

## Remarks to American College of Consumer Financial Services Lawyers

April 18, 2015

It is indeed humbling to accept this award from colleagues whom I deeply respect. I cannot help but feel that many in this room are more worthy than I of recognition for their contributions to the field of consumer financial services law, and I am grateful for your kindness in giving the award to me this evening.

Of course, I will share with you that I accept the award with some trepidation. The title **Lifetime** Service Award reminds me of the pilot who comes over the intercom to announce, “We are about to make our final approach to the runway.” One lives in the hope that there will be other approaches to the runway in the future, and I hope that, even having received the Lifetime Achievement Award, I will still have some professional runways left.

The award you have kindly given me is named in honor of Senator William Proxmire. Looking around, I think I may be the only person in the room who actually knew Senator Proxmire personally. In the less partisan days of the 1970’s, when I served as Minority Staff Director of the Senate Banking Committee, my boss, Senator Edward Brooke, the Ranking Republican Member, worked closely with Senator Proxmire, who was the Committee Chair. They co-sponsored much of the legislation that makes up the body of our federal consumer financial protection laws today.

I was personally friendly with Senator Proxmire. Since we lived near each other, I often gave him a ride home in the evening after he had run into work in the morning. I brought along a picture Senator Proxmire autographed to me which

shows him on the front of the Chicago Tribune magazine, with a younger me in the background.

And speaking of Proxmire awards, many of you may remember the Golden Fleece Award he gave from time to time to a government agency or private organization that he felt deserved to be recognized for fleecing the taxpayers by some boondoggle program. I certainly hope that the award given by the College of Consumer Financial Services Lawyers carries no such implication.

The legislative output of the Proxmire era was truly prolific. He was a sponsor of the original Truth in Lending bill, having picked up the mantle for that legislation after the Senator Paul Douglas of Illinois left the Senate. Senator Proxmire, during my time on the Committee, sponsored or successfully saw to enactment: the Real Estate Settlement Procedures Act, the Home Mortgage Disclosure Act, the Community Reinvestment Act, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, the Fair Debt Collections Practices Act and other legislation, including housing finance legislation. He deserves to be recognized as the father of federal consumer financial services law.

So as a young Senate staffer, I was present at the creation, although I really didn't expect at the time that I would spend much of my future legal career dealing with what Senator Proxmire created. When Senator Brooke died recently, I corresponded with Ken McLean, who was Senator Proxmire's chief of staff on the Banking Committee. I told Ken that the legislation Senator Proxmire promoted now occupies a large part of the time of the approximately 160 lawyers at BuckleySandler. I am sorry the Senator is not around so that I could thank him personally, so I thanked Ken instead. It is interesting to reflect that at the time the

Proxmire bills were being considered in the 1970's, there were few, if any, law firms in the city of Washington with 160 lawyers.

Some of you may wonder how Senator Proxmire was able to enact such a broad array of consumer financial protection legislation, given the fact that the banking industry had a powerful lobby and, whatever the merits of the legislation, it certainly adds considerably to the risk exposure and cost of running a bank. And yes, it is true that the banks were opposed to much of what Senator Proxmire proposed. However, Senator Proxmire had a lever that does not exist today--- interest rate controls, generally referred to as Reg Q.

The way it worked was this: in order to provide financing for housing, which was provided largely through savings and loans and savings banks, the Federal Reserve maintained a regulatory differential between the maximum amount that could be paid on a savings account at a bank and what could be paid at a savings institution. Typically, the savings institutions were allowed to pay  $\frac{1}{4}$  of 1 % more than the banks, thus assuring that they would be able to attract stable savings accounts that would help them finance home mortgages. The authority to maintain interest rate controls had to be extended by the Congress every year or two. So, Senator Proxmire would negotiate with the S&L's and the Homebuilders, two powerful lobbies, to secure their support for his consumer protection legislation in return for his support of a Reg. Q extension, thus overcoming the opposition of the banks. Later, during Paul Volker's term as Fed Chair, rates went through the roof and interest rate controls fell by the wayside. Shortly after that, the secondary mortgage market started to take off, and the S&L's lost their market share and ultimately faded away. So it might be argued that the principal legacy of Reg Q is the consumer financial protection regime that is in place today. While not all the

consumer protection legislation took this path, Reg. Q provided the lever for at least some of it.

Since I witnessed the birth and growth of federal consumer financial services legislation, you might fairly ask if I think these laws have been effective in meeting the goal of protecting consumers. I would have to answer, as I think all of us would, that the record is mixed. After all, we suffered a major economic meltdown recently sparked by what many believe were irresponsible and, in some cases, abusive extensions of credit. This has spawned a new set of enactments as part of the Dodd Frank legislation, some of which involve building on the Proxmire disclosure regime and some of which establish so called “principles-based rules,” which regulators can enforce based upon their perception of whether a practice is unfair or abusive.

We have not lived with this new regulatory regime long enough to understand its full impact. We do know that the risks and costs of compliance are causing some institutions to reduce their exposure to consumer finance, while private equity players have been testing the waters. It remains to be seen whether consumers will a few years from now still have access to as wide an array of financial services as they do now and whether they will be better protected.

