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U.S. CHAMBER OF COMMERCE

Statement of the U.S. Chamber of Commerce

ON: "Legislative Proposals to Promote Accountability and Transparency at the Consumer Financial Protection Bureau"

TO: Subcommittee on Financial Institutions and Consumer Credit of the Committee On Financial Services U.S. House of Representatives

DATE: February 7, 2012

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 115 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Chairman Capito, Ranking Member Maloney, and members of the Subcommittee: My name is Andrew Pincus, and I am a partner in the law firm Mayer Brown LLP. Thank you for the opportunity to testify before the Committee today on behalf of the U.S. Chamber of Commerce and the hundreds of thousands of businesses that the Chamber represents.

The Chamber strongly supports sound consumer protection regulation that deters and punishes financial fraud and predation and ensures that consumers receive clear, concise, and accurate disclosures about financial products. Everyone, businesses as well as consumers, benefits from a marketplace free of fraud and other deceptive and exploitative practices.

The Chamber has been engaged in an ongoing dialogue with the Consumer Financial Protection Bureau ("CFPB"), through meetings and the filing of public comment letters, to assist the Bureau in meeting these goals while avoiding the imposition of duplicative and unjustified regulatory burdens that divert resources essential to fuel economic growth and, perhaps even more importantly, prevent small businesses from obtaining the credit they need to expand—and create the new jobs that our economy so desperately needs.

The bills that are the focus of this hearing address significant problems confronting the CFPB and the Chamber strongly supports their expeditious enactment. Although these measures certainly will not address all of the Chamber's concerns about the Bureau, they will resolve several important issues.

I. Speedy Enactment of Legislation Protecting the Attorney-Client Privilege is Essential to Ensure Effectiveness of the Bureau Examination Process and Basic Fairness to Regulated Companies.

A critical issue that the Bureau faces is determining how to exercise its examination authority. As the Subcommittee is aware, the Bureau has statutory authority to examine federally-regulated depository institutions with assets exceeding $10 billion(Dodd-Frank Section 1025) and certain categories of non-depository businesses (Dodd-Frank Section 1024).

One of the most important issues that has arisen thus far in connection with the Bureau's examination authority is the absence of any statutory protection for materials subject to the attorney-client and related privileges that Bureau employee's seek to review (and perhaps even retain) during the examination process.

The Chamber strongly supports speedy enactment of legislation—as does the Bureau's Director Richard Cordray. We believe that H.R. 3871 addresses this issue.[1]

This problem first arose years ago in connection with the bank regulatory agencies' examination authority. Banks were concerned that disclosure to examiners of documents protected by the attorney-client privilege would "constitute a waiver of the privilege with respect to those documents in litigation with third parties." [2]

The Office of the Comptroller of the Currency in 1991 issued an opinion addressing this issue. It stated that "[t]he examination process depends upon a free, unhindered flow of information between the OCC and the banks it regulates. We view with concern anything that threatens this exchange."[3]

The OCC concluded that it had "the power to request and receive materials from national banks in carrying out its supervisory duties. It follows that national banks must comply with such requests. That being the case, it is our position that when national banks furnish documents to us at our request they are not acting voluntarily and do not waive any attorney-client privilege that may attach to such documents."[4]

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[1] A number of additional important questions regarding the Bureau's examinations remain unresolved:

- Will the Bureau's approach in conducting examinations involve identifying potential problems and resolving them speedily and cooperatively, or will the Bureau use the examination process to develop evidence for much more confrontational enforcement actions, which will increase costs for regulated businesses and for the Bureau?

- How will the Bureau ensure consistency between its approach and the approach of the federal bank regulators, which are responsible for conducting consumer protection examinations —and, even more importantly, how will the Bureau obtain input from the bank regulators regarding its examination processes as well as specific issues that arise during the course of examinations?

- How will the Bureau propose to exercise its discretionary authority with respect to non-bank entities (Section 1024(a)(2) of the Dodd-Frank Act sets a deadline of July 21, 2012, for issuance of a final regulation)?

