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Consumer Credit and Debt Protection Act: State Enforcement Authority

Good afternoon Chairman Rush, Ranking Member Radanovich, and members of the Subcommittee. My name is John Beisner. I am a partner at O'Melveny and Myers, and I am appearing on behalf of the U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform ("ILR"). As you know, the Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. ILR is a national campaign representing the nation's business community with the critical mission of making America's legal system simpler, fairer and faster for everyone. I appreciate the opportunity to testify about the Consumer Credit and Debt Protection Act.

My focus today is not on the substantive elements of the Consumer Credit Protection and Debt Protection Act.[1] Rather, I would like to discuss Section 4 of the bill, which enables state attorneys general to enforce the bill's substantive provisions and a broad range of other federal laws. Under Section 4, states may "bring a civil action on behalf of [their] residents in an appropriate State or district court of the United States to enforce the provisions of the Federal Trade Commission Act or any other Act enforced by the Federal Trade Commission . . . whenever the attorney general of the State has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of a rule prescribed under [the Act] or any other rule relating to consumer credit or debt promulgated by the Federal Trade Commission." States must notify the Commission 60 days prior to filing suit under Section 4 so that the FTC has an opportunity to intervene. Finally, Section 4 permits states to recover damages, costs, and attorneys' fees.

Because Section 4 permits state attorneys general to invoke any law within the jurisdiction of the FTC, its scope is significant. A wide range of laws fall within the FTC's ambit, including the Truth in Lending Act, the Equal Credit Opportunity Act, the Consumer Leasing Act, the Fair Credit Billing Act, the Fair Credit Reporting Act, and the Fair Debt Collection Practices Act. As long as a state believed its residents were harmed by a violation of a Commission rule related to consumer credit or debt, it would have authority under Section 4 to sue.

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[1] Although my testimony has focused on the grant of federal authority to the state attorneys general in Section 4, the Chamber may have concerns over other aspects of the bill, such as the expedited rulemaking authority, and it appreciates the opportunity to discuss later with the Committee.

Although protecting consumers from unfair trade practices is a laudable goal, it is important for the Committee to recognize that providing state attorneys general with new and expansive authority to enforce federal law carries with it a significant risk of litigation abuse. Therefore, I respectfully urge the Committee to consider adding safeguards to the legislation to ensure that such authority is exercised in a uniform, open, and impartial manner.

Background: State Enforcement of Federal Laws

The authority of state officials to enforce federal laws is well-established in the antitrust realm, where the Sherman and Clayton Acts permit state attorneys general to prosecute anti-competitive behavior that violates federal law. In recent years, however, Congress has enacted several statutes that expand the authority of state and local governments to enforce federal laws into new areas. For example, state attorneys general are now empowered to enforce federal laws governing diverse issues such as automated telemarketing, on-line gaming, transportation of household goods, and on-line privacy – to name a few. In the past four months, Congress expanded state enforcement authority even farther: the economic stimulus bill authorized state attorneys general to enforce the federal Health Insurance Portability and Accountability Act, and the Omnibus Appropriations Bill authorized state attorneys general to enforce the federal Truth in Lending Act and any mortgage loan rules promulgated by the FTC, If enacted, Section 4 of the Consumer Credit Protection Improvement Act would mark an even more significant delegation of federal authority.

When the executive branch of the federal government enforces federal laws, those involved are subject to numerous safeguards to ensure that prosecutorial efforts are consistent, fair, and free from outside bias or political interference. Those safeguards include statutes prohibiting public corruption, ethics rules governing political activities of anyone retained by the government to assist in enforcement efforts, and Executive Order 13433, which limits the use of contingent fee arrangements with private attorneys retained by the government. States and the private attorneys they hire are generally not subject to such safeguards. As a result, delegation of enforcement authority to states can result in inefficient, haphazard prosecution efforts – and create opportunities for public corruption.

Let me be clear: the vast majority of state attorneys general exercise their powers every day in a responsible manner, consistent with the need to protect the citizens of their jurisdictions. Nevertheless, there have been troubling reports of some state officials placing large-scale litigation projects in the hands of private attorneys who have contributed to their campaigns. For example:

- Questions have been raised in Mississippi about whether Attorney General James Hood used private attorney arrangements to reward friends and political campaign contributors with contingency-based engagements that yield lucrative fees that would otherwise accrue to the state treasury.[2]

[2] *See*, *e.g.*, L. Rupp, *Senate Restricts Attorneys' Contracts*, CLARION-LEDGER, Jan. 26, 2008, at 1B ("Hood was under fire after attorney Joey Langston - one of his biggest campaign contributors - was paid $14 million to help

