Consumer Federation of America

June 6, 2017

Re: Oppose the Financial CHOICE Act (H.R. 10)

Dear Representative:

This week the House of Representatives is scheduled to vote on the "Financial CHOICE Act," (H.R. 10) which purports to offer an alternative approach to reforming the financial system. We are writing on behalf of the Consumer Federation of America (CFA)[1] to urge you to oppose this dangerous and misguided bill. It is by and large a deregulatory wish-list from special interests that repeals many of the significant achievements in the Dodd-Frank Act and other critical laws designed to ensure consumers, investors, and honest market participants are appropriately protected from harm in the marketplace. Without such protections, consumers and investors will be exposed to greater risk of being harmed in concrete ways and the financial system will be exposed to greater risk of instability and crises. This bill would put our financial marketplace in a weaker position than it was before the crisis, making American consumers more vulnerable and more at risk. Contrary to its name, this bill would not create better financial choices for consumers; rather, it would create a financial marketplace of no fair choices. It would foster a financial marketplace with higher risk, without a regulator with the authority, resources and independence to minimize risks for consumers. This is not a choice that any consumer would knowingly make.

Congress should not fool itself that the financial crisis, which destroyed trillions of dollars in wealth and wreaked havoc on the financial lives of millions of families, was a random event. As noted by the Financial Crisis Inquiry Commission, widespread failures in financial regulation and rampant predatory lending practices were key drivers of the crisis. The bill appears to completely ignore the lessons learned from this devastating event in our nation's history.

The provisions discussed below are among the sections that raise the most serious concerns. They do not, however, represent all of the concerns that CFA has with this legislation.

I. H.R. 10 would eviscerate the Consumer Financial Protection Bureau and increase the likelihood of rampant abuse in the marketplace by eliminating the majority of the agency's tools to hold financial institutions accountable.

[1] Consumer Federation of America (CFA) is a national organization representing approximately 300 organizations at the state, local and national level that conducts public education and policy analysis on behalf of consumers, with a particular focus on low- and moderate-income consumers.

H.R. 10 would weaken the Consumer Financial Protection Bureau's (CFPB's) ability to protect consumers from abusive financial practices. For five years, the CFPB has proven itself to be a transparent, deliberative, and data-driven agency. The CFPB has worked closely with consumers and the financial services industry to develop sensible safeguards against harmful and discriminatory products and practices like abusive payday lending and aggressive debt collection tactics that have harmed consumers and servicemembers. To date, the CFPB has returned $11.8 billion in relief to more than 29 million harmed consumers.[2]

The bill would eliminate the CFPB's authority in significant ways:

- In section 736, H.R. 10 would eradicate the agency's authority to stop unfair, deceptive, and abusive acts and practices. This provision appears to protect companies that cheat their customers. This is critical authority that the CFPB has used, for example, to stop companies such as Wells Fargo from opening sham accounts in customers' names. CFPB enforcement that relies on this authority has returned billions of dollars to consumers. Stripping the agency of this authority would make the CFPB useless to consumers and the marketplace.

- In section 733, H.R. 10 would completely eliminate the CFPB's authority to create competition and sensible safeguards for payday and auto title loans, industries plagued by problems. This section ties the hands of the CFPB, banning the agency from taking any enforcement action when payday lenders break the law. Over the last several years, the CFPB has produced a voluminous body of research and worked closely with all stakeholders to propose commonsense consumer protections. This provision would thwart this critical work.

- In section 727, H.R. 10 would eliminate the CFPB's supervisory authority. Much of the toxic mortgage lending that fueled the financial crisis was originated outside of the traditional banking system. While banks were subject to supervision and regular oversight, nonbanks operated in the shadows. Eliminating supervision will recreate an unfair marketplace where nonbanks are not subject to oversight. This supervision is essential to stopping problematic behavior before consumers are harmed. This provision puts consumers at risk.

