

Testimony of the
U.S. Public Interest Research Group

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Financial Consumer Hotline Act of 2007:
Providing Consumers with Easy Access to the Appropriate
Banking Regulator

before the

Subcommittee on Financial Institutions and Consumer Credit
Honorable Carolyn Maloney, Chair

Committee on Financial Services
United States House of Representatives

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Madame Chair Maloney, members of the committee: I am Edmund Mierzwinski, Consumer Program Director of U.S. PIRG. As you know, U.S. PIRG serves as the federation of and national lobbying office for state Public Interest Research Groups. PIRGs are non-profit, non-partisan public interest advocacy organizations with offices around the country.

Thank you for the opportunity to offer U.S. PIRG's views at this hearing on "Providing Consumers with Easy Access to the Appropriate Banking Regulator." We commend you for having this timely hearing and we urge passage of your proposed bill: The Financial Consumer Hotline Act of 2007.

SUMMARY:

We commend you for having this timely hearing and we urge passage of your proposed bill: The Financial Consumer Hotline Act of 2007. We support the hotline as a necessary first step in improving consumer financial services complaint handling. We also believe that consumers need a centralized, non-biased one-stop federal source for complaint-handling and finding unbiased information about bank laws. We support the proposed study of a centralized website. We recommend further, however, that consumers need a "Complaint-busters" centralized source for any sort of complaint, whether by phone, web, mail, fax or email. Ideally, it should be an advocate on their behalf and be independent of the bank-friendly culture that permeates OCC and the other bank regulators. In this testimony, we recommend these and other suggested improvements to current law.

DISCUSSION

We support your proposal to establish a centralized one-call hotline and call for a study of a centralized website. In addition to the hotline, we recommend that the committee consider other changes to current bank complaint handling. The additional changes are designed to make the hotline more effective, reduce the friction caused by the cozy relationship regulators have with banks and balance the scales more favorably toward victims of unfair bank practices.

The great science fiction writer and futurist Arthur C. Clarke once said that "any sufficiently advanced technology is indistinguishable from magic." The analog here would be that any sufficiently pro-consumer complaint handling system should be widely-available, simple and easy-to-use and transparent.

Unfortunately, there is nothing magical about dealing with mistakes or law violations by your bank. Federal bank regulators have a cozy relationship with banks. This culture impedes their ability to understand their role as public servants.

First, based on complaints to our offices, most consumers have never heard of any bank regulator, except perhaps the FDIC because its name is sticker-ed on bank windows. Second, no bank regulator serves as an advocate for consumers. Although their somewhat opaque complaint-handling processes purport neutrality, the systems appear to favor the banks. According to the GAO:

"Bank Made an Error" was the least common outcome for complaints resolved by OCC and FDIC and next-to-least common for the other two regulators.¹

Third, in our view, no bank regulator views its primary, secondary or even tertiary role as helping consumers. Even the OCC's ballyhooed new website, helpwithmybank.gov, largely offers regulator-colored views of the law and does not even include full explanations of consumer rights.²

Fourth, the insistence by bank regulators in spending time explaining their own differences, rather than their similarities, is unnecessary and confusing. For example, the OCC's helpwithmybank.gov is largely promotional of the OCC's own "National Banks" to the point of obfuscating the site's well-intentioned general consumer mission:

Helpwithmybank.gov helps you find answers to your **National Banking** questions... Assistance for **National Bank** Customers... Have you checked our Get Answers section for information about **National Bank** regulations and your rights as a bank customer?
[emphasis added]

Several of the recommendations we make below could be incorporated as amendments to your bill. Others might be subjects for future hearings on improving the rights and representation of consumers in the financial system.

ADDITIONAL AMENDMENTS

1) Establish one-stop complaint shopping through a central source: We recommend further that you amend the bill to require a centralized source for all points of entry -- phone, web, mail, fax or email -- for complaints. Your bill would commendably require a report to Congress on establishing a central website. Yet, whether a consumer complains by phone, web, mail, fax or email, he or she should have one-stop complaint shopping. While this centralized source would be nominally similar to the manner in which the 2003 Fair and Accurate Credit Transactions Act amendments to the Fair Credit Reporting Act³ required the three national credit bureaus to provide free credit reports -- whether requested by phone, mail or website -- through a centralized source, it must be better than the FACTA system, which is little more than a conduit.