- Will the Bureau modify its regulation regarding the sharing of confidential information obtained during examinations to match the restrictive standard applied by other federal banking regulators that exercise examination authority? (The January 4 Bulletin discussed below appears to adopt a more restrictive view than that embodied in the Bureau's regulations. *Compare* 12 C.F.R. § 1070.43 *with* Bulletin at 5; *see also* U.S. Chamber of Commerce Comment Letter to the CFPB Regarding the Disclosure of Records and Information at 4-10 (October 21, 2011) *available at* http://www.centerforcapitalmarkets.com/letters/#cfpa.)

The examination manuals released by the Bureau provide extremely generalized guidance regarding the examination process and do not address any of these issues.

[2] OCC Interpretive Letter, 1991 WL 338409 (Dec. 3, 1991).

[3] *Id.*

[4] *Id.*

Nonetheless, the federal courts have not reached consistent results when confronted with claims (arising in connection with provision of information to a variety of different federal regulators) that a privilege had been waived by disclosure of documents to a federal regulator. Some courts hold that provision of information to a regulator does not waive the privilege, but others have concluded that a waiver can occur.

Congress in 2006 addressed this issue conclusively in the bank examination context by enacting 12 U.S.C. § 1828(x), which provides that "[t]he submission by any person of any information to any Federal banking agency . . . for any purpose in the course of any supervisory or regulatory process of such agency . . . shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information . . . ." The term 'Federal banking agency" is defined by 12 U.S.C. § 1813 to mean "the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation."

Although the Dodd-Frank Act both transferred some examination authority from the federal banking agencies to the CFPB (in Section 1061(b)) and conferred new examination authority on the Bureau (in Section 1025), it did not address the privilege waiver issue. And, because the Bureau is not defined as a "Federal banking agency" in Section 1813, some may argue that the existing statute does not apply.

The Bureau has addressed this issue as best it can through a bulletin issued on January 4.[5] That Bulletin states that "the provision of information to the Bureau pursuant to a supervisory request would not waive any privilege that may attach to such information. Further, if a supervised institution were ever faced with a claim of waiver, the Bureau would take all reasonable and appropriate actions to rebut such a claim."

Of course, the Bureau's interpretation of the law provides less certainty than clarifying the terms of the law itself. Therefore, just as Congress in 2006 codified the OCC's view regarding this issue, Congress should act expeditiously to codify the Bureau's interpretation here.

Swift congressional action will not simply benefit regulated businesses; it is essential to enable the Bureau to exercise its supervisory authority effectively. Without statutory protection, any prudent general counsel of a regulated company would recognize the risk that disclosing privileged documents to the Bureau could later be held to constitute a waiver. Given the potentially draconian adverse

[5] CFPB Bulletin 12-01 (Jan. 4, 2012), *available at* http://www.consumerfinance.gov/guidance/.

consequences to the company—unjustified exposure to multi-million dollar, or even billion dollar, class actions, for example (because of the risk that legal advice would be erroneously interpreted by a jury)—company officials understandably may be reluctant to provide such documents and will seek to convince Bureau examiners that review of the documents is not necessary. That will delay examiners' work unnecessarily.

Indeed, in order to provide maximum protection against a finding of waiver, a company may insist that the Bureau formally demand access to the privileged material—and even obtain an order requiring compliance—in order to create the strongest possible record that the company was compelled to produce the information and, accordingly, did not waiver its privilege. That would impose a significant burden on the Bureau and, as the OCC explained in 1991, "would also introduce an adversarial element to the examination process that would not be healthy."

Enactment of legislation addressing this issue will avoid wasted resources, increasing the efficiency and effectiveness of the examination process, and ensure protection of the long-established right of a client to consult privately with an attorney.

II. Including the CFPB Within the Appropriations Process is Essential to Ensure Accountability and Protect the Taxpayers.

The Chamber strongly supports H.R. 1355, which would subject the Bureau's expenditures to the congressional appropriations process that applies to virtually every federal agency—and to the agencies on which the Bureau was most closely modeled: the Securities and Exchange Commission, the Consumer Product Safety Commission, and the Federal Trade Commission.

The fundamental principle of American government is that those who exercise power must be accountable to the people, acting through their elected representatives. Every government agency must satisfy this basic standard. Congress has for this reason historically, and uniformly, subjected all federal agencies, including independent regulators, to robust checks and balances that ensure their accountability and fidelity to law.

