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The Honorable Trent Franks
Chairman, Subcommittee on the Constitution and Civil Justice of the United States House of
Representative Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Steve Cohen
Ranking Member, Subcommittee on the Constitution and Civil Justice of the United States
House of Representative Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

November 15, 2016

Dear Chairman Franks and Ranking member Cohen:

I am writing regarding the pending mark up of H.R. 1669, the proposed Judgment Fund Transparency Act. I testified on this legislation at the Subcommittee's hearing last September. I understand that the subcommittee is considering an amendment in the nature of a substitute and I wish to update my testimony in light of the proposed amendment. At the September hearing, I testified in favor of the legislation under consideration. I have a technical, but important, objection to the contemplated amendment. As presently drafted, I would not support the substitute to H.R. 1669.

As originally drafted, H.R. 1669 would have applied prospectively to payments made from the Judgment Fund (hereinafter "the Fund") and would have imposed a requirement that its disclosure provisions be met within 30 days of any payment being made. The amendment to H.R. 1669 would apply the bill retroactively to payments made from the Fund after January 1, 2016. The problem is that no provision is made for how to accommodate this retroactive application to the 30 day disclosure requirement. With respect to any payment made more than 30 days before the amendment is enacted, the Secretary of the Treasury will have no way of satisfying the new legal duty to have made the requisite disclosures within 30 days of the payment. For example, as to a payment from the Fund made on April 15, 2016, the Amendment would require the Secretary to have made the disclosures by May 15, 2016. Nothing in the amendment specifically addresses this problem raised by its retroactive application. I realize that the amendment repeats the implementation provision (section 2(b)) of the original version, which gives the Secretary 60 days to carry out the amendment. This provision does not specifically apply to or alter the legal duty established in the now-retroactive section 1. Indeed, the fact that it predates the retroactivity amendment demonstrates that it was not addressed to

that situation. It is poor legislative practice to establish a legal duty that simply cannot be satisfied. I strongly urge the Subcommittee to revise the amendment to either eliminate its retroactive application or to establish a legal duty that is not physically impossible for the Secretary of the Treasury to satisfy.

Sincerely,



Neil Kinkopf
Professor of Law