Unlike the FACTA centralized source, which transfers requests to each credit bureau and its own different Byzantine systems, the Bank Complaint Central Source should be truly centralized, where a consumer -- whether a national bank consumer or a state non-member bank consumer or an operating subsidiary consumer, simply complains to the central source and uses one complaint form. The system itself should later figure out how and where to direct the complaint.

It should be indistinguishable from magic. No consumer should need to worry about drilling down into web pages to figure out what kind of entity he or she has an account or a hassle with.

This entire system should be multi-lingual; to start, it should be in at least English and Spanish.

As an example of the problem consumers now face, the OCC's helpwithmybank.gov spends too much time urging consumers to figure out whether they're correctly in the "National Bank" place to the point of obfuscating the site's general consumer mission. Once a consumer figures out how to file a complaint (but is discouraged first from doing so until exhausting all efforts with the bank itself) the site requires consumers to undertake a forensic institution-finding exercise through a decision-tree:

- Check the National Bank List. A national bank is a financial institution chartered and regulated by the Office of the Comptroller of the Currency. National banks typically have the words "national" or "national association" in their titles, or the letters "N.A." or "NT&SA" in their names. {NEXT}
- Check the List of National Bank Operating Subsidiaries.

What consumer cares or has the patience? More importantly, why is this forensic exercise the consumer's job?

2) Require a Complaint-busters icon and logo: We further recommend that the committee require that all regulated banks and other entities include a memorable express statutory and graphical complaint icon and logo – think “Ghostbusters, who ya gonna call?” or “Mr. Yuck, the Poison Control Center guy,” – on their websites and account statements and on brochures available at bank branches, promoting and directing consumers to the new shared centralized complaint resource.

Since we recognize that this requirement on the banks may not quickly make it through the legislative process, the committee should at a minimum require that the regulators use such an icon and logo on their home pages, and also advertise the centralized source, on television and radio as well as on their websites. Consumer groups could also download the Complaint-busters icon and link from their websites to the centralized source.

3) As a further step, make the Complaint-busters central source an independent funded advocate for consumers: Most of the bank regulators have built their various fiefs largely through the stability of guaranteed fee income from regulated entities. This independence from the traditional Congressional budget process has in many cases bred an arrogant disregard for and misunderstanding of their role as public servants; instead, they perform as bank cheerleaders. The inherent conflict of interest posed by their weighing their role as public servants against the risk to the flows in the fee pipeline contributes to their demonstrable lack of interest in either solving complaints or vigorously enforcing the consumer laws.

Absent complete reform of that fee system, which is not the subject of today's hearing, Congress should mandate that a portion of these fees from several regulators should be pooled to fund a beefed-up version of the central source for complaint-handling. It should also be an independent consumer bank advocate that advocates on behalf of consumers of all bank products. The template already exists at the state level, where at least 40 states use a portion of utility company regulatory fees to fund an independent utility consumer advocate or counsel.⁴

4) As a next step, establish an independent Financial Consumers Association (FCA) to represent consumers in bank regulatory arenas: Over twenty years ago, then-Representative Chuck Schumer (NY) first proposed legislation establishing an FCA. The organization's role is explained by banking expert Jonathan Brown:

One way to establish a collective information system would be for the national government to (1) charter a financial consumers association⁵, (2) prescribe democratic rules of governance for the association, (3) provide the association with direct access to price and term information for various financial service products, (4) provide the association with a

modest level of support, and (5) subject the association to a special obligation to serve the financial service information needs of low and moderate income persons.⁶

5) Require accountability of complaint systems: For accountability and transparency, we recommend that statistics on complaint handling should be easily available to the public without the need to first file FOIA requests and then challenge redactions. The Congress, the media and the public should all receive regular, consistent and detailed reporting about the specific nature of complaints and inquiries and the institutions most complained about. Data should be posted in downloadable database formats for additional analysis by academics and public policy groups. The availability of this transparent information will also help consumers make deposit and loan application decisions, aiding the marketplace to operate in a truly competitive manner.