  Already, the CFPB has engaged in supervisory oversight of payday lenders, student loan servicers, debt collectors, and credit reporting agencies that has yielded major benefits to consumers. The bill would reverse these reforms.

- In section 738. H.R. 10 would thwart the implementation of the CFPB's proposed rule on forced arbitration. The CFPB submitted more than 700 pages of its research findings in a 2015 Report to Congress that analyzed the impact of forced arbitration clauses on consumers and competition. After publishing this report, the CFPB proposed reforms regarding the use of forced arbitration, but the agency did not

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[2] https://www.consumerfinance.gov/?gclid=Cj0KEQjwxPbHBRCdxJLF3qen3dYBEiQAMRyxS5edU7b7j7L-qWfSfHo7c_62LB3OPaRMOigg6ueev5caAm4K8P8HAQ. Data updated on 2/28/17.

propose eliminating forced arbitration altogether. The CFPB's approach was grounded in extensive evidence. This provision would block these consumer protective reforms entirely.

- In section 731, H.R. 10 would block the public's right to know regarding consumer complaint data received by the CFPB. The agency's consumer complaint database is a model of transparency and accountability. This provision would create insurmountable barriers for the public to access this information.

The bill would also weaken the leadership structure of the CFPB. The current structure of the CFPB has successfully led to important work that has increased consumer protection. CFPB's confirmed Director, Richard Cordray, was nominated by the President and confirmed by the Senate. He is fully accountable to Congress and the public and regularly appears before Congressional committees to provide details about the agency's rule-writing, supervision and enforcement strategies. There is no evidence that the changes made by this bill would strengthen the CFPB, and we oppose the many provisions in Title VII that weaken the current structure of the Bureau. For example:

- We oppose section 711 of the bill which provides that the director of the Consumer Financial Protection Bureau, which will be renamed to the Consumer Law Enforcement Agency, could be fired by the President without cause. This politicizes the Bureau at the expense of consumers.

- We oppose section 712 of H.R. 10 which empowers the Office of Information and Regulatory Affairs within the Executive Office of the President to oversee all consumer protections promulgated by the Bureau, giving further opportunity to politicize rulemaking.

- We oppose section 713 of H.R. 10 which eliminates the CFPB's independence from the Congressional appropriations process. Investors and taxpayers have suffered from subjecting the Securities and Exchange Commission and the Commodity Futures Trading Commission to the appropriations process, which has left them starved of resources needed to keep pace with rapid changes in our financial markets. Budget constraints have left these agencies out-gunned by the powerful firms they are expected to police, unwilling or unable to pursue an aggressive enforcement program, and years behind on meeting major rulemaking deadlines, all of which puts investors and market stability at risk. Subjecting the CFPB to these beltway antics would give the worst elements of the financial services industry endless opportunities to deny the CFPB the funding to do its job.

- We oppose section 723 of the bill which would diminish the CFPB's ability to pay employees at the same rate as other federal financial regulators. This unequivocally makes it harder for the CFPB to hire qualified experts in financial services.

Section 715 of H.R. 10 also would significantly limit the ability of the CFPB to protect consumers by providing defendants with the ability to move proceedings from the administrative

adjudication process of the CFPB to federal court. This will hamstring the CFPB's enforcement authority. In addition, the bill undermines the current organization of the Bureau by duplicating and complicating the structure (section 717), while simultaneously further isolating the Bureau by eliminating the Mandatory Advisory Board, made up of financial services stakeholders, including academics, community banks, credit unions and consumer advocates (section 726).

These sections would eviscerate critical authority that the CFPB has used effectively and that remains necessary to make our financial marketplace effective and fair.

