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December 18, 2017

Rep. Sean Duffy
U.S. House of Representatives
Washington, DC 20515

Re: HR 3746, the Business of Insurance Regulatory Reform Act of 2017 (oppose)

Dear Representative Duffy,

The undersigned consumer, economic justice and community groups write to oppose HR 3746, the Business of Insurance Regulatory Reform Act of 2017. The bill limits the CFPB's authority to enforce federal consumer financial protection laws against entities that are regulated by a state insurance regulator to the extent such person is engaged in the business of insurance. The bill could have wide-ranging impacts that infringe on the CFPB's core authority to address problems with consumer financial products and services.

It is not clear to what problem this bill is addressed. The Consumer Financial Protection Act already has a carefully delineated provision that generally exempts entities regulated by state insurance regulators from CFPB jurisdiction but gives the Bureau authority over laws that apply to non-insurance consumer financial products or services offered by those entities.[1] The CFPB does not have the authority to regulate insurance and we are not aware of any instance in which it has attempted to do so.

[1] 12 U.S.C. § 5517(f)(1), (2).

However, the term "business of insurance" is broad, vague and subject to debate.[2] It is also not clear if the bill would prevent the CFPB from addressing ancillary activities undertaken in the context of insurance products. The bill could be interpreted to prohibit the CFPB from addressing well-documented problems with deception and fraud involving force-placed mortgage and auto insurance, credit insurance add-ons, and private mortgage insurance.

Companies that are engaged in core consumer financial markets such as mortgages, consumer loans, and auto loans may also sell credit insurance and hold limited purpose insurance licenses. The CFPB's oversight of deceptive practices and lending law violations in these areas is critical as state insurance regulators have been largely unable or unwilling to rein in bad practices.

The bill could also be interpreted to prevent the CFPB from enforcing credit reporting, privacy, electronic payment, and other laws that apply to insurance companies but are not within the expertise or authority of state insurance regulators.

The bill states that it is to be "broadly construed in favor of the authority of a State insurance regulator with respect to a person regulated by a State insurance regulator." Thus, it appears to give a single state regulator the authority to impact the jurisdiction of a federal agency on core consumer financial areas outside of insurance.

While it is possible that the bill's authors do not intend these results, in its current form the bill poses a threat to important CFPB authorities.

Problems with credit-related insurance products are widespread.

State insurance regulation intersects with federal financial regulation in the area of credit-related insurance products – consumer credit insurance, private mortgage insurance, force-placed insurance and title insurance. In many instances, companies that are primarily in the lending business also hold a limited lines credit insurance producer license and thus are regulated by a State insurance regulator. The bill might also provide an incentive for lenders to get such licenses or to stop providing insurance through a separate affiliate if it helped to avoid CFPB oversight of deceptive practices involving the sale of credit insurance in connection with lending products.

There is a long history of consumer abuses and market problems with these products, largely as a result of lenders, insurers and others involved in these transactions playing state insurance regulators off against federal financial regulators. Examples abound, which state insurance regulators have done little to nothing to stop and certainly not on a nationwide basis.

Consumer credit insurance. Credit insurance add-ons have frequently been deceptively marketed to consumers who often do not even realize that the price of a loan has been padded with credit insurance (that the consumer may not even have agreed to) and may pay high prices

[2] The amendment presumably draws on the definition in 12 U.S.C. § 5481(3): "The term "business of insurance" means the writing of insurance or the reinsuring of risks by an insurer, including all acts necessary to such writing or reinsuring and the activities relating to the writing of insurance or the reinsuring of risks conducted by persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons.

for products with little to no value. Lenders may effectively require the insurance without complying with the Truth in Lending Act's requirement that the charge for mandated insurance be included in the annual percentage rate (APR).

The Consumer Financial Protection Bureau (CFPB) recently informed Signet, the owner of Kay Jewelers, that it may take legal action against the jeweler for violating the law, including the Truth in Lending Act, relating to Signet's in-store credit practices, promotions and payment-protection products. We understand that Signet holds limited lines credit insurance licenses.

The CFPB has also taken action against all of the major credit card companies for deceptive add-on products, which plague many other consumer credit markets as well. While the credit card companies do not currently style their add-on products as insurance, they previously did, and other lenders engaged in similar deceptive practices may hold insurance licenses.

State insurance regulators have done little to oversee low-value credit insurance products directly and virtually nothing to stop deceptive or illegal stop lending practices that involve credit insurance.

