

Statement of

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Before the

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Hearing on

H.R. 936 – the Prevention of Fraudulent Access to Phone Records Act

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Chairman Dingell and Members of the Committee, thank you for holding this hearing on the “Prevention of Fraudulent Access to Phone Records Act.” Although I did not ask to participate in this hearing, I appreciate the invitation to describe my experience as a victim of pretexting. Having said that, please understand that it is impossible to explain what happened to me without placing it in context.

My testimony is a cautionary tale. It is about a corporation and management team that, in attempting to ensure their survival, placed no limits on the exercise of their power. Pretexting is a brazen invasion of privacy. The thought of an individual engaging in pretexting is unnerving enough. But when a corporation, with millions of dollars at its disposal, has its agents spy on private citizens in order to silence criticism, that threatens more than just the sanctity of the individual’s privacy; it threatens the freedom of the securities markets that we take for granted. I believe that the “Prevention of Fraudulent Access to Phone Records Act,” which explicitly addresses pretexting, will send a strong message and act as a deterrent to those who feel that they can invade the privacy of citizens simply because they are suspicious of them or disagree with them. That is why I am testifying in support of this legislation.

My name is David Einhorn. I am the President of Greenlight Capital, a long-term oriented value investment company. One of our long-term investments is Allied Capital, a company headquartered a few blocks from here on Pennsylvania Avenue. Some time ago, our research led us to believe that Allied suffered from significant accounting and operational deficiencies, and Greenlight took a short investment position in Allied based upon that belief.

In 2002, I voiced my criticism of Allied publicly at an investment research conference, which was part of a charity fundraiser for a pediatric cancer hospital. I told the audience that I

had sold Allied short based on my research, and pledged to give half my personal profits based on this investment to the children's hospital sponsoring the event.

Our research indicated that Allied hides its problem investments by misleading the public about their value – valuing them at their original cost even as the investments go bankrupt – while stating publicly that the SEC valuation rules do not apply to them. Our research also indicated that Allied inflates its earnings by charging excessive interest rates and fees to companies it controls but does not consolidate in its financial results, while disclosing little about the performance of these companies. And its small business lending unit has defrauded the SBA and the USDA government lending programs out of hundreds of millions of dollars. All the while, we had seen Allied attempt to outgrow its problem investments by raising new capital from unknowing investors.

I discussed Allied's problems at the research conference in 2002. In response to my speech, instead of examining and cleaning up these problems, Allied decided to attack me. The company began a systematic campaign to discredit me, publicly attacking my reputation and my motivations. But ultimately the public – and the regulators – began to see through Allied's tactics. The SEC began an investigation into Allied in 2004 about the very practices I had accused Allied of from the beginning. Later that same year, the U.S. Attorney for the District of Columbia began a criminal investigation.

In its zeal to silence its critics, Allied used extreme measures. But even I did not believe Allied would go so far as to invade the privacy of my home and family. I was wrong. In an apparent attempt to find some piece of information to embarrass and discredit its critics, Allied retained private investigators to obtain its critics' personal and business phone records, including mine.

In 2004, Herb Greenberg, a respected financial journalist for Dow Jones who had publicly criticized Allied, told me that his phone records had been illegally accessed. I subsequently learned that a woman unknown to me had called my long distance provider; identified herself as my wife; provided my wife's social security number; and opened an online account to access our home telephone records. We then learned that the phone records of other known critics of Allied – including other hedge fund managers, a journalist, a research analyst, an individual investor and a former media relations advisor to Greenlight – had been similarly illegally accessed.

The FBI ultimately discovered the identity of the individual who had accessed my phone records, though they could not share that information with me. The phone records investigation was subsequently moved to the U.S. Attorney's Office in Washington D.C., where the criminal probe of Allied was already underway.

In March 2005, I wrote a private letter to Allied's Board of Directors and told them that someone had stolen my wife's social security number and used it to steal my phone records, along with the records of several other prominent Allied critics. I asked the Board to fully investigate what happened. A week later, I received a brush-off response that I had not provided sufficiently specific information for them to conduct an inquiry. A copy of my letter to Allied's Board of Directors and Allied's response is attached.

