DUE PROCESS
INSTITUTE

September 25, 2018

The Honorable Paul Ryan
Speaker of the House
U.S. House of Representatives

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives

The Honorable Kevin McCarthy
Majority Leader
U.S. House of Representatives

The Honorable Steny Hoyer
Minority Whip
U.S. House of Representatives

RE: **Bipartisan Concerns regarding H.R. 6729 on Suspension Calendar**

Dear Speaker Ryan, Leader Pelosi, Leader McCarthy, and Whip Hoyer,

The Due Process Institute, FreedomWorks, the National Association of Criminal Defense Lawyers (NACDL), and Defending Rights and Dissent write to raise concerns with several aspects of H.R. 6729 ("Empowering Financial Institutions to Fight Human Trafficking Act of 2018"). There is an effort to put this bill, which was introduced just two weeks ago, on the suspension calendar this week even though it contains controversial expansions of regulatory power that could have serious unintended consequences for innocent people. **We urge leadership to ensure this bill not be placed on the suspension calendar and instead allow deliberate consideration of the serious changes it seeks to make. We urge Members to vote NO on this bill.**

On its face, H.R. 6729 would protect nonprofits wishing to report suspicions of human trafficking or money laundering activities to law enforcement. Importantly, there are no known legal impediments to nonprofits who wish to engage in such reporting. Anyone can report credible suspicions of criminal activity to law enforcement. However, it is possible that a reporter could potentially face civil liability if the report was false and led to reputational damage, or if the report violated a privacy law. This bill offers a very broad "safe harbor" from such liability. In conflict with the principle of federalism, it would nullify any and all federal, state, or local laws that might otherwise allow someone to seek damages in the instance of damaging or malicious reporting or for otherwise invading their privacy. This powerful and all-encompassing "safe harbor" does not require good faith on behalf of the reporting organization yet it would invalidate all defamation, libel, or privacy laws in existence. The undersigned organizations recognize the importance of preventing and appropriately investigating human trafficking related crimes but have grave concerns about aspects of this bill that go far beyond the purpose of preventing human trafficking.[1]

[1] The undersigned organizations do not currently take a formal position on the Congress' decision to immunize groups from all civil liability as a result of their reports to law enforcement.

Importantly, H.R. 6729 does much more than provide a safe harbor from civil liability for nonprofits wishing to share information with law enforcement and it is those aspects of the bill that might not be readily apparent but cause concern. The bill also sets up a structure to encourage nonprofits to share their suspicions with "financial institutions," and also creates a related structure by which financial institutions will be encouraged to then share these suspicions with each other. Importantly, the term "financial institution" is not confined to entities like traditional banks and financial services providers, but also applies to insurance companies, real estate firms, casinos, jewelers, and even car dealers.[2] (Again, there is nothing that prevents such reporting but the "safe harbor" protection discussed above would also apply to any financial institution, thus preventing customers of a wide array of businesses who would otherwise have legal recourse under privacy laws or tort law to seek relief for the negligent or even malicious acts of others.) Importantly, the "information sharing" at stake in this bill is not based on provable criminal acts, or even criminal accusations brought by law enforcement. The types of information subject to this extraordinary "safe harbor" protection are mere suspicions that could be based on purposefully malicious information or stem from improper motivations.

Unfortunately, the harm that is likely to result to innocent Americans is very real and not just because of the safe harbor provision. Current banking regulations already require financial institutions to file "Suspicious Activity Reports" (SARs) with the government any time it "knows, suspects, or has reason to suspect that an individual, entity, or organization is involved in, or may be involved in terrorist activity or money laundering," because of shared information it has received.[3] Because a financial institution can face criminal prosecution for failing to investigate or file SARs after receiving such information, these institutions invariably err on the side of over-filing.[4] This bill would add a broad swath of new suspected activity to the SARs regime, causing the overall amount of SARs to increase—despite the fact that over one million SARs are already filed each year—the vast majority of which never lead to a formal investigation of any kind.

