Statement
of the
U.S. Chamber
of Commerce

ON: **Legislative Proposals to Improve the Structure of the Consumer Financial Protection Bureau**

TO: U.S. House Subcommittee on Financial Institutions and consumer Credit

DATE: **April 6, 2011**

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.

INTRODUCTION

Chairman Capito, Ranking Member Maloney, and distinguished members of the Committee, my name is Jess Sharp and I am Executive Director for the Center for Capital Markets Competitiveness at the U.S. Chamber of Commerce. Thank you for the opportunity to testify before the Subcommittee today on behalf of the hundreds of thousands of businesses that the Chamber represents.

The Chamber firmly 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. All players, including businesses as well as consumers, benefit from a marketplace free of fraud and other deceptive and predatory practices.

We also want to work with the CFPB to ensure that the Bureau takes a targeted approach to regulation and enforcement, taking care to prevent sweeping policies that would impose duplicative regulatory burdens on small businesses and, perhaps even more importantly, that would prevent small businesses from obtaining the credit they need to expand, and create the new jobs that our economy so desperately needs.

At the same time, we are acutely aware that good intentions by themselves cannot ensure good results. The ability of a regulatory agency to carry out its mission successfully is influenced by—among other things—organizational structure; coordination with other agencies operating in related areas; and the ability to maintain over the long term a consistent, effective approach to regulatory and enforcement issues.

The unprecedented structure and authority of the Consumer Financial Protection Bureau ("CFPB") fails these longstanding, commonsense tests. Indeed, the House recognized these problems in the last Congress, adopting a structure for the Bureau very different from the Senate-passed approach that was included in the final legislation

The proposals that the Subcommittee is considering today—the "Responsible Consumer Financial Protection Regulations Act," introduced by Chairman Bachus; the "Consumer Financial Protection Safety and Soundness Improvement Act of 2011," introduced by Representative Duffy; and two discussion drafts—provide an opportunity to reinstate the multi-member commission approach embodied in the House bill, an approach that has proven so successful for a variety of regulatory agencies, as well as to address other structural issues essential to the success of the Bureau's mission.

NEED FOR CHECKS AND BALANCES

I want to make clear at the outset that the CFPB can help further these goals, but only if Congress puts in place the appropriate controls and oversight.

Rulemaking and enforcement, in order to be effective and consistent with a sound economy, must be well-considered, evidence-based, and carefully calibrated. Agencies, even those established with the best of intentions, can over time abandon sound regulatory principles if structural protections against politicization and sclerosis are not put in place. Aware of this inherent risk, Congress has historically subjected all federal agencies, including independent regulators, to a system of robust checks and balances that ensures their accountability and fidelity to law. The need for these traditional constraints is particularly acute in an area as fundamental to the health of the American economy as consumer finance. Americans can ill-afford government action that imposes unjustified regulatory costs on lending institutions and, perhaps even more importantly, prevents businesses from obtaining the credit to expand—and to create the new jobs that our economy so desperately needs.

DANGERS OF THE CFPB'S CURRENT STRUCTURE

The CFPB's structure is unprecedented:

- Independent regulatory agencies typically are headed by a multi-member bipartisan commission whose members serve for fixed terms. That is the structure of the Federal Trade Commission, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal Communications Commission, and numerous other agencies.

  The Bureau, by contrast, will be headed by a single director with tenure protection and a five-year fixed term. Although located formally within the Federal Reserve, the Bureau is completely insulated from the Federal Reserve's supervision and control.

- The Bureau also is exempt from the congressional budget process. It is funded by a transfer of money from the Federal Reserve to be spent as the director decides, subject only to a cap that in the first year exceeds $500 million.

There is no other government official who serves for a fixed term, and is therefore exempt from Presidential control, exercises sole authority over an agency, and has sole power to spend hundreds of millions of dollars outside the congressional appropriation process. To be sure, some regulators—for example, the Office of the Comptroller of the Currency and the now abolished Office of Thrift Supervision—have single directors. Members of the commissions heading independent regulatory agencies generally serve for fixed terms. Very few agencies are funded outside the appropriations process. But there is no other entity in the federal government that combines all of these features. It is a dangerous mix.

Some have pointed to the OTS, the OCC, the Federal Reserve, and the FDIC as precedents for the Bureau's structure, but the significant contrast between those entities and the Bureau in fact shows how radically the Bureau's structure deviates from established practice. Both the OTS and the OCC are part of the Treasury Department, and the heads of both serve at the pleasure of the President. They are thus politically accountable in a way that the Director of the Bureau simply is not. And while banking regulators such as the Federal Reserve and the Federal Deposit Insurance Corporation are outside the budget process, they have bipartisan, multi-member leadership, and thus are subject to the protection provided by collective decision-making, a protection that simply is not present when a single director makes the decisions.

The combination of these features—a single director, nearly complete independence, and exemption from the budget process—renders the Bureau virtually immune from the checks and balances that normally guide and constrain agency action. The director's spending authority is especially dramatic. To put the Bureau's potential $500 million-plus budget in perspective, in FY 2010, the budget of the Consumer Products Safety Commission was $118 million and the budget of the Federal Trade Commission was $292 million. Both of those agencies are, of course, subject to the appropriations process.

Moreover, while some have suggested that the Federal Reserve will be able to effectively control the Bureau's budget, that is not in fact the case. Dodd-Frank expressly states that the Federal Reserve "***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 Bureau's functions, up to a cap of between 10 and 12 percent of the Federal Reserve's operating budget. Subject to the limits inscribed in the Act itself, then, the Director—not the Federal Reserve—decides the Bureau's budget.

