Written Testimony

Before The

HOUSE COMMITTEE ON FINANCIAL SERVICES

Regarding

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

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on behalf of the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Current Marketing of Credit-Monitoring is Often Deceptive

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

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

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

Moreover, the main Equifax, TransUnion and Experian websites are

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CROs already tie their products to credit monitoring.

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

extensive credit monitoring. As the CRO explains:

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

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

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

> Attempting to resolve identity theft fraud on your own can be complicated, and it's hard to know all the steps you need to take, to say nothing of the time and effort required. If you are

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

> an identity theft victim, Lexington Law can assist you in identity theft restoration. Lexington Law will work to clean up your credit report and increase your credit score by challenging all the negative credit reports items accrued. We will also monitor your credit reports to catch potential identity theft fraud and provide enhanced identity theft restoration services to protect you from additional identity theft issues that do not initially appear on your credit reports.

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

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

CROA can be strengthened to protect consumers as well as industry

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

her testimony before the Senate Commerce Committee, my colleague Joanne Faulkner outlined the several improvements we believe are critically necessary to accomplish the still current objectives of the CROA. These include:

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

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

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

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

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

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

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

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

2008

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

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

2007

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

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

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

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

2006

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

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

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

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

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

2005

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

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

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

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

2004

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

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

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

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

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

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

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

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

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

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

Numerous published opinions favorable to consumers.