II. This bill would undermine financial regulators' ability to protect the public.

Title III of H.R. 10 broadly curtails the regulatory authority of financial regulators. The subtitles include numerous new analytic requirements that will have the result of thwarting agency action and will provide more opportunities for opponents of consumer protection to litigate and enjoin action by agencies. Subtitle B requires the approval from both Houses of Congress of any significant rule without changes. This hurdle would be virtually impossible for agencies to overcome. By design, this subtitle strips away the authority of agencies that Congress created to develop expertise on specific financial matters. Subtitle C contradicts extensive Supreme Court precedent of court deference to the expertise of agencies by undermining the *Chevron doctrine* and permitting judges to substitute their perspectives for agency expertise. These provisions, alone and in combination, will have the effect of stopping critical agency efforts in their tracks.

III. This bill would increase the threat that nonbank financial institutions become too big to fail, that they actually fail, and that their failures wreak havoc on the financial system.

Among other imprudent provisions that are likely to increase financial instability, Title I of H.R. 10 would repeal the Financial Stability Oversight Council's (FSOC's) authority to designate non-bank financial companies or particular financial activities as systemically important financial institutions (SIFIs) and subject them to heightened oversight and prudential standards. This attack on FSOC's authority is entirely without merit. In exercising its designation authority, the FSOC has undertaken a rigorous, careful, and deliberative process and used this authority judiciously, designating only four financial institutions as SIFIs after determining that their material financial distress or the nature, scope, size, scale, concentration, interconnectedness, or mix of their activities could pose a threat to U.S. financial stability. Furthermore, FSOC has shown a willingness to rescind a SIFI designation when a financial institution no longer poses a threat. The provisions in this bill, however, would effectively allow firms like Lehman Brothers and AIG, companies whose failure during the 2008 financial crisis caused widespread panic and devastating losses throughout the financial system, to operate without sufficient supervision and regulation. In fact, this bill would retroactively repeal the FSOC's current SIFI designations, including that of AIG, which received the largest taxpayer bailout in U.S. history during the financial crisis. Removing this critical oversight function would reopen the possibility of a repeat scenario of 2008.

In addition, Title I of H.R. 10 would abolish the Office of Financial Research (OFR), which was established in Dodd-Frank to help promote financial stability. OFR helps to inform the FSOC's deliberations by looking across the financial system to measure and analyze risks, perform essential research, and collect and standardize financial data. Abolishing OFR would put a blindfold back on regulators when they should be encouraged to examine all aspects of the financial system that could foster financial instability.

IV. This bill would expose investors to increased harm and financial markets to increased instability.

H.R. 10 contains an array of provisions that would weaken protections for investors, reduce transparency, and weaken regulatory oversight of our securities markets. Two areas of particular concern are the repeal of the Department of Labor's conflict of interest rule and the assault on investor protections in the name of capital formation. However these do not, by any means, represent all of the anti-investor provisions in this bill.

Section 841 of H.R. 10 would repeal the Department of Labor's conflict of interest rule, the single most important advance in protection for retail investors and retirement savers in decades. The rule requires financial advisers to act in their customers' best interests when providing retirement investment advice, and it requires financial firms to rein in practices that encourage and reward advice that is not in customers' best interests. Since it was finalized, the rule has spurred pro-investor innovations, such as development of new mutual fund share classes and new fee-based annuities, with the potential to dramatically reduce investor costs even as they reduce harmful conflicts. Developments in the marketplace since the rule was finalized have clearly shown that even the smallest accountholders will retain access to affordable investment advice under the rule, as well as a choice regarding how to pay for that advice.

H.R. 10 would not only reverse this progress, it would suspend DOL's authority to determine who is a fiduciary under ERISA until at least 60 days after the Securities and Exchange Commission acts to adopt a fiduciary standard for broker-dealers under the securities laws. SEC action to address this problem is far from guaranteed even without the provisions in the bill that impose burdensome new requirements on the SEC before it can act. The DOL would be limited to adopting rules that are substantially identical to any rule adopted by the SEC. That limitation on DOL's authority to define who is a fiduciary under ERISA and what standard should apply would extend to areas where the SEC has no authority or expertise, including with regard to retirement plan fiduciary status and advice regarding non-securities. Before the SEC could engage in rulemaking under the securities laws, it would have to repeat studies it has already conducted and duplicate the extensive economic analysis conducted by the DOL, an analysis that has now been upheld by three separate district courts. In short, the clear intent of this provision of the bill is to preserve the ability of broker-dealers and insurance agents to syphon tens of billions of dollars a year out of the retirement and investment accounts of working families and retirees in order to line their own pockets.

