# 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.

[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]

---

[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

[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

---

[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.

[10] 15 U.S.C. §1681n-p.

[11] 15 U.S.C. §1681s(a) and (c).