Testimony of

Charles T. Tuggle, Jr.

On behalf of the

American Bankers Association

before the

Subcommittee on Financial Institutions and Consumer Credit

of the

Committee on Financial Services

United States House of Representatives

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Chairman Luetkemeyer, Ranking Member Clay, and members of the Subcommittee, I am Charles Tuggle, Executive Vice President and General Counsel of First Horizon National Corporation. First Horizon is a $30 billion financial institution headquartered in Memphis, Tennessee. We have 170 bank branches in eight states in the southeast United States. We offer a full range of banking services to consumer and commercial customers in the southeast. Our fixed income business operates nationwide, and our fixed income customers include about half of all banks in the U.S. with portfolios over $100 million, as well as other institutional investors. Later this year, after we get regulatory approval, we plan to merge with another southeastern bank, increasing our assets to $40 billion and roughly doubling our branches.

I appreciate the opportunity to present the views of the American Bankers Association (ABA) on several important bills that would help ease the pressures banks like mine face in meeting the needs of our customers and communities. The ABA is the voice of the nation's $17 trillion banking industry, which is composed of small, mid-size, regional and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits and extend more than $9 trillion in loans.

Thank you, Mr. Chairman, for holding this hearing. It is both timely and beneficial to assess objectively where the current financial regulatory system is achieving policymakers' objectives, and where it is not. Our industry and its regulators both acknowledge that new regulations have overshot their mark in several important ways, imposing unintended costs on consumers, businesses, and the economy. We support Congressional efforts to identify where statutory and regulatory provisions need revision, and to make adjustments that will promote economic activity without compromising systemic stability. The bills under discussion today represent several advances that will be helpful to our customers. More can and needs to be done, and we appreciate the leadership of Chairman Hensarling and the entire Financial Services Committee for advancing much needed reforms.

The ABA is very supportive of the H.R. 3312, the Systemic Risk Designation Improvement Act of 2017, a bipartisan bill that would eliminate the arbitrary dollar threshold currently in place for designation as a systemically important financial institution, commonly known as a SIFI. Instead, this bill would establish a process for identifying and regulating globally systemic institutions based on the nature of their business, not simply their size. This bill offers an opportunity to tailor and focus supervisory oversight to best accomplish the goal of promoting safe and sound banking and protecting against systemic risks.

ABA also supports the Community Institution Mortgage Relief Act and the TRID Improvement Act of 2017. These bills take important steps toward enhancing consistency and efficiency in key aspects of the mortgage lending process. In my testimony, I offer suggestions for how these bills can be made even more effective.

We thank you, Mr. Chairman, for your leadership, not only on the SIFI designation issue but on many common sense proposals that would ease the barriers banks face in meeting the needs of our customers. In the remainder of my testimony, I will discuss each of the three bills in turn.

I. Systemic Risk Designation Improvement Act of 2017 (H.R. 3312)

The ABA strongly supports H.R. 3312. Under the Dodd Frank Act, an institution with $50 billion or more in consolidated assets is automatically deemed to be a "systemically important financial institution" or "SIFI." Each SIFI is subject to much higher levels of regulation ***regardless of the real risk it might pose to the financial system***. This arbitrary size threshold—and the significant regulatory requirements that come with it—has needlessly trapped many banks without any benefit to the system, handcuffing their abilities to provide needed credit and other services to consumers, businesses and their communities.

Institutions over $50 billion vary greatly, by size, scope and geography. Many have a regional retail presence, others specialize in commercial lending. Most are domestically focused but a few are global banks. Most have regional market areas, do not have significant international presence or exposure, and are not engaged in complex market, trading, or investment activities. In fact, many simply offer traditional banking products and services whose risks are well understood by our industry and its regulators. From a systemic viewpoint such banks are no riskier than community banks; the larger banks merely offer traditional products to a larger number of customers over a larger geographic area. By any objective assessment, most banks designated today as being "systemically important" in reality pose no systemic risk at all, either domestically or globally.