The need for these traditional constraints is particularly acute where the regulation of consumer finance is concerned. Consumer finance is critical to the strength of the American economy—and a major generator of beneficial innovation. Government action that imposes unjustified regulatory costs on lending institutions will limit consumer choice, threaten safety and soundness, and prevent businesses from obtaining the credit they need to expand—and to create the new jobs that our economy so desperately needs. American consumers and businesses alike can ill-afford such an outcome.

The risks of agency tunnel-vision, overreach, and politicization are real for all government regulators, including the Bureau. If these risks are not properly addressed at a ***structural*** level, agencies inevitably will, over time, abandon sound regulatory principles.

In light of the fundamental importance of checks and balances in our system of government, we have deep concerns about the unprecedented lack of accountability of the Director of the CFPB. That is because the Bureau's structure concentrates an amount of unchecked authority in a single individual—the Director—that is unprecedented for a federal agency that regulates private entities and individuals:

First, the Bureau is headed by a ***single Director*** with complete, unilateral authority to make all regulatory and enforcement decisions and to hire and fire all personnel, including his or her own deputy.

By contrast, since the creation of the Interstate Commerce Commission in 1887, independent regulatory agencies have almost always been headed by a bipartisan, multi-member commission, usually consisting of five-members who serve for staggered fixed terms.[6] That is the structure of the Federal Deposit Insurance Corporation ("FDIC"), the National Credit Union Administration ("NCUA"), the Federal Trade Commission ("FTC"), the Securities and Exchange Commission ("SEC"), the Commodity Futures Trading Commission ("CFTC"), the Federal Communications Commission ("FCC"), the Federal Energy Regulatory Commission ("FERC"), the Consumer Product Safety Commission ("CPSC"), and other agencies. The Federal Reserve also follows this model, although there is no requirement of bipartisan representation on the Board of Governors. Congress has almost uniformly rejected periodic attempts to replace these multi-member regulatory commissions with a single administrator.

Second, the Bureau's Director does not serve at the pleasure of the President. Rather, during his or her five-year term, the Director may be removed only "for inefficiency, neglect of duty, or malfeasance in office."[7] That standard eliminates the

[6] The Bureau, although located for organizational purposes within the Federal Reserve System, is completely insulated from the Federal Reserve's supervision and control, and thus functions as an independent agency. *See* Dodd-Frank § 1012(c)(2) & (3).

[7] Dodd-Frank § 1011(c)(3).

President's power to remove the Director based on a policy disagreement: once nominated and confirmed, the Director cannot be overruled by the President.

Moreover, although the Bureau is located within the Federal Reserve as an organizational matter, the Board of Governors of the Federal Reserve is expressly prohibited from reviewing any action of the Director.[8] The President too lacks the power to conform the Bureau's regulatory decisions to his own policy views and to reconcile them with the conflicting policy views of other agencies.

Third, the Bureau is exempt from the congressional appropriations process. It is funded instead by a transfer of money from the Federal Reserve in an amount determined solely by the Director, subject only to a cap that already exceeds $550 million, will increase 10% for the next fiscal year, and is subject to automatic inflation adjustments thereafter.[9] To put the Bureau's potential $550 million-plus budget into perspective, in FY 2010, the budget of the CPSC was $118 million, and the budget of the FTC (for both consumer protection *and* antitrust activities) was $292 million. Both of those agencies are, of course, subject to the appropriations process.

Once again, the Director has authority that is not subject to checks or balances. We are not aware of any other federal official responsible for regulating private sector activity who exercises sole authority over an agency; has sole power to determine whether and how to spend hundreds of millions of dollars outside the congressional appropriations process; and serves for a fixed term and is subject to removal only for cause (and therefore exempt from Presidential control).

To be sure, as some have pointed out, none of these features is unique in and of itself. But the ***combination*** of all of these features ***is*** unique. ***No federal regulatory agency has the same combination of features as the Bureau, which concentrate unprecedented power in a single individual***—the Director—who is virtually unconstrained by the well-established checks and balances that traditionally have been relied upon to guide and constrain agency action.

Moreover, one of the only constraints that was included in the statute—the requirement that the Senate advise and consent with respect to the Director's nomination—has been eliminated by virtue of the President's recess appointment.

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[8] Dodd-Frank § 1012(c)(2) & (3).

[9] *See* Dodd-Frank § 1017(a)(1) (providing that "the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law"); *id.*§ 1017(a)(2) (setting amount) .