But even more importantly, one of the stated purposes for information-sharing between financial institutions is to allow these businesses to determine "whether to establish or maintain an account, or to engage in a transaction."[5] Thus, the filing of a SAR frequently leads to a person being "de-banked" or deemed "too risky to do business with." This bill would dramatically increase the number of SARs filed on the basis of unproven suspicions passed to financial institutions, not from law enforcement agencies but from nonprofits. Stories already abound regarding instances of innocent consumers having their accounts closed or transactions prohibited as a result of unproven suspicions. *See* Emily Flitter & Stacy Cowley, "Wells Fargo Accused of Harming Fraud Victims by Closing Accounts," *New York Times*, Feb. 28, 2018; [6] Rick Jones, "Closing the Door on Closing Accounts: Ending the Damaging Impact of

[2] 31 C.F.R. §§ 1010.520(a)(1), 1010.540(a)(1).
[3] 31 C.F.R § 1010.540(d).
[4] 31 C.F.R §§ 2020.520(d), 1010.540(d).
[5] 31 C.F.R. § 1010.540(b)(4)(i).
[6] https://www.nytimes.com/2018/02/28/business/wells-fargo-fraud-closing-accounts.html

De-Banking," *The Champion*, March 2018; and Alex Morrell, "Banks are keeping closer tabs on your reputation than ever before—and it may explain why one … cardholder mysteriously had his account shut down….", *Business Insider*, Sept. 14, 2018.[7] While the threat of human trafficking is real and law enforcement should continue to engage in best efforts to prevent such crimes, surely not every suspicion or accusation that would come through a nonprofit will be accurate or truthful. Some suspicions or accusations might even be motivated by personal, political, ethnic, racial, cultural, or religious animus. But by encouraging nonprofits to share their "suspicions" with financial institutions, and to encourage financial institutions to in turn share these suspicions with each other, law-abiding customers could be improperly de-banked, preventing them from engaging in critical financial activities like home buying, investing, or even having a bank account on the basis of unproven hearsay.

Another concerning aspect of H.R. 6729 is that it contains multiple authorizations for the Treasury Department to promulgate an unlimited number of additional regulations regarding the "sharing of information between financial institutions on suspected unlawful activities."[8] These incredibly broad strokes of authority—not limited to the context of the subject matter of the bill [human trafficking] but applying to any "suspected unlawful activity"—are deeply concerning given that the regulatory state is already out of control and given previous recent attempts by the Treasury Department to increase the use of warrantless surveillance through "information-sharing" programs and other extraordinary powers it was previously granted only for the purposes of preventing terrorist activities. The blanket authorization in this bill would allow unelected regulators to enact changes in the law to expand surveillance and the access and sharing of Americans' financial records under Section 314 of the USA PATRIOT Act that they have been unable to get authorized in bills such as H.R. 5606 ("Anti-Terrorism Information Sharing is Strength Act"), H.R. 3439 (the "Financial Institution Security Act") and the November 2017 draft "Counter Terrorism and Illicit Finance Act"—efforts that were widely opposed by a diverse group of concerned organizations. For all the reasons listed herein, we urge leadership to ensure this bill not be placed on the suspension calendar and instead be subjected to a full and fair law-making process that will allow for deliberate consideration of the serious changes it seeks to make and we urge Members to vote NO on this bill.

Respectfully,

Due Process Institute
FreedomWorks
National Association of Criminal Defense Lawyers (NACDL)
Defending Rights and Dissent

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[7] https://www.businessinsider.com/mystery-of-chase-sapphire-cardholder-who-was-shutdown-and-never-told-why-2018-9

[88] *See* § 5333(a)(3): "The regulations required … may (A) be made coextensive with the regulations adopted pursuant to other programs, regulated by the Secretary, for sharing information on unlawful activities between financial institutions" and §5333(a)(5): "The regulations adopted pursuant to this section—(A) may be coextensive with other regulations governing the sharing of information between financial institutions on suspected unlawful activities: and (B) shall allow financial institutions that receive information in compliance with the regulations issued under subsection (a) to share such information with other financial institutions through existing information sharing programs."