Consumer Federation of America

January 16, 2018

The Honorable Jeb Hensarling
Chairman
Financial Services Committee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Maxine Waters
Ranking Member
Financial Services Committee
U.S. House of Representatives
Washington, D.C. 20515

Re: Vote NO on H.R. 4738, the Mutual Fund Litigation Reform Act
Vote NO on H.R. 4785, the American Customer Information Protection Act

Dear Chairman Hensarling, Ranking Member Waters, and Members of the Committee:

We are writing on behalf of the Consumer Federation of America (CFA) to urge you to oppose two anti-investor bills that are scheduled for mark-up this week, H.R. 4738, the Mutual Fund Litigation Reform Act, and H.R. 4785, the American Customer Information Protection Act.

- **Vote NO on H.R. 4738, the Mutual Fund Litigation Reform Act**

This legislation would take the problem of excessive mutual fund fees and make it worse by placing insurmountable barriers in the way of mutual fund shareholders who seek to hold funds, fund boards, and fund managers accountable when they charge excessive fees.

H.R. 4738 would impose two new requirements that, between them, would make it virtually impossible for mutual fund shareholders to bring claims for excessive fees. The first would require plaintiffs to plead with particularity, before they have access to evidence that would enable them to do so. The second would raise the burden of proof from a preponderance of evidence standard to a clear and convincing evidence standard. The effect would be to further immunize fund companies from accountability when they charge excessive fees.

The fund industry makes the self-interested argument that the legislation is needed to protect funds from frivolous litigation. But they offer no evidence that existing suits are frivolous, nor do they support their claim that existing regulations and market competition are effectively disciplining fund costs. On the contrary, careful examination of the mutual fund market makes clear that neither the requirement that fund boards oversee funds to ensure that they are run for the benefit of shareholders nor market competition have been uniformly effective in disciplining costs. In reality, the remarkable success in recent years of a few fund companies

that specialize in keeping costs low – most notably Vanguard – has contributed to a picture of dropping fund fees that masks excessive costs in other areas of the market.

If the market were functioning as intended, we would expect to see narrow price differences among comparable funds, but this is not the case.[1] Instead, we see large price differences even among something as basic as S&P 500 index funds, where keeping costs to a minimum is essential to their success in matching the performance of the index. This is particularly problematic in a broker-sold market characterized by reverse competition, where some funds compete to be sold by offering more generous compensation, rather than competing to be bought by offering a high quality product at a reasonable price.[2] This is a problem of some urgency, since reducing excessive costs is one of the most effective steps we can take to improve the returns investors receive on retirement and other long-term savings.

At a time when policymakers are concerned about improving Americans' retirement security, Congress should be looking for ways to further discipline excessive fund costs, rather than further undermining the already inadequate protections against excessive fees. One such step would be to overturn the so-called *Gartenburg* test, adopted by the Supreme Court in 2010, which requires plaintiffs to show that a fee charged is "so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining." Another would be to require funds to disclose costs in dollar amounts on account statements, to ensure that even financially unsophisticated investors can better understand the impact of those fees and thus encourage greater competition based on costs. Under no circumstances should Congress compound the problem by making it even more difficult for mutual fund shareholders to hold funds accountable.

For these reasons, we urge you to vote no when H.R. 4738 is marked up this week.

- **Vote NO on H.R. 4785, the American Customer Information Protection Act**

This bill would undermine the SEC's ability to conduct market surveillance and ensure market integrity by summarily prohibiting the Consolidated Audit Trail (CAT) from accepting any personally identifiable information (PII), except with respect to large traders. In doing so, it would preempt steps already underway to ensure the use of PII is limited and appropriate.

SEC Chairman Clayton stated in November that he has "made it clear that the SEC will not retrieve sensitive information from the CAT unless we believe appropriate protections are in place."[3] He further stated that the Commission staff is currently conducting an evaluation of their needs for PII in the CAT and that "it is important that the Commission, the SROs, and the plan processor continuously evaluate the approach to the collection, retention and protection of PII and other sensitive data, as we continue to progress in the development and operation of the CAT."

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1 See, e.g., Michael Cooper, Michael Halling and Wenhao Yang, The Mutual Fund Fee Puzzle, October, 2016 http://bit.ly/2nEq7MK.
2 See, e.g., Reshma Kapadia, The Great Fund Fee Divide, Barron's, January 6, 2018 http://bit.ly/2D88wt9.
3 Chairman Jay Clayton, Statement on Status of the Consolidated Audit Trail, November 14, 2017, http://bit.ly/2D95nW9.

We agree with Chairman Clayton that any decision on the retrieval of PII should be based on an informed analysis of the need for such information and any appropriate safeguards to assure that such information is not misused. Summarily prohibiting the retrieval of such information without any thoughtful analysis or evidence-based justification flies in the face of smart and effective governance and would hamstring the SEC from effectively carrying out its mission.

The CAT is a critical tool that will allow regulators to better understand how our computerized marketplace works, better and more quickly identify and address market disruptions, eliminate improper behavior, and more thoughtfully create effective rules of the road. It is clear, however, that there is a concerted industry campaign underway to undermine the CAT and leave the SEC in the dark. Rather than immediately deferring to industry interests, members of Congress should provide Chairman Clayton and his staff with the opportunity to conduct the careful evaluation and analysis that he promised.

For these reasons, we urge you to vote no when H.R. 4785 is marked up this week.

Respectfully submitted,

Barbara Roper
Director of Investor Protection

Micah Hauptman
Financial Services Counsel