6) Additional solutions to a toxic regulatory culture are also needed: In our recent joint testimony⁷ presented by Travis Plunkett of the Consumer Federation of America last July, we also discussed in detail the manifold failures by the regulators, caused partly by the toxic regulatory culture created by the funding conflicts most have, as well the regulators' lack of will to use existing authority to modify unfair regulations. Key highlights from that testimony:

In order to improve federal consumer protection efforts, serious underlying problems with this regulatory culture must be addressed, including a focus on safety and soundness regulation to the exclusion of consumer protection, the huge conflict-of-interest that some agencies have because they receive significant funding from industry sources, the balkanization of regulatory authority between agencies that often results in either very weak or extraordinarily sluggish regulation (or both) and a regulatory process that lacks transparency and accountability.

The key to addressing these root problems is to make the regulatory process more independent of the financial institutions that are regulated. This means allowing the Federal Trade Commission (FTC) to bring enforcement actions against national banks and thrifts for unfair and deceptive practices and to initiate regulation of these entities. It also means granting consumers the right to privately enforce federal laws. Finally, Congress should act to rein in lending abuses where agencies have shown an unwillingness to act vigorously, such as credit card lending, sub-prime mortgage lending and the use of deceptive and high-cost "overdraft" loans by national banks.

That testimony goes on to explain a variety of areas where regulators have failed to act to protect consumers and makes a number of additional suggestions which we incorporate by reference.

7) The committee should also reinstate the authority of state attorneys general to enforce consumer laws: Although states have aggressively sought to enforce unfair and deceptive practices and other laws against banks, credit card companies and bank subsidiaries, the states have been limited in their enforcement by the growing use of preemption theory to restrict their regulation of the industry.

Most recently, the Second Circuit has supported the OCC view that state attorneys general and regulators do not have authority to enforce state laws that it itself concedes are themselves not preempted.⁸ The case builds on the Supreme Court's 2007 ruling in *Watters vs. Wachovia Bank*,⁹ which upheld a regulation by OCC that permits operating subsidiaries of national banks to violate state laws with impunity. This prevents states from using their historical authority to protect

consumers and communities in large parts of the financial services arena and leaves a huge consumer protection gap that federal regulators have not shown an inclination or an ability to fill. The Wachovia ruling and the second circuit decision encourage national banks and their subsidiaries to ignore even the most reasonable of state consumer laws.

In 2004, the OCC had imposed two onerous administrative rules restricting states from enactment or enforcement against national banks and their state-licensed operating subsidiaries¹⁰ which has resulted in further court decisions upholding the rules, which the courts have unfortunately upheld.

These decisions and actions have aided and abetted the anti-consumer practices of this industry and deserve careful scrutiny by the committee. We remain disappointed that, at a minimum, the committee has not reined in the over-reaching OCC rules, although it did in 2004 condemn the OCC¹¹ when it passed a bipartisan budget resolution¹² on a vote of 34-28, stating that the OCC action “may represent an unprecedented expansion of Federal preemption authority” and “comes without congressional authorization, and without a corresponding increase in budget resources for the agency.” The committee also pointed out that without a budget increase, the OCC cannot really expect its modest staff of forty consumer-complaint specialists to both continue their own work and also take over much of the work of an estimated 700 state consumer enforcers and examiners. “In the area of abusive mortgage lending practices alone, State bank supervisory agencies initiated 20,332 investigations in 2003 in response to consumer complaints, which resulted in 4,035 enforcement actions.”

While the OCC has since beefed up complaint handling mechanisms and attempted to negotiate various memoranda of understanding with state officials, many states still investigate their own consumer complaints, rather than referring consumer to the “OCC’s black hole in Houston.”¹³ As has been well-documented by consumer groups and academics, concentration of the financial services industry has resulted in a system where the largest and most powerful players act with impunity while federal regulators conduct little oversight.