Force-placed mortgage insurance. When borrowers take out a loan for real property, a vehicle, or some types of personal property, lenders require the borrowers to maintain property insurance and will force-place it if the borrower fails to maintain it. During the financial crisis, the amount for force-placed home insurance grew six fold as lenders unnecessarily and abusively force-placed millions of policies while reaping billions of dollars of profits because of kickback arrangements with lender-placed insurers. Through its mortgage servicing rule – as well as new servicing guidelines from Fannie and Freddie – the CFPB was able stop many of the abuses, including inadequate notification to borrowers and unnecessary placement, while carefully limiting its efforts to avoid infringing on the domain of state insurance regulators. In contrast, and with the exception of a few states, ten years after the onset of the financial crisis, the vast majority of the states have done nothing to address problems in lender-placed insurance markets.

Force-placed auto insurance. Auto lenders have also inappropriately used force-placed insurance without effective state regulator oversight. In the weeks before the disclosure that Wells Fargo had falsely placed 800,000 lender-placed auto policies, state insurance regulators were deciding to leave their lender-placed model law alone for lender-placed auto insurance because there were purportedly no problems in that market.

Private mortgage insurance. Similar to the lack of progress on force-placed insurance, state insurance regulators have made no progress addressing the model law for private mortgage insurance that failed to stop the kickbacks from private mortgage insurers to lenders that were the principal cause of the failures of private mortgage insurers during the financial crisis.

Title insurance and RESPA. Finally, the bill could threaten federal enforcement of the Real Estate Settlement Procedures Act, which prohibits kickbacks for referrals for title insurance, among other things. Enforcement of RESPA has long been done at both the federal and state levels and the CFPB has taken action against entities licensed by state insurance regulators because of these entities' intimate role in the real estate settlement process. The bill threatens RESPA because lenders, realtors, developers, homebuilders and attorneys or their affiliates often obtain licenses as title insurance agents or title insurance companies in order to monetize their

ability to refer consumers for title insurance. The bill could encourage those entities engaged in kickback schemes for title insurance referrals to challenge the CFPB's authority to enforce RESPA – at the expense of consumers.

HR 3746 could weaken enforcement of core CFPB areas unrelated to insurance.

HR 3746 could have wide-reaching negative consequences, because it could be interpreted to prevent the CFPB from enforcing consumer financial protection laws that are not the focus of state insurance regulators, including but not limited to:

- The Fair Credit Reporting Act (FCRA)
- The Gramm Leach Bliley Act (GLBA)
- Electronic Fund Transfer Act (EFTA)
- The Truth in Lending Act (TILA)

For example, insurers are subject to the FCRA when they obtain and use consumer reports or credit scores in underwriting insurance policies. Insurance companies are also governed by the FCRA when they furnish information to consumer reporting agencies, such as the Comprehensive Loss Underwriting Exchange (C.L.U.E.). Under the FCRA, insurers are required to:

- provide adverse action notices if they reject an applicant for insurance based on a consumer report or credit score, as they often do;
- have a permissible purpose when obtaining a consumer report; and
- refrain from furnishing information to a consumer reporting agency that the insurer knows or has reasonable cause to believe is inaccurate.

HR 3746 could be interpreted to prohibit the CFPB from taking enforcement action against insurers that violate these provisions of the FCRA "to the extent such person is engaged in the business of insurance."

Depriving the CFPB of authority over consumer financial laws is especially problematic because state insurance regulators may not have authority to enforce those laws. For example, insurance regulators are *not* among the state actors specifically designated to enforce the FCRA, which reserves enforcement by state agencies to the "chief law enforcement officer of a State" or "an official or agency designated by a State,…" 15 U.S.C. § 1681s(c)(1). Thus, unless state law specifically allows a state insurance regulator to enforce the FCRA, only the state Attorney General can take action.

Furthermore, several of these FCRA provisions, such as the prohibition against furnishing inaccurate information or the requirement to provide adverse action notices, have been construed by most courts as not privately enforceable by injured consumers. Thus, without the CFPB, there are very few entities that can take action against an insurer that violates these provisions.

The CFPB also might not have the authority to police violations of the Electronic Fund Transfer Act, which among other provisions sets forth requirements for when and how companies can use

preauthorized fund transfers to debit consumers' bank accounts. Insurance companies are subject to the EFTA, which does not provide for enforcement by state insurance regulators.

The broad and vague provisions of the HR 3746 could also encourage companies that are, in part, regulated by state insurance regulators to get into other consumer financial business lines such as lending without CFPB oversight.

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The proposed amendments appear to be a solution in search of a problem. The CFPB has been scrupulous about not infringing on state-based insurance regulation. The bill could prevent the CFPB from protecting consumers in areas with clear abuses even if state insurance regulators are unable or unwilling to do so. We therefore urge opposition to HR 3746.

Yours very truly,

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