For a bank like mine, soon to have $40 billion in assets, the prospect of crossing the arbitrary asset threshold at $50 billion—which will trigger much greater expense and will be a significant drain on existing resources—is very troubling. The fact that we are growing means that we are successfully and effectively meeting the needs of our customers. Good business decisions should not be hijacked by arbitrary cutoffs that bear no relationship with danger to the financial system.

H.R. 3312—a bipartisan piece of legislation—would replace the current automatic SIFI designation with a process for the Federal Reserve Board to make a determination that an individual financial institution, or group of institutions, is systemically important and subject to enhanced supervision and prudential regulation. The Fed would make its determination by analyzing a variety of relevant measures of risk, rather than being bound by the sole criterion of asset size—which taken alone is a poor measure of risk—and allow the regulators to tailor their supervision and reduce regulatory burdens as appropriate. A separate process would apply to global systemically important banks.

ABA believes strongly that the most effective and value-added supervision regime is one that is risk-based and individually tailored, taking into account a wide variety of factors including size, business model, complexity of operations, and other factors relevant to the systemic risk of its activities, products, and services. H.R. 3312 addresses this issue by establishing a process that allows banking regulators to review institutions appropriately and not based on size alone.

We are encouraged by recent comments of some regulators acknowledging the need for more tailored regulation, for better coordination among regulators, and for revisiting regulations that may have led to negative unintended consequences for customers and the economy. But Congress has a critical role in both permitting and driving this change. H.R. 3312 takes an important step forward, to the benefit of our financial system and our economy. We urge support for this legislation.

II. Community Institution Mortgage Relief Act

We support the Community Institution Mortgage Relief Act introduced by Rep. Tenney. This bill would provide needed relief for smaller lenders with regard to escrow practices. The legislation would exempt lenders with $50 billion in assets or less from escrow requirements on Higher Priced Mortgage Loans (HPML) they hold in their portfolios and it would provide regulatory relief for small servicers, defined as those servicing 30,000 loans or fewer, by exempting them from various servicing requirements.

The important exemptions detailed in this legislation recognize the strong history of small institutions in providing high-quality mortgage servicing, even with limited staff and resources. Given their excellent track record, small servicers should be incentivized to continue to service mortgage loans. Unfortunately, under current rules, banks generally must provide escrow services for certain types of mortgage loans (subject to limited and often confusing exemptions), even to borrowers who don't want those services. There are efficiencies of scale to providing escrow services which smaller banks cannot enjoy. This, combined with compliance costs, makes it more expensive for smaller lenders to offer escrow services. The result is that all borrowers end up paying more, even those who don't want to avail themselves of escrow services. Even worse, some customers will face fewer credit choices as small local lenders choose to limit their participation in the mortgage market rather than take on the additional expense of adding escrow services.

Existing regulatory efforts to provide exemptions and other relief from escrow mandates have resulted in a complicated and confusing hodgepodge of requirements which makes compliance difficult. Under current escrow rules, exemptions are limited based upon a complex web of qualifiers, including geographic limitations (the servicer must be in a defined rural or underserved area), size limitations (the servicer must be under an asset cap of $2 billion), and servicing portfolio limitations (the servicer cannot service more than 2,000 loans annually).

This legislation seeks to simplify and provide some relief—goals we support. The bill could be improved, however. In its current form it adds complexity and hard-wires certain limitations and thresholds that might better be achieved through regulation. Over time, the regulators will be in a position to adjust the rules to address changing market conditions.

Also, we are concerned about the $50 billion cutoff in the current bill. It is, at best, an imprecise measure of a smaller servicer. Although size-only regulations may be a simple shortcut for supervising financial institutions, they are a poor proxy for market signals or risk; distort business decisions for institutions close to the threshold; and misallocate resources of the institution and regulators. Moreover, they needlessly burden many financial institutions which have noncomplex operations and business models; as a result they increase costs and reduce products and services available to bank customers.