In September 2006, after Hewlett-Packard's CEO publicly admitted to involvement in very similar conduct and resigned, I wrote another private letter to the Chairman of the Audit Committee of Allied's Board, reminding them of the seriousness of pretexting and once again asking them to investigate. Two weeks later the Board responded that it had looked into my allegations and found no evidence to support my claim. Copies of these letters are also attached

At the same time, Allied's management went on the offensive yet again. On the November 8, 2006 earnings conference call, Allied's CEO, William Walton, spent several minutes attacking my motivations and stating that my concerns about my stolen phone records were "yet just another example of Mr. Einhorn's tactics." He recounted my letters to Allied's Board and their prompt denials. He criticized me for not providing more evidence. And he issued his own denial that anyone at Allied had accessed my records, saying:

There is simply no evidence to support a claim that Allied tried to access Einhorn's phone records. We never received his records and all that the article points to in support of this claim is the word of Einhorn, an individual with a motive to depress Allied Capital's stock.

Only three months later, Allied completely changed its story. On February 6, 2007, Allied issued a press release innocuously titled "Allied Capital Comments on Recent Events." Allied admitted that its "agent" had stolen not only my home phone records, but also Greenlight's records. The release read:

Allied Capital Corporation announced today that, in late December 2006, it received a subpoena from the United States Attorney's Office for the District of Columbia requesting, among other things, the production of records regarding the use of private investigators by Allied Capital or its agents. The Board established a committee, which was advised by its own counsel, to review the following matter.

In the course of gathering documents responsive to the subpoena, Allied Capital has become aware that an agent of the Company obtained what were represented to be telephone records of David Einhorn and which purport to be records of calls from Greenlight Capital during a period of time in 2005.

Also, while Allied Capital was gathering documents responsive to the subpoena, allegations were made that Allied Capital management had authorized the acquisition of these records and that management was subsequently advised that these records had been obtained. The management of Allied Capital states that these allegations are not true.

Until Allied issued this press release, I had not known that Greenlight's phone records had also been stolen. For them to admit this, the evidence must have been extremely clear. After denials since 2005, only a grand jury subpoena from the U.S. Attorney's Office finally pried the truth out of Allied.

The press release was a model of evasion, however, and not at all consistent with the disclosure expected of a public company. Who had made the allegations? Who had obtained the records? Who had authorized the theft, and for what purpose? What did they do with this information? And what else did these agents do to gather information about their critics? The release did not even deny that Allied had authorized the theft of my phone records. It only stated that "management of Allied Capital states" that this was not true. The release said there would be no further comment, effectively refusing to answer these questions or clarify this muddled statement.

For me, the theft of my personal phone records and my wife's personal information has done more than just confirmed my views about Allied. It has struck at my sense of security and the protection I have put around my family and my home. After the Hewlett Packard pretexting scandal, HP immediately apologized to the victims and promised to give the victims a full account. But to date, I have heard nothing from Allied. No one has contacted me to apologize or explain who invaded my privacy and my family's privacy. Allied has not yet admitted to taking anyone else's records. Of course, they don't deny it, either. It is simply not credible that Allied management did not know about this.

This pretexting strikes at the ethical heart of the securities markets, which are based on the free and fair flow of ideas, critical and otherwise. It is a cold reality that companies, left to their own devices, will rarely divulge the full truth about their problems. It is left to others –

regulators, analysts, the media, and investors like myself – to hold these companies accountable. The free exchange of ideas in our market system depends on the very people who were pretexted in this case.

But that system is under attack; more and more, the instinct of a company under attack from critics is to hit back harder, not to address the underlying problem. Unless companies like Allied are told in no uncertain terms to *stop*, this trend will escalate. There are many valuable voices in the marketplace who will choose not to criticize companies for fear of being retaliated against. Nobody wants their privacy violated. As the Committee has noted in this very legislation, actions such as pretexting can lead to harassment and intimidation. It can also lead to less information in the marketplace. A line must be drawn.

I support this legislation. There is no question that pretexting is a criminal activity under any number of federal and state laws. But there is no law specifically designed to address pretexting and the harm that it causes. That a company like Allied believes it can have agents pose as me or my wife in order to steal our personal records is proof that the seriousness of pretexting has not truly been communicated to the public. I believe that the Prevention of Fraudulent Access to Phone Records Act is an important step in raising the public's awareness of this issue and will enhance the protections available to the ordinary citizen against unauthorized invasions of their privacy.