TESTIMONY

OF

OLIVER IRELAND

BEFORE THE

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

OF THE

UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON FINANCIAL SERVICES

EXAMINING LEGISLATIVE PROPOSALS TO PRESERVE
CONSUMER CHOICE AND FINANCIAL INDEPENDENCE

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Chairman Neugebauer, Ranking Member Clay, and members of the Subcommittee, my name is Oliver Ireland. I am a partner in the financial services practice of the firm Morrison & Foerster LLP here in Washington DC. I have over forty years' experience as lawyer in the area of the regulation of banking institutions. I spent over twenty-five years as an attorney in the Federal Reserve System, including fifteen years as an Associate General Counsel at the Board in Washington working on a wide range of issues. Since leaving the Federal Reserve, I have spent fifteen years in private practice representing banks and other financial institutions. I am pleased to be here today to address legislative proposals to improve our system for regulating banking institutions.

In this hearing, the Subcommittee is considering a dozen different proposals that cover a broad range of issues. My testimony will focus on the most significant proposals where I believe that I can offer the most value to the Subcommittee, but I will be happy to address questions on any of the proposals to the best of my ability. As an initial matter, however, I would like to voice my support for the Subcommittee's efforts to examine the bank regulatory system at this time. It is important to seek improvements in a growing economy as well as in times of stress. Significant adverse events in our banking system almost always trigger legislation designed to address the problems that led to those events as they are perceived at the time. Later on, with the benefit of hindsight, it often becomes apparent that our bank regulatory system has become overly constraining whether due to the remedial legislation or to the normal evolution of banking services and markets.

The most recent financial crisis was followed by the Dodd-Frank Wall Street Reform and Consumer Protection Act, which was enacted almost five years ago. Although that Act is still in the process of implementation, it is not too early to look again at our regulatory system to see if we have appropriately balanced caution and restraint with the ability to innovate and to provide financial services to consumers and businesses.

The proposals that the Subcommittee is considering today include proposals dealing with the structure and the actions of the Consumer Financial Protection Bureau, proposals addressing the examination process, and proposals relating to state governments' access to information about individuals. As in the case of virtually all financial services legislation, the details of individual proposals may raise technical issues that need to be worked out, but I believe that the thrust of these proposals is constructive. In light of where we are in the legislative process, I will focus on the policy issues raised by these proposals, although I will be happy to discuss the details.

Turning to the individual proposals, H.R. 1266, The Financial Product Safety Commission Act of 2015, would replace the Director of the Consumer Financial Protection Bureau with a five-member bipartisan commission.
I strongly support this change. Executive departments in our government are typically headed by an individual, or Secretary, of the department that is appointed by the President with the advice and consent of the Senate. This structure enables the President to be able to implement policies with the President's own team. An advantage and disadvantage of this system is that when policies change with a new administration, policy changes can be implemented relatively quickly.

In the area of financial services regulation we have often, although not always, chosen a different model. The Federal Reserve Board, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission and the Commodity Futures Trading Commission, as well as any number of other independent agencies, are headed by boards or commissions that provide the expertise and balanced views of several members. The board or commission structure provides greater continuity and stability of policy than does an individual head of an agency. This continuity and stability helps to foster public confidence in our regulated financial institutions and helps to provide those institutions with confidence to innovate and invest. Continuity and stability are every bit as important in retail financial services as they are in other financial services. Even the most vigorous consumer advocate should recognize that dramatic shifts in policy in consumer protection will not be in consumers' longer run interests. Replacing the director of the Consumer Financial Protection Bureau with a bipartisan commission, particularly now that the Bureau is established, would provide for an approach to consumer protection that benefits from the views of the differing members of the commission and that is not subject to abrupt changes in direction that could come from individual directors.

H.R. 1737, the Reforming CFPB Indirect Auto Financing Guidance Act, would establish procedural steps, including public notice and comments, for the Consumer Financial Protection Bureau to follow before issuing guidance primarily related to indirect auto financing. Where agencies, such as the Bureau, have broad enforcement authority, the issuance of "guidance" is often the effective equivalent of a rule, but without the procedural protections established by the Administrative Procedure Act for rulemaking. The procedures that would be required by H.R. 1737 would improve the process for the issuance of guidance by the Bureau generally, as well as in the area of indirect auto financing.

H.R. 1941, The Financial Institutions Examination Fairness and Reform Act, would make changes to the bank examination process, including creating an Office of Independent Examination Review in the Federal Financial Institutions Examination Council to review and investigate complaints from financial institutions concerning examinations, examination practices, or examination reports. Financial institutions would be given the right to obtain an independent review of material supervisory determinations. The bank examination process allows federal bank supervisors to examine the activities of banking institutions in almost every detail, and the powers of the federal bank regulatory agencies to require changes to practices in the name of safety and soundness are broad. The importance of the safety and soundness of banking institutions to our financial system requires these detailed examinations and broad discretion to protect the safety and soundness of institutions, as well as the public purse, through the backing of the Federal Deposit Insurance fund with the full faith and credit of the United States.

The federal bank regulatory agencies bring to this task great expertise developed through the examination of all federally insured banking institutions over decades, giving them the ability to do peer comparisons at a point in time as well as over time. But examiners are not infallible, and even independent appeals processes within regulatory agencies may be influenced by a predisposition to support the judgments of the agency's expert examiners. In private practice, it is not uncommon to hear reports from banking institutions about disputes between banking institutions and their examiners and the examining agency where the banking institutions feel strongly that the examiners' judgments are in error.