For example, an institution which is well over $50 billion in assets may not be heavily engaged in mortgage lending or servicing. That institution may hold and service few loans, but under the approach taken by this bill, would still have to comply with escrow requirements on any HPML loans. The cost and complexity of doing so may force that institution to abandon mortgage lending and servicing in that market segment entirely, depriving the bank's customers of a convenient and trusted option and eliminating a competitor from the market. A cutoff based on the number of loans being serviced would be a better alternative than the asset size cutoff included in the bill. The loan cutoff for small servicers which is included in the current bill is clear and consistent, and it comports with feedback we have received from member banks about the appropriate number of loans which generally ought to define a "small" servicer.

III. TRID Improvement Act of 2017

The ABA appreciates the efforts undertaken by Rep. Hill in beginning to address the many unanswered questions about liability and compliance under the new Truth in Lending and Real Estate Settlement Procedure Act Integrated Rules, also known as the Know Before You Owe or "TRID". We believe the TRID Improvement legislation is an important first step, but there are many more steps needed to provide clarity under the rules. We offer the following comments as a starting point for discussion of further efforts that might be undertaken to bring clarity to the rules, and we stand ready to work with Rep. Hill and any other members of the committee in developing further legislation.

The housing market plays a vital role in the growth of our economy, creating jobs, fostering communities, and improving the standard of living of homeowners. In spite of record low interest rates for years, the housing market has been weak and still is far from its potential. While homeownership levels may have been over-stimulated before the financial crisis, it is shocking that now, ten years later, homeownership has fallen to levels not seen in 50 years. This result is shocking but should not be surprising. The cost of originating a home loan has doubled since 2009, to over $7,000 according to one of our members. As a major mortgage lender, this same bank reports that TRID's massive compliance costs added 350,000 man hours (or 175 full time employees/year), and cost $25 million for implementation with the likelihood for spending twice that over the next five years. This is not an isolated case, but is repeated for every bank involved in mortgage lending. Ultimately, it is the homebuyer that bears the added costs and the inconvenience of a more cumbersome and confusing process with slower times to closing.

There is a serious need to clarify liabilities under the new TRID rules, which the TRID bill does not address. A most critical element of uncertainty continues to be the scope and effect of RESPA and TILA's liability provisions given the integration of the two sets of disclosures. Since the launch of the TRID reform implementation process, banks have expressed significant anxiety about which remedies are effective under which circumstances, and about the extent to which those remedies affect non-creditors, including settlement agents and investors.

The continued uncertainty in liability forces industry stakeholders to assume that the more stringent liability will apply in all instances of non-compliance, even if that is not the intent of the law or the Consumer Financial Protection Bureau (Bureau). In the long run, the resulting impact to consumers is grim—lenders and investors will avoid exposure to uncertainty and confusion, which will result in diminished product choice and increased costs for borrowers. ABA has consistently called for more transparency regarding risks that stem from unintentional mistakes and technical non-compliance with the TRID rules. The complexity of the regulations, the intricacy of the TRID disclosure forms, and the infinite number of scenarios involved in mortgage finance create a situation where inadvertent mistakes and noncompliance are unavoidable.

In addition, there are differences in the interpretation of various TRID provisions between lenders and investors. These would be easily resolved by clarity in how TRID liabilities apply. In short, it is the Bureau's responsibility as a policy maker to affirm with certainty what law they are relying on for the different provisions. That is good public policy. It will also result in more consistent outcomes for consumers when courts interpret the law, and, most importantly, it is a critical piece of information for compliance so banks know what cure provisions apply. Congress should direct the Bureau to provide this clarity to the marketplace.