In assessing the effectiveness of the Proxmire-inspired consumer protection laws, we have to keep in mind the context in which they were enacted some 40 years ago. The financial landscape was different. As noted, there was no effective secondary market. Computer science was in its infancy. The ability to use data to analyze a consumer’s credit profile and to price a loan accordingly was in those pre-computer days more art than science. And so far as disclosures are concerned,

they sought, sometimes awkwardly or at excessive length, to describe complex transactions using paper disclosures, which became stylized and voluminous. Even with the best intentions, these disclosures often appear to be crafted not so much to inform the consumer as to protect the lender from the likelihood of any charge of consumer protection law violation. Our profession has, we must admit, been a party to that process, not with any intent to confuse consumers, but fulfilling our responsibility to protect financial services clients from the traps for the unwary that are inevitably embedded in any disclosure regime.

Can we do better?

Having spent a great deal of time promoting the use of electronic records in financial services, I believe that we have yet to realize the full benefits of this medium, particularly as it relates to disclosures. Unlike in Senator Proxmire's day, we now have the computing capacity and data to underwrite a borrower almost instantly and far more accurately than in the 1970's. Another advance over the Proxmire era is that electronic communications now give us the capacity to deliver much more meaningful disclosures to consumers than they receive on paper.

A few years ago, I wrote an article in the American Banker that advocated development of Dynamic Disclosures. What I advocated in that article was essentially pulling back the underwriting curtain and letting the borrower see the information the lender is using to evaluate the borrower's creditworthiness, not just the credit score, but any information generated regarding the borrower's prospects for defaulting and how that is influencing the price the consumer is paying for credit. This information would empower borrowers to better understand their credit profile in real time and let them see how their loan terms might be enhanced

(for instance by increasing downpayment, reducing credit card debt or buying less house). This would, of course, involve some testing to determine how to present the information (and how much information to present) so as to inform rather than confuse the borrower. But I think both borrowers and lenders could benefit: borrowers by understanding their choices better and lenders by what I propose to be a presumption of UDAAP compliance if they have given borrowers dynamic disclosures which meet the standards prescribed by the CFPB. It should also go a long way toward reducing fair lending exposure since borrowers would be given every chance to find a credit solution that works for them. That said, I must note that my idea has not been embraced either by the CFPB or the lending community. But that has not dissuaded me from my belief that electronic interactive media holds the key to making meaningful and understandable disclosures of the kind that Senator Proxmire would have embraced if the technology had existed in his day.

If we can develop electronic financial disclosure models that are scientifically tested and proven to be effective, they could become a standardized part of a financial literacy curriculum offered in every high school. Like taking drivers education, students would learn the basic rules of the road, not from a manual, but by actually being in the driver's seat...but in this case on an electronic device. And by using new gamification strategies I believe we could actually make financial literacy education fun and exciting.

I am on the board of a group called the Youth Leadership Foundation which works with inner city Washington youth promoting learning and character formation. I have made financial literacy my focus at YLF. Partnering with Junior Achievement, we are providing financial literacy training to YLF kids, albeit not

yet with the dynamic disclosure tools I am advocating. I am going to ask that the financial piece of the award you are giving me be donated to the YLF financial literacy efforts, which are also supported by the Kolar Charitable Trust of BuckleySandler.

As you can tell, I find the policy aspect of consumer financial services law interesting. But on the scales of life, there are things that matter a lot more to me. In the audience today are Debbie, my wife of 32 years, and two of my three daughters, Gretta and Anne. My other daughter, Mary, is in Africa where she is doing research on drug resistant TB. Mary is getting married next month, and beneath Debbie's calm exterior beats the nervous heart of a mother who has six weeks to go until the wedding. Also here are some colleagues whom I count among my best friends. I have been incredibly fortunate in my life partner, in my children and in the wonderful friends I have made in the journey through life.

Recently, we have experienced that loss of several close colleagues and friends, and others have been diagnosed with serious illnesses. It seems that recently we have also witnessed more irrational brutality in the world, confirming Thomas Hobbs observation that man can be a wolf to man. Understanding the fragility and vulnerability of the human experience, it seems to me that our highest calling is a commitment to helping our friends and colleagues and even strangers to realize all they can be, relieving their pain and promoting their confidence and happiness. I believe, and I am sure that many of you have found, that only by committing to those goals can we can be truly happy. I am still on the journey to earning that "Lifetime Service Award" and always will be.

Finally, I am happy to be receiving this award in San Francisco, my native city. My parents were married in Old St. Mary's Church in Chinatown. I was born in San Francisco Childrens Hospital, and we lived on Francisco Street in the Marina district until I was about a year old, when we moved to Connecticut. So, as the song goes, I find myself "right back where I started from." To receive this important professional award from my colleagues here is, in some ways, like coming full circle. I will always cherish the memory of this evening and the friendship of you who have honored me with your presence.

Thank you.