H.R. 1355 begins to address these issues by including the Bureau within the normal congressional appropriations process. This step is especially appropriate given the Bureau's lack of responsiveness in providing financial information to Congress thus far.

As the Subcommittee knows, the Bureau has announced plans to expend $329,045,000 in fiscal year 2012, an increase of more than 130% over what it planned to spend in the prior fiscal year. But the Bureau has provided very little justification for this very large expenditure of funds. The House Appropriations Committee explained in its report on the Financial Services and General Government Appropriations Bill for FY2012:

> "Unlike other agencies, the BCFP does not describe or explain the relationship between its policy objectives and the budgetary resources, performance measures or goals, significant proposals that effect obligations in the five to ten year period and their relationship to the current year and budget year, or the budgetary effect of workload, strategic planning, capital planning, or investments in information technology. In the absence of this fine print, the Committee cannot discern what the BCFP plans to do, how it will do it, or how much it will cost.
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> The Committee is disappointed that an agency dedicated to transparency and accountability was not more forthcoming about how it plans to spend taxpayer money . . .[10]

Including the Bureau within the appropriations process is not by itself sufficient to align the Bureau's structure with the norm for federal regulatory agencies: replacing the single Director with a bipartisan commission (as provided in the House-passed version of Dodd-Frank) and ensuring consideration of the views of prudential

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[10] H.R. Rep. 112-xx, 112th Cong., 1st Sess. at 7 (2011).

The budget document that the CFPB has published (*see* http://www.consumerfinance.gov/wp-content/uploads/-2011/02/CFPB-2012-CJ.pdf) consists primarily of blank space, interspersed with a few paragraphs of text and a couple of tables. To be precise, the entire content of the document consists of a one-sentence "Mission Statement," a one-page description of "Bureau Vision and Priorities," a one-page "Program History and Future Outlook," and two tables—covering a single page—describing "Operating Levels" and "Resource Detail[s]." A half-page of text following these tables notes that "CFPB budget estimates are based on the best available information at the time the Budget was prepared"—although the CFPB apparently did not see the necessity of sharing this information with Congress. Such a high-level description of broad policy objectives and estimated resource needs makes it impossible for Congress to conduct a meaningful review of what the CFPB plans to do, how and why it plans to do it, and how much those activities will cost. For a sample of the budget detail provided to Congress by virtually all other federal agencies, see the Federal Trade Commission's *summary* of the justification provided to Congress: http://www.ftc.gov/ftc/oed/fmo-/budgetsummary12.pdf.

regulators in rulemaking and enforcement actions, in addition to in examination decisions, are essential additional steps. But we strongly support taking the critical first step of ensuring that one individual cannot by himself decide how to spend up to $550 million of the taxpayers' money.

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Finally, at this time, the Chamber does not have a position regarding H.R. 2081—which would substitute the Chairman of the Board of Governors of the Federal Reserve System as a member of the Board of the Federal Deposit Insurance Corporation, in place of the Bureau Director. We would note, however, that in view of the significant questions regarding the legality of the Director's appointment, this statutory change would have the beneficial effect of eliminating legal uncertainty regarding acts of the FDIC that could, and likely will, stem from the Bureau Director's votes as a member of its Board.

Thank you again for the opportunity to testify before the Subcommittee today. I look forward to answering your questions.

United States House of Representatives
Committee on Financial Services

"TRUTH IN TESTIMONY" DISCLOSURE FORM

Clause 2(g) of rule XI of the Rules of the House of Representatives and the Rules of the Committee on Financial Services require the disclosure of the following information. A copy of this form should be attached to your written testimony.

1. Name:	2. Organization or organizations you are representing:
Andrew J. Pincus	U.S. Chamber of Commerce
3. Business Address and telephone number:	
[redacted]	
4. Have you received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2008 related to the subject on which you have been invited to testify?	5. Have any of the organizations you are representing received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2008 related to the subject on which you have been invited to testify?
☐ Yes ☑ No	☐ Yes ☑ No
6. If you answered .yes. to either item 4 or 5, please list the source and amount of each grant or contract, and indicate whether the recipient of such grant was you or the organization(s) you are representing. You may list additional grants or contracts on additional sheets.	
7. Signature:	

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