Testimony of Brad Miller

House Committee on Financial Services

Subcommittee on Financial Institutions and Consumer Credit

Hearing entitled "Examining Legislative Proposals to Preserve Consumer Choice and Financial Independence," June 11, 2015

Good afternoon Chairman Neugebauer, Ranking Member Clay and members of the Subcommittee. I'm Brad Miller. I served for an eventful decade in the House of Representatives and as a member of the House Financial Services Committee. I am now a Senior Fellow at the Roosevelt Institute and Of Counsel to the law firm of Grais and Ellsworth.

The invitation to appear today asked me to assess twelve legislative proposals on a variety of topics, and to do so in five minutes. Like the other witnesses, I will not attempt that.

But this pudding does have a theme. The bills are based on the exculpatory "narrative" about of the financial crisis that industry participants were victims, not perpetrators. Lending practices that might appear predatory or even crooked to the unsophisticated were really an honest effort to meet consumer needs. The industry should now be relieved of any annoying regulatory requirement that was based on an unjust accusation to the contrary.

That narrative has been dutifully repeated on Wall Street and in Washington for years, but is not credible to most Americans, because it is not true.

The bills would unlearn the real lessons of the crisis. Here are some examples:

There's an old joke that a man jumped off the Empire State Building and as he passed the 60th floor, he said "So far, so good." HR 1941 would codify "so far, so good" as the examination standard for commercial real estate loans held by federally-insured institutions, large and small alike. If a developer made payments on a loan, then the examiner would treat the loan as performing and look no further. It would not matter if the loan was interest-only and had an impending balloon payment, if the collateral for the loan had collapsed in value and the loan was deeply underwater, if the project for which the developer had borrowed was in deep trouble and the loan was very large, if that bank or other banks had many such loans, or if the developer's creditworthiness had declined and the developer would not qualify for a rollover loan. The legislation would obviously make it very difficult for regulators to keep a problem from becoming a catastrophe, not just for a given institution but for the financial system.

The bill also creates an appeal from any supervisory determination that provides far more process than is due. An appeal would not review the agency's decision for error or caprice, but would be a de novo review with no deference to the agency's fact findings, expertise or judgment. In other words, it would be a second guess. In extremis too-big-to-fail banks would hire lawyers to block urgent supervisory actions by appeal after appeal, and cripple efforts to prevent or contain a crisis.

HR 1210 exempts depository institutions, also large and small alike, from the ability-to-repay rules for mortgages held in an institution's portfolio, not sold to the securitization market, which is still comatose anyway. The argument is that the purpose of the requirement was to prevent foolish mortgages that create systemic risk, and lenders would not let credit standards slide if they kept the mortgages. That argument is not supported by the experience of the financial crisis. Washington Mutual and Wachovia both got in trouble because of portfolio mortgages.

More important, the purpose of the ability-to-repay rule is equally to protect consumers against predatory, equity-stripping mortgages. Asset-based predatory mortgages are no less predatory if held in portfolio, and homeowners can lose all of the equity in their homes, which for most homeowners is the bulk of their life's savings, and still pose no risk to predatory lenders even if held entirely in portfolio.

Finally, the failure by government agencies to investigate misconduct in the financial sector, including criminal fraud, and hold economically and politically powerful institutions accountable has offended the sense of justice of millions of Americans, including me. Important government powers to investigate criminal conduct have gathered dust while Americans seethed. HR 766 provides a surprising solution to that problem: it strips the Department of Justice of much of the power to investigate and hold financial institutions accountable. Congress enacted FIRREA in response to the savings and loan crisis of a generation ago, in which criminal fraud was rampant. More than 800 bank officials went to prison for financial crimes. FIRREA allows the DOJ to seek civil penalties for violation of certain criminal laws that affect a federally insured financial institution. FIRREA provides a ten-year statute of limitations, a standard of proof of preponderance of the evidence, and enhanced investigative powers, all important tools to fight financial crime. The courts have held that FIRREA applies equally when financial institutions are the victims of financial crimes, and when financial institutions are the perpetrators of financial crimes. HR 766 would amend FIRREA to apply only when financial institutions are victims of a crime, not when financial institutions are the perps. The lesson of HR 766 would be that our nation promises "equal justice under law," but some are more equal than others, much more equal.

The narrative for the financial crisis that I described earlier is very popular at fundraisers in Washington. But go home this weekend and talk to the people you represent. Ask them if you think Wall Street was unjustly accused of wrongdoing in the financial crisis and since, and that law enforcement agencies and government regulators have bullied them. You probably will get a very different response.

Brad Miller is a Senior Fellow at the Roosevelt Institute. Prior to joining Roosevelt, he served for a decade in the United States House of Representatives, representing North Carolina's 13th district, and was a Senior Fellow at the Center for American Progress. He is also Of Counsel for Graise & Ellsworth LLP.

As a member of the House Financial Services Committee, Mr. Miller led efforts to enact financial reform legislation, including legislation to prohibit predatory mortgage lending and create the Consumer Financial Protection Bureau, or CFPB. He also led efforts to address the foreclosure crisis and reform the private mortgage securitization market.

As chairman of the Investigations and Oversight Subcommittee of the House Science Committee, Mr. Miller led investigations into environmental contamination and public health risks. He also worked with the House Democratic leadership to develop the legal strategy to enforce congressional subpoenas issued to the Bush Administration concerning the firing of U.S. Attorneys.

Mr. Miller has been interviewed on almost every cable news channel, including MSNBC, CNN, Fox News, Fox Business, CNBC, Bloomberg, Current TV, and Al Jazeera America, and has frequently been quoted in national publications on a variety of issues, especially financial reform and housing. He has published opinion articles in national publications, including *Politico, Roll Call, The Hill, The Wall Street Journal, American Banker, Bloomberg View, The New Republic, Huffington Post*, and *Salon*.

Education

- Columbia University, JD 1979
- London School of Economics, MS 1978
- The University of North Carolina at Chapel Hill, BA 1975

Other Employment

- Senior Fellow, Center for American Progress, 2013-present

Previous Employment

- United States House of Representatives, Member 2003-2013
- North Carolina Senate, Member 1997-2002
- North Carolina House of Representatives, Member 1993-1994
- Private law practice with various firms, 1980-2002

Judicial Clerkship

- The Honorable J. Dickson Phillips, Jr., U.S. Court of Appeals for the Fourth Circuit, 1979-1980

Bar Admissions

- North Carolina, 1979
- EDNC, MDNC, Court of Appeals for the Fourth Circuit