- Pennsylvania Governor Ed Rendell has recently faced similar criticism for awarding a no-bid contract to a campaign contributor – after his own Attorney General declined to hire the attorney – to sue a pharmaceutical company on behalf of the state.[3]

- In Rhode Island, state officials came under criticism for hiring Jack McConnell, a prominent contributor to state officials, to spearhead the state's litigation against lead paint companies on a contingent fee basis.[4]

In the public litigation context, contingency fee arrangements can also create significant conflicts of interest. A basic principle of good government is that public actors should not participate in decisions in which they have a financial stake. Deputizing plaintiffs' attorneys to serve as private attorneys general flouts this fundamental principle, because those attorneys get paid nothing unless they win – and they have no chance of winning unless they prosecute claims. Accordingly, such attorneys have a clear incentive to litigate (and to continue litigating), even when doing so is not in the public interest (particularly when the facts discovered indicate that prosecution is unwarranted).

Finally, contingent fee arrangements often shortchange taxpayers. Any recovery in litigation initiated by the government belongs, by definition, to the public fisc. Because contingent fee arrangements typically require a governmental entity to promise a significant percentage of its recovery to private counsel, the payments to those counsel divert money that should be going to taxpayers (or relieving their tax burdens).

Proposed Safeguards

For all of these reasons, Congress should approach the expansion of state authority to enforce federal laws with care – and ensure that any such expansion is accompanied by safeguards to ensure that federal laws are enforced in an open, impartial and ethical manner.

As the Consumer Credit and Debt Protection Act moves through the legislative process, the Subcommittee should consider amending the legislation to include some or all of the following safeguards:

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the state collect $100 million in back taxes from MCI. Earlier this month, Langston pleaded guilty to corruption charges in an unrelated case. In his statement, he said he tried to influence Mississippi judges, sometimes with help from Oxford lawyer Dickie Scruggs."); S. Byrd, *Senate OKs Attorney Bill*, HATTIESBURG AMERICAN, Jan. 26, 2008 ("[Judiciary Chairman Joey] Fillingane cited attorney Joey Langston of Booneville as an example of 'a mistake' made by Hood. Langston received $14 million in legal fees for assisting in the state's successful lawsuit against MCI, Inc. The state received $118 million from the lawsuit about overdue taxes. Langston also has made hefty contributions to Hood's campaigns."); N. Chandler, *Hood Defends Contract Awarded to Political Donor*, CLARION-LEDGER, Oct. 23, 2007 at 1B ("Langston gave a $100,000 contribution to Hood and a similar amount to the Democratic Attorneys General Association, which then contributed to Hood.").

3 *See, e.g.*, *Editorial: There Has to be a Limit*, PHIL. INQUIRER, Apr. 15, 2009, at A14.

4 *See, e.g.*, Mike Stanton, *In Deposition, Lynch Defended DuPont Pact As 'Best Deal,'* PROVIDENCE JOURNAL, Aug. 20, 2006, at A01.

- **Require Disclosure of Private Attorney Retention Agreements.** In order to ensure that attorney engagements are not driven by political considerations, Congress should require state officials who retain private attorneys to disclose the arrangement to the Attorney General of the United States for publication in the Federal Register. For a federal policy to be successful, it must be implemented in a fair and consistent manner, with effective oversight by the federal officials primarily responsible for enforcing it. Effective oversight becomes more difficult when enforcement is delegated to non-federal actors, which can lead to enforcement decisions that do not necessarily coincide with federal policy goals. Requiring transparency will help ensure the objective, consistent implementation of federal laws.

- **Prohibit "Pay-to-Play" Arrangements.** Congress should sever the connection between campaign contributions and "private attorney general" retentions by prohibiting state and local government officials from rewarding substantial campaign contributors with potentially lucrative contracts to enforce federal laws.

- **Prohibit Contingent Fee Arrangements Consistent with Executive Order 13433.** Under Executive Order 13433, the federal government can only enter contingent fee arrangements with private attorneys if the Attorney General finds that such an arrangement is necessary. As a result, federal agencies using private attorneys to assist in the enforcement of federal law may use contingent fee arrangements only where it is cost-effective and consistent with the public interest. Congress should apply these same standards to state and local governments' efforts to enforce federal law.

While these safeguards would promote transparency and reduce ethical concerns about the use of contingency fee arrangements to reward political donors, they would ***not*** diminish the discretion of state and local governments to make independent, objective judgments about the best course of action in each case involving enforcement of federal law.

Once again, thank you for the opportunity to testify today.