The threat posed by the Bureau's insulated and essentially unaccountable structure is magnified by the extraordinary authority that the Bureau will wield once it receives its full complement of powers. The Bureau's authority is not limited to banks and other financial service businesses. It also will have the power to regulate a number of activities that are common to Main Street businesses (for example, over-the-counter financing of goods purchases), and in some cases to regulate the service providers to those companies. And it will have a very broad standard to enforce—the prevention of "unfair, deceptive, or abusive acts or practices" in the market for consumer financial products. While unfair and deceptive practices have been proscribed for years with decades of case law to guide compliance and enforcement, the new "abusive" standard will require immediate interpretation by the Bureau— and likely will continue to evolve into the future.

While it is true that a two-thirds majority of the ten-member Financial Stability Oversight Council will be able to overturn CFPB regulations in certain circumstances, there are a number of reasons why that review is unlikely to meaningfully constrain the Bureau's authority. First, the FSOC veto applies only to rules, not enforcement actions. Second, the standard for exercising the veto is very restrictive—a rule must threaten the safety and soundness of the entire U.S. banking system or the stability of the U.S. financial system. Third, two-thirds of the FSOC must agree to a veto, meaning that even a unanimous vote of the five prudential regulators—the Federal Reserve, FDIC, OCC, National Credit Union Administration, and Federal Housing Finance Agency—would not suffice. Yet these are the entities responsible for ensuring the safety and soundness of the U.S. banking system. Finally, it should be remembered that the Bureau's Director is one of the FSOC's ten members, rendering it even harder to obtain the necessary two-thirds majority when the Bureau's own rules are at issue.

This FSOC process is also not a substitute for the need for regulator coordination between the CFPB and other Federal and State regulators in order to avoid conflicting rules or guidance from regulators.

In sum, it is fair to say that the Bureau's current structure places more unreviewable power in the hands of a single unelected official than any other federal regulatory law. The combination of the Bureau's unprecedented lack of accountability with its vast powers creates a significant foreseeable risk that, at some point in the future, it will take action that harms the American economy—including the very consumers it is meant to protect. When that time comes, it will be too late for Congress to make the necessary legislative corrections. The time to act is now.

I would now like to turn to the specific legislative measures that are the subject of this hearing.

BACHUS BILL

The bill introduced by Chairman Bachus, H.R. 1121 would restructure the CFPB so that it is governed by a five-member, bipartisan commission rather than a single director. Under the legislation, the President would appoint, with the advice and consent of the Senate, commissioners to staggered five-year terms. The President alone would select a Chair from among the Commission's members to serve as the Bureau's principal executive officer. Significantly, under this proposal, no more than three of the five commissioners could be affiliated with any one political party. This proposal thus adopts the basic provision in the House-passed version of the Dodd-Frank legislation. For four main reasons, we strongly support this reform as necessary to address the significant flaws in the Bureau's current governance and funding structure.

1. **Conform the Bureau to Other Independent Agencies.** Far from singling the Bureau out for special treatment, the Bachus Bill would conform the Bureau to other independent federal agencies, including those responsible for consumer protection. Indeed, that has been the standard structure for independent federal agencies since the creation of the Interstate Commerce Commission in 1887. Today, almost all independent agencies follow that model, although some have three commissioners rather than five. In addition to the FTC, SEC, CFTC, and FCC, examples include the Consumer Product Safety Commission, the Equal Employment Opportunity Commission, the National Credit Union Administration, the National Transportation Safety Board, the Nuclear Regulatory Commission, the Federal Energy Regulatory Commission, and the U.S. International Trade Commission. Congress has almost uniformly rejected periodic efforts to replace certain of these commissions—such as the NRC and FERC—with a single administrator.

Moreover, the decision to place a single director in charge of the Bureau—far from being essential to the original conception of this agency—actually was made quite late in the legislative process. Professor Warren first introduced the concept of a federal regulator of consumer finance in a 2007 article for the journal *Democracy*. She identified the model for her proposed "Financial Product Safety Commission" as the Consumer Product Safety Commission, which as I have already noted is just the type of multi-member, bipartisan decision-making body that the Bachus Bill would create. That structure has demonstrated its effectiveness in the consumer-protection context: in the words of Professor Warren, "[t]he evidence clearly shows that CPSC is a cost-effective agency."

The President's June 30, 2009, draft legislation proposing the creation of the Consumer Financial Protection Agency likewise would have adopted this commission model, as would the original version of financial reform legislation reported by the House Energy and Commerce Committee in 2009. Although the House-passed bill provided for a single director to serve for 30 months from the date of the bill's enactment, a five-member commission would have come into existence at the end of that period. It was the Senate bill that introduced the concept of a single, tenure-protected director serving for a fixed five-year term, and that modification was adopted in the final compromise legislation.

As this history makes clear, there is nothing about the single director structure that is inherent to the concept of a consumer financial protection agency. In fact, that unprecedented structure was tacked on very late in the legislative process. The history of the Bureau concept, and the uniform approach taken with respect to other independent agencies, demonstrate that a multi-member commission actually is the proven, logical approach to regulating consumer financial products—just as it is for the broad consumer protection oversight provided by the FTC.

2. Ensure Better, Impartial Decision-Making. The Chamber believes that technical expertise, exercised in a non-partisan fashion, should guide the Bureau's regulatory and enforcement activities. This