Further, we explained the most common unfair credit card company practices in testimony before this subcommittee in June. These range from misleading teaser rates to the use of universal default schemes to ratchet up high-cost debt servitude. That testimony also explains in detail a number of past state Attorney General enforcement actions.¹⁴

Further, as Professor Art Wilmarth¹⁵ testified before this subcommittee in April 2007:

The OCC’s record is similarly undistinguished with respect to consumer enforcement actions taken against national banks for violations of consumer protection laws. Since January 1, 1995, the OCC has taken only thirteen public enforcement actions against national banks for violations of consumer lending laws. With two exceptions, all of those actions were taken against small national banks... Since January 1, 1995, the OCC has not issued a public enforcement order against any of the eight largest national banks for violating consumer lending laws. In contrast to this absence of public enforcement action by the OCC against major national banks, state officials and other federal agencies have issued numerous enforcement orders against leading national banks or their affiliates – including Bank of America, Bank One, Citigroup, Fleet, JP Morgan Chase, and US Bancorp – for a wide variety of abusive practices over the past decade, such as predatory lending, privacy violations, telemarketing scams, biased investment analysis, manipulative

initial public offerings, and allowing hedge funds to engage in late trading and market timing in bank-sponsored mutual funds. [Citations omitted.]

Consumers need more consumer cops on the beat. If the committee is not going to completely revisit the OCC rules, it should at a minimum reinstate state Attorney General authority over national banks and their operating subsidiaries. Such an action will serve the public policy marketplace well.

8) Eliminate mandatory arbitration on consumer banking contracts: According to a recent GAO study of OCC complaint-handling procedures:¹⁶

OCC, like the other federal bank regulators, resolves most complaints it receives by providing information to consumers. This can include clarifying consumers' misunderstandings, referring consumers to other regulators, or advising the consumers to seek legal counsel when their complaint concerns a factual dispute that only a court can resolve. Less frequently, regulators determine that specific errors or wrongdoings have occurred.

So, most of the time, the consumer is told by the federal regulators to go to court. But if this is a right, it is one without a remedy, since most consumer banking contracts provide only for mandatory arbitration. Congress should enact legislation, the Arbitration Fairness Act, HR 3010, proposed by Rep. Hank Johnson (D-GA), to eliminate pre-dispute binding mandatory arbitration in all consumer contracts, including bank and credit card contracts. The legislation would also assist small farmers, franchisees and employees without collective bargaining agreements who are also forced to accept mandatory arbitration as a one-sided contract of adhesion that eliminates their right to go to court.

CONCLUSION

We thank you for holding this important hearing and for your leadership on a variety of consumer issues, including the imposition of unfair overdraft fees. We have attempted to describe a failed enforcement climate that has led to a pattern of sharp industry practices. Those practices result in consumer complaints. Often, a consumer may not know where to complain or worse, finds her complaint ignored by an unsympathetic bureaucrat. Your proposed hotline will go a long way toward solving the problem. By expanding the hotline into a Complaint-busters centralized source for all complaints, we believe we can improve the situation even more. We also make additional suggestions to improve the toxic regulatory climate. We look forward to working with you and your staff on the proposed legislation.

ENDNOTES

¹ OCC Consumer Assistance: Process Is Similar to That of Other Regulators but Could Be Improved by Enhanced Outreach, February 2006, Government Accounting Office Report to the Subcommittee on Oversight and Investigations, Committee on Financial Services, House of Representatives, GAO 06-293.

² See testimony of Travis Plunkett, Consumer Federation of America, on behalf of CFA, CU, CRL, NCLC and USPIRG at the hearing: Improving Federal Consumer Protections in Financial Services — Consumer and Industry Perspectives Before the House Committee on Financial Services. 25 July 2007, available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/plunkett.pdf. For example, beginning at 12, the testimony goes into a detailed explanation of limitations and flaws in the OCC's advice that banks are free to post the largest checks first, triggering more overdraft penalties than if they had been posted smallest to largest; that banks are not

required to notify consumers when they have insufficient funds; that banks may post withdrawals before deposits and may delay posting deposits made on Friday until the following Tuesday; and that overdraft fees may be charged when there is a deposit pending and further, at page 14, the testimony points out that the OCC website fails to describe all consumer billing rights under the Truth In Lending Act:

“Consumers, advocates and state regulators have long noticed that card issuers are either themselves ignorant of, or do not honor, special rights that consumers have when they have a dispute with a merchant over goods or services purchased with a credit card. This right allows consumers to assert the claims and defenses arising out of a credit card purchase of goods or services against the card issuer. The rules for asserting these claims are different than the standard “billing error” rights. We were unable to find any reference at all to this important consumer right in the portion of the “Help With My Bank” section labeled “credit cards dispute.”