Title IV of the bill also includes a host of provisions that, in the name of promoting capital formation, would weaken the very characteristics that once made our securities markets the envy of the world. While some of the provisions included here are harmless, if largely ineffective, others are reckless in the extreme, paving the way for a new wave of securities fraud

and abuse that will harm investors and undermine the very capital formation process they are meant to promote. The following are among the most troubling "capital formation" provisions of the bill:

- Subtitle P would allow sales of securities of highly speculative start-up companies through **crowdfunding**, based on limited disclosures and with no limits on the amount of the offering, no limits on who can invest or how much they can invest, and no requirement that the sales go through regulated crowdfunding intermediary. This is a recipe for disaster, which will turn the already abuse-prone crowdfunding market into a venue dominated by fraudsters in which capital is diverted from sound companies with genuine prospects for growth and unsophisticated investors suffer devastating financial losses.

- Subtitle M would create a new exemption for **"micro" offerings**, those raising $500,000 or less in a year, subject only to a limit on the number of purchasers and a requirement that those purchasers have a pre-existing relationship with the issuer. The provision, which broadly preempts state oversight authority, doesn't require that investors have the financial sophistication to understand the risks of the offering or the financial wherewithal to withstand potential losses. Nor does it require issuers to notify regulators of the offering, require them to provide even minimal disclosures, impose any limits on the amount individuals can invest, or include any restrictions on secondary sales.

- Subtitle F would make it easier for micro-cap companies to raise additional capital without appropriate regulatory scrutiny by granting them **access to the shelf registration** system designed for use by large, well known issuers. While speedy access to markets enables companies to take advantage of favorable market conditions, it also facilitates several varieties of fraudulent and abusive conduct. These include accounting fraud, market manipulation, and insider trading, all of which have been found to be more common among micro-cap companies and particularly among non-exchange-listed companies.

- Subtitle N would limit **SEC authority to oversee private offerings** under Regulation D, a market which rivals the public markets in size and importance. The SEC would lack even basic authority, under this provision, to limit misleading statements in private fund promotions or collect data necessary to determine how investors are faring and whether the offerings are promoting sustainable capital formation and job growth.

- Subtitle L would allow a new class of **venture exchanges** to offer securities of early stage companies without meeting a host of requirements to ensure either that the markets operate fairly or that issuers meet basic standards appropriate for sales to the general public. Subtitle S would eliminate the requirement that exchanges have **listing standards** comparable to the major national exchanges in order for securities listed on the exchange to qualify for exemption from state oversight. In combination, these provisions threaten to exempt a broad new category of securities from state oversight without any likelihood that federal oversight would fill the gap.

These are merely the most extreme of a group of "capital formation" provisions that, taken together, will destroy the underpinnings of our public securities markets, increase the risk of fraud in our private markets, and raise the cost of capital that investors demand to compensate for those increased risks.

V. The bill's elimination of the Federal Insurance Office halts four years of progress to make the insurance industry more transparent and accountable.

