medical debts or reach agreement with their medical providers as to a payment plan. In addition, H.R. 3421 states that “medical debt collections are more

likely to be in dispute, inconsistently reported, and of questionable value in predicting future performance because it is atypical and non predictive." This sentence is attributed to "credit evaluators" without further clarification. This anonymous attribution is puzzling particularly because it is contradicted by the testimony of witnesses, including credit score model developers, before this Subcommittee. Moreover, to the extent that a consumer disputes a medical collection debt or any other debt that is furnished to a consumer reporting agency, the consumer has adequate rights and procedures under the Fair Credit Reporting Act to dispute that debt and have it corrected if it is inaccurate or incomplete.

Additional "findings" in H.R. 3421 are irrelevant. These include the statement that "medical debt that has been completely paid off or settled can significantly damage a consumer's credit score for years." This statement does not explain why medical debt should be treated differently from any other debt which is paid or settled and which can also affect a consumer's credit score. The following statement: "consumers can be denied credit or pay higher rates when buying a home or obtaining a credit card" does not explain why this result is relevant in the case of medical debt, as opposed to other forms of consumer debt. Similarly, statements about the use of collection agencies to collect medical debts or the number of consumers who have medical debts do not provide a factual basis as to why it is in the public interest to eliminate from consideration by creditors, other credit report users, information that has been proven to have a predictive value in credit scoring and other credit risk assessments. Lacking any empirical basis for the preferential treatment of medical collection debt, H.R. 3421 would impair credit scoring and other credit evaluation systems without any countervailing public benefit.

FCRA Private Right of Action for Section 615 Violations

Section 615 of the FCRA imposes requirements on users of consumer reports that are designed to protect consumers from identity theft and its consequences, and notice requirements to help educate consumers about information included in consumer reports and the effect of that information on the user. Users who fail to follow the requirements of Section 615 face administrative enforcement actions by the FTC, the federal financial institutions regulatory agencies and state attorneys general.

In 2003 as part of the FACT Acts amendments, Congress enacted FCRA § 615(h)(8), which eliminated a consumer's private right of action for all violations occurring under Section 615. Since the enactment of this provision more than six years ago, litigants across the country have argued about whether Congress intended to eliminate a private right of action for provisions that existed in Section 615 before the FACT Act amendments, or whether there was a "scrivener's error" that led to this result. There have been at least 68 reported opinions addressing this issue, and virtually all the courts have concluded that Congress eliminated the private right of action for *all* provisions found in Section 615.[3] Thus, there is little doubt as to the effect of this change: There is no private right of action for any violation of FCRA Section 615.

Some critics of this result complain that there was no legislative history evidencing the Congressional intent to achieve this result. However, the lack of legislative history is irrelevant. Because of the haste with which Congress deliberated and enacted the FACT Act amendments to the FCRA, there is a dearth of legislative history on ***any*** of the provisions. Moreover, a claim that the placement of the exclusion

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[3] *See*, e.g. *Perry v. First Nat'l Bank*, 459 F.2d 816, 822-823 (7th Circuit (Ill.) 2006); *Banga v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 86619 *11 - *12 (E.D. Cal., Sept. 22, 2009).

with Section 615(h)(8) is indicative of Congress' intent to limit its application to the particular subsection is not supported by anything in the legislative record, and there other are other examples of misplaced provisions added by the FACT Act, such as the credit and debit card number truncation requirement which was inexplicably placed in Section 605 (Requirements Relating to Information Contained in Consumer Reports). The credit and debit card truncation provision has no relevance whatsoever to the section where it was placed by the FACT Act.

At this point in time, rather than trying to discern what Congress may or may not have intended six years ago, I believe that the appropriate inquiry is whether Congress should now entertain amending Section 615 to reinstate a private right of action for certain subsections. Recent history weighs against amending the FCRA to revisit the issue.

Some of the provisions in Section 615 clearly never extended private rights of action, such as the provisions adding in the FACT Act amendments that require the federal agencies to promulgate the red flags rule and the risk-based pricing rule. As far as I am aware, there is no suggestion that a private right of action should be allowed for these rules' requirements. What must now be considered is whether extending a private right of action to consumers enhances the other protections found in Section 615 in any way. Based upon my more than 30 years experience in working with the FCRA, and my participation as an expert witness in litigation related to issues arising under Subsection 615(a), I do not believe that there is any measurable benefit to consumers.

First, it has been my experience that most users of consumer reports comply with the law, even in the absence of a private right of action. In the credit context, creditors

who use consumer reports and other information bearing upon creditworthiness give adverse action notices to consumers in writing, even though they could lawfully give the notice orally or electronically under Subsections 615(a) and (b). In fact, most creditors include their FCRA adverse action notices as part of their adverse action notices required under the ECOA and Regulation B. The model FCRA adverse action notice language was added by the Federal Reserve Board to the sample ECOA adverse action notice forms found in Appendix C to Regulation B.[4] Thus, in the credit context, consumers receive protection under both the ECOA and the FCRA.