Providing for an independent review of material supervisory determinations as contemplated by H.R. 1941 would provide banking institutions with the ability to obtain an independent and expert review of these determinations, and thereby should increase their confidence in the examination process without placing the bank regulatory agencies in conflict with their own examination staffs.

H.R. 2213 would provide a temporary safe harbor from enforcement of the integrated disclosure requirements for mortgage loan transactions under the Real Estate Settlement Procedures Act and the Truth in Lending Act until January 1, 2016—five months after the current August 1, 2015 effective date. The new requirements for mortgage loan transactions are detailed and complex. Depending on the transaction, there may be over one hundred transaction-specific disclosures that must be provided to the consumer. Fee and other information must be obtained from third parties, including title companies, appraisers and others. Estimated disclosures must be provided to consumers within three business days of receipt of an application, and final disclosures must be given to the consumer at least three business days before closing the transaction.

The new rules present numerous challenges. Mortgage lenders must: create new policies, procedures, forms and systems that capture existing and new terms and features; integrate the new policies, procedures, forms and systems with existing policies, procedures, forms and systems; train employees, and test to make sure that everything works. The modest safe harbor period provided by H.R. 2213 would help to ensure the uninterrupted availability of mortgage credit during the transition to the new rules.

H.R. 1210, The Portfolio Lending and Mortgage Access Act, would create a safe harbor from litigation or supervisory action on the basis that a mortgage loan is not a qualified mortgage for certain mortgages held on the balance sheet of a depository institution. When a depository institution holds a mortgage loan on its balance sheet, it retains the full risk of the loan and has a strong incentive to maintain high underwriting standards. This safe harbor would encourage depository institutions, particularly smaller depository institutions, to continue make mortgage loans in the face of the complexity and attendant risks of the new mortgage rules.

H.R. 766, The Financial Institutions Customer Protection Act of 2015, and H.R. 1413, The Firearms Manufacturers and Dealers Protection Act of 2015, both address the problem of access to bank services, particularly credit and deposit and payment services by legal businesses. Access to credit and deposit and payment services is the lifeblood of any business. Without access these services, no business of any size can survive. But federal banks regulators' concern for reputational risk and the Department of Justice's concern for potential illegal activity on the part of some bank customers has led some banks to be reluctant to provide these services to a variety of businesses. The potential inability to obtain banking services threatens the viability of these businesses, even though these businesses have not been found to be engaged in illegal activity.

If businesses are operating in violation of applicable laws, the appropriate response is direct action through the enforcement of those applicable laws, not indirect action to discourage banks from providing services to these businesses. In particular, the use of "reputational risk" by bank regulators for this purpose is inappropriate. Banks, even more than many other businesses, depend on their reputations and public confidence. Even with deposit insurance, banks depend on their reputations and public confidence in order to borrow funds by attracting deposits. But the issues that adversely affect banks' ability to attract deposits are limited and the implementation of social and criminal policies is most appropriately achieved through actions directed at the specific businesses that are the subject of the concern so that prohibited acts can be clearly defined and the protections of due process applied, rather than addressing these issues indirectly by discouraging the provision of banking services.

H.R. 1553, The Small Bank Exam Cycle Reform Act of 2015, H.R. 1660, The Federal Saving Association Charter Flexibility Act of 2015, and H.R. 2287, The National Credit Union Budget Transparency Act, would make seemingly technical, but nonetheless important, changes to the supervisory process for banks and credit unions. H.R. 1553 would increase the size of depository institutions eligible for an eighteen-month examination cycle instead of an annual examination cycle. This change would benefit both banks and bank regulators without jeopardizing the stability of our financial system. Examinations consume time and resources at both the examining regulator and at the institution examined. Reducing the examination frequency for smaller institutions would facilitate a more risk-based approach to examinations.

H.R. 1660 would allow federal savings associations to elect to operate with the powers of national banks, including higher lending limits, without going through the expense of corporate restructuring and applying for a national bank charter. Both federal savings and loan associations and national banks are regulated by the OCC. A similar provision has worked well in Massachusetts and I can see no reason not to allow this election.

H.R. 2287 would provide greater transparency in the National Credit Union Administration's budgeting process. While the National Credit Union Administration is an independent agency and is self-funded, greater transparency can provide discipline from public accountability, without jeopardizing the agency's policy independence.

H.R. 2091, The Child Support Assistance Act, and the draft bill prepared by Mr. Williams are both focused on access to information. H.R. 2091 would amend the Fair Credit Reporting Act to make it a permissible purpose to obtain a consumer report where the consumer report is requested by the head of a state or local child support enforcement agency or other authorized state or local government official to enforce a child support order, and by deleting the requirement for ten days' prior notice to the consumer for obtaining consumer reports in connection with obtaining consumer reports in connection with child support. The broadening of the permissible purposes and the removal of the prior notice requirement would facilitate the administration of state and local child support programs.

The Williams bill would direct the Attorney General to provide criminal history information to state officials to facilitate background checks on non-depository financial service providers in addition to the mortgage loan originators. I understand that access to this information can cut as much as three weeks out of the process for licensing these financial service providers. This is the kind of streamlining of regulatory processes that promotes confidence in our regulatory system and should be encouraged.

Thank you for your attention. I would be happy to address any questions that you may have.

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