Title XI of the bill repeals section 313 of the Dodd-Frank Act, which created the Federal Insurance Office (FIO) and gave it the authority "to monitor the extent to which traditionally underserved communities and consumers, minorities, and low- and moderate-income persons have access to affordable insurance products."[3] Dodd-Frank also gave the FIO the ability to collect data to carry out this mission. In 2016, the Office concluded a two-year process of developing a working definition of affordability for the auto insurance market, with input from a variety of stakeholders, including consumer, civil rights and community groups and the insurance industry.[4] Earlier this year, FIO issued its first "Study on the Affordability of Personal Automobile Insurance," which found that 18.6 million Americans live in ZIP codes where auto insurance is unaffordable. FIO's role of providing relevant data and analysis is extremely important and can be used to improve the economic conditions in struggling communities. Eliminating the Federal Insurance Office and replacing it with a new office that lacks the authority to monitor the insurance market and collect the necessary information to explain these and other affordability challenges, as is proposed here, rolls back four years of progress to improve the transparency and accountability of the insurance market.

VI. This bill would undermine progress on housing finance reform.

Section 352 of H.R. 10 would repeal the important provision that the Director of the Federal Housing Finance Agency (FHFA) can only be removed "for cause" during his or her term. This would seriously undermine the agency's independence and make it open to political threats to its ability to fully exercise its oversight authority over the housing GSEs and the Federal Home Loan Banks. Taxpayers will benefit from having fully independent leadership of the agency charged with regulating these systemically important institutions. In addition, section 362 of this bill would require congressional appropriations for all FHFA expenses. Current law finances FHFA operations through assessments on its regulated entities without appropriations approval. This provision will weaken FHFA's oversight ability and constrain its ability to fully discharge its responsibilities in a timely and efficient manner.

This bill creates significant exemptions to the CFPB's Qualified Mortgage rule. Section 501 would weaken protections for purchasers of manufactured housing who are already routinely more subject to high-pressure sales tactics and higher costs than other housing consumers. The current protections, which are designed to discourage predatory lending by manufactured housing dealers and their affiliated finance companies, provide important consumer protections that should be maintained. Section 516 would exempt any loan held by a depository lender in its portfolio from the basic consumer protections in Title XIV of Dodd-Frank, including the basic

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[3] 31 U.S. Code § 313

[4] 81 Fed. Reg. at 45372 (July 13, 2016)

requirement that creditors base a loan decision on a reasonable expectation that the consumer can repay the loan. Documented review of the most important factors is essential in this process. This section also would exempt depositories from prohibitions against steering customers into loans if they merely *tell* the consumer that they plan to hold the loan on their balance sheet. Creditors should not be subject to different standards of care or diligence in considering and approving credit decisions based simply on where the loan ultimately will be held. This provision would exempt *any* depository without regard to asset limits from the basic ability to repay requirements that have been so important in reestablishing appropriate alignment of interests between creditors and mortgage applicants.

Section 531 of the bill would exempt institutions with less than $10 billion in assets from the escrow requirements for mortgage loans in current law. Failure to properly account for and assure timely payment of required tax and other amounts typically escrowed by mortgage lenders can be very injurious to consumers.

Section 576 of the bill would exempt depository institutions originating fewer than 100 closed end or 200 open ended residential mortgage loans from the mortgage data collection and reporting requirements of the Home Mortgage Disclosure Act (HMDA). Current law and pending regulations provide sufficient flexibility for smaller creditors to disclose pertinent information. Section 727 would eliminate the CFPB's authority to examine compliance with HMDA. Without such authority the government would have much less ability to monitor compliance with these reporting requirements, potentially weakening the regime and confidence in the data.

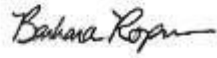
VII. Conclusion

The CHOICE Act removes critical authority from regulatory agencies and entrusts the nation's financial wellbeing to financial institutions, which have shown time and time again they are incapable of self-monitoring and self-policing. As such, it opens the door to a renewed round of financial crises that have in recent years been the real culprits in slowing growth and harming consumers. This bill is a recipe for disaster that will increase harm to consumers and investors and foster instability in the financial marketplace. We urge you to oppose the Financial CHOICE Act as it offers no choice that any consumer would knowingly make.

Sincerely,

Rohit Chopra
Senior Fellow

Micah Hauptman
Financial Services Counsel



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