Second, there are significant negative, and perhaps unintended, consequences that will undoubtedly result if a private right of action is added to Section 615, particularly to Subsection 615(a). The nationwide class action litigation brought against the insurance industry from 2000 through 2009 illustrates that the burden of litigation can vastly overshadow any benefit to consumers. This litigation was predicated on an FTC staff opinion letter written by a junior staff attorney, who relied on incorrect legislative history, in reaching a conclusion that was unsupported by the language of the FCRA. The litigation involved many large property and casualty insurance companies in this country. After years of protracted and extremely expensive litigation, two of these cases, involving Safeco and GEICO, reached the United States Supreme Court. In a unanimous opinion, the Court rejected the FTC staff interpretation that had engendered the litigation.[5]

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[4] *See,* Form C-1, Form C-2, Form C-3, Form C-4, and Form C-5.
[5] *Safeco Ins. Co. of America v. Burr* and *GEICO General Ins. Co. v. Edo*, 551 U.S. 47, 70 (2007).
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While these insurance companies were thus vindicated, the outcome came at enormous cost. At the same time, many other insurance companies had chosen to settle prior to the Supreme Court's ruling rather than face the prospect of potentially ruinous liability. As a result, those companies paid statutory damages to some customers who, according to the Supreme Court's ruling in GEICO, would have been entitled to no recovery at all. No public policy supports such a windfall.

Finally, one major insurance company gave its customers the notice as required under the FTC staff lawyer's interpretation, but was forced to defend a class action challenging the *content* of its notice. In reliance on advice of legal counsel, the company tried to craft a portion of the notice, which was sent to about 94% of its customers, in a manner that was meaningful and accurate. Ultimately, that insurance company was vindicated by a unanimous jury verdict in its favor, but only after facing the prospect of statutory damages in the billions of dollars and incurring enormous legal fees and other costs in its defense. In not one of these cases could any consumer demonstrate harm.

If Congress amends the FCRA to add a private right of action under Subsections 615 other than Subsection 615(h), the only persons who stand to benefit are those lawyers who can assemble a class and pursue class action litigation, unless Congress also implements limits on class action liability. Otherwise, consumers will ultimately be the ones who bear the cost of litigation in the form of increased credit and insurance rates.

Thus, adding a private right of action under Subsection 615(a) will do nothing more than encourage frivolous litigation. History has demonstrated that fact. There is nothing for individual consumers to gain by allowing consumers to sue directly on

policies and procedures or subjective beliefs about what should and should not be in notices and how they should be given.

Similar policy reasons apply to the other provisions of Section 615. The threat of administrative enforcement is significant. The FTC has substantial authority to ensure that users of consumer report information have the proper tools in place to protect and educate consumers. The FTC actively pursues complaints to ensure that consumers are protected and that the users of consumer report information comply with all aspects of the FCRA. In addition, The Federal Deposit Insurance Company, the Office of the Comptroller of the Currency, the Federal Reserve Board, the Office of Thrift Supervision, the National Credit Union Administrator, the Surface Transportation Board, the Secretary of Transportation, the Secretary of Agriculture all have examination and enforcement authority over entities that they regulate. Any gap in regulation can be filled by state attorneys general. Section 621 allows for robust enforcement of the FCRA.

The elimination of the private right of action for Section 615 violations has not precluded consumers alleging violations of the FCRA from bringing private actions. Generally, the provisions for which consumers can sue for willful violations are those that involve a fundamental breach of consumer privacy or an abdication of responsibilities with respect to consumer disputes as to the accuracy or completeness of information in a consumer report. For example, consumers can seek statutory penalties for a willful violation against someone who obtains their consumer reports without a purpose that is specifically permitted under the FCRA. This may occur when someone obtains a report on an ex-spouse during a divorce proceeding or when a car salesman

obtains the report for use in negotiating the price of a car even though the consumer is not planning to finance the purchase.

Someone who obtains a consumer report in an attempt to commit identity theft may also be subject to statutory damages for a willful violation. Creditors and insurers that do not have a permissible purpose to obtain prescreened lists from consumer reporting agencies may also face statutory damages for willful violations.

Similarly, if a creditor or other company that furnishes consumer report information to a consumer reporting agency ignores consumers' disputes as to the accuracy or completeness of the information in the consumer report based on that information, the furnisher may be subject to statutory damages for a willful violation. Statutory penalties for willful violations may also be available to users of consumer reports that fail to dispose of consumer report information in a proper manner and thereby create a risk of identity theft for consumers whose information is involved in the reports.

Finally, Section 615 is not the only portion of the FCRA for which there is no private right of action. Subsection 623(a) is also limited to administrative enforcement. There are valid policy reasons for limiting private rights of action under these FCRA provisions.

Thank you for the opportunity to testify. I will be glad to answer your questions.