In a comment letter[1] ABA filed jointly with the Consumer Bankers Association on October 18, 2016, we recommended that the Bureau provide a more detailed description of the specific statutory

[1] https://www.aba.com/Advocacy/commentletters/Documents/cl-KBYO-2016Oct.pdf

provisions under RESPA and/or TILA (or other statutes) it relied upon for each provision of the TRID disclosure provisions contained in the Bureau's December 2013 final TRID rule. The two Associations stated that it is only though a more precise description of the statutory authority for each disclosure element that industry stakeholders and government authorities will be able to properly identify penalties and liabilities applicable under the law. The comments below, taken from that letter, can serve as a basis for legislation that would mandate the Bureau act if it does not do so on its own.

First, we have submitted recommendations for sample documents containing a bright-line matrix of all the various disclosure elements of the Loan Estimate and Closing Disclosure forms (i.e., the Projected Payments table; Estimated Taxes, Insurance & Assessments table; adjustable rate and payment tables, among others). In such a matrix, the Bureau could explicitly address how liability might attach to any specific error. Any such matrix should include: (1) each regulatory provision that provides for a disclosure item or requirement; (2) a description of the statutory section relied upon for each disclosure item or requirement; (3) if curable, how it may be cured, e.g., as a tolerance refund, as a non-numeric clerical error, or under Section 130(b) of TILA; and (4) any comments. We understand that developing such a matrix would require that the Bureau issue additional clarifications beyond the items defined by the present proposed rulemaking. Nonetheless, we think this additional effort would be of considerable value, as stakeholders urgently need this guidance, and consumer interests would be greatly enhanced by the added clarity.

Second, although the Bureau informally issued a blank Loan Estimate and Closing Disclosure that included annotations to the statutory sections under Part B of TILA that were "referenced" in the preamble to the TRID rule, these annotated disclosures are of limited usefulness because they are informal, do not specifically address individual disclosure items, and for some provisions may conflict with the preamble of the 2013 final rule with respect to the statutory authority relied on or implemented. If the Bureau provided a matrix as described herein, issued via official commentary to the regulations, it would facilitate proper application of the law, and would allow market participants to recognize and manage their responsibility and/or accountability in the transaction.

Third, the cure provisions under TRID are extremely limited. Only two cure provisions exist under the regulation: one for tolerance violations and the other for non-numeric clerical errors. This means that there is no provision for lenders to fix other inadvertent mistakes that may not actually harm a borrower. While there is an additional cure provision under the statute that may have broader applicability, the extent to which the statutory cure provision is available with respect to TRID violations is unclear, because it historically has been applied only in the context of numerical under-disclosures of the annual percentage rate and finance charge, rather than to the substantial amount of information that must be disclosed under TRID. For this reason, there are many different interpretations in the industry regarding the applicability of the statutory cure provisions.

In a December 29, 2015 letter to the financial industry, Bureau Director Cordray added interpretive details to these cure provisions by stating that, "consistent with existing [TILA] principles, liability for statutory and class action damages would be assessed with reference to the final closing disclosure issued, not to the loan estimate, meaning that a corrected closing disclosure could, in many cases, forestall any such private liability." We read this statement to mean that the Bureau believes that many TILA violations on the Loan Estimate or Closing Disclosure may be "cured" with a corrected final closing disclosure. It would be useful for Congress to direct the Bureau to formalize formalized this interpretation via incorporation of this language into TRID's regulatory text or commentary.

ABA would be pleased to work with the committee on legislation to effectuate these recommendations.

Summary

ABA believes that common sense proposals are desperately needed that will make our regulatory system more efficient and effective. Doing so would free up scarce resources for banks that can be used instead on meeting the needs of customers and communities. Clearer and more streamlined rules also help the regulators devote resources to where the risks truly lie rather than wasting resources as a result of arbitrary asset thresholds or confusing and conflicting rules that create uncertainty and legal risks—which ultimately reduce access to credit.

The three bill we discussed today make significant advances to rationalize the system. More can and needs to be done and ABA stands ready to assist in this process. Thank you again, Mr. Chairman for your leadership to bring some much needed relief to our financial system and the communities across the country we serve.