³ 15 USC 1681 et. seq as amended by Section 211(c) of the Fair and Accurate Credit Transactions Act, Public Law 108–159, enacted 4 December 2003. See <http://www.ftc.gov/os/statutes/fcradoc.pdf> Also visit the centralized source at www.annualcreditreport.com

⁴ For more information, see the website of the National Association of State Utility Consumer Advocates (NASUCA) at <http://www.nasuca.org/about/>

⁵ For a sample Financial Consumers Association statute, see <http://www.csrl.org/modellaws/fca.html>

⁶ See Financial Deregulation: the Need for Safeguards, undated, Jonathan Brown, director, Banking Information project, Essential Information, available at <http://www.public-gis.org/reports/amexnew.html>

⁷ See testimony of Travis Plunkett, Consumer Federation of America, on behalf of CFA, CU, CRL, NCLC and USPIRG at the hearing: Improving Federal Consumer Protections in Financial Services — Consumer and Industry Perspectives Before the House Committee on Financial Services. 25 July 2007, available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/plunkett.pdf.

⁸ On 4 December 2007, the 2nd Circuit, U.S. Court of Appeals largely upheld district court decisions restricting state attorney general investigations of national banks and their subsidiaries for violating state laws not preempted by the OCC. See *The Clearing House Association v. Cuomo*, 05-5996-cv, and *Office of the Comptroller of the Currency v. Cuomo*, 05-6001-cv available at <http://www.ca2.uscourts.gov/opinions.htm>

⁹ *Watters v. Wachovia Bank, N.A.*, 127 S.Ct. 1559 (2007) See <http://www.supremecourtus.gov/opinions/06pdf/05-1342.pdf>

¹⁰ See the PIRG OCCWatch website for detailed information on the OCC’s anti-consumer actions, including links to its rules, <http://www.pirg.org/ocwatch> Also see "Preemption Of State Consumer Laws: Federal Interference Is A Market Failure," by U.S. PIRG's Edmund Mierzwinski, which appeared in the Spring 2004 (Vol. 6, No. 1, pgs. 6-12) issue of the *Government, Law and Policy Journal of the New York State Bar Association*. The article includes a major section on the OCC rules, available at <http://www.pirg.org/consumer/pdfs/mierzwinskiarticlefinalnysba.pdf>

¹¹ News story on committee vote available here: <http://www.housingchoice.org/news%20stories/2004/02272004.htm>

¹² See Comm. On Fin. Serv., 108th Cong., *Views And Estimates Of The Committee On Financial Services On Matters To Be Set Forth In The Concurrent Resolution On The Budget For Fiscal Year 2005*, At 15–16 (Comm. Print 2004).

¹³ Personal communication with a senior state assistant attorney general, 5 December 2007.

¹⁴ See testimony of Edmund Mierzwinski, U.S. PIRG before the Subcommittee on Financial Institutions and Consumer Credit Hearing on Improving Credit Card Consumer Protection: Recent Industry and Regulatory Initiatives, 7 June 2007, available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/htmierzwinski060707.pdf

¹⁵ See testimony of Professor Art Wilmarth, 26 April 2007, before Financial Institutions and Consumer Credit Subcommittee, available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/htwilmarth042607.pdf

¹⁶ *OCC Consumer Assistance: Process Is Similar to That of Other Regulators but Could Be Improved by Enhanced Outreach*, February 2006, Government Accounting Office Report to the Subcommittee on Oversight and Investigations, Committee on Financial Services, House of Representatives, 23 February 2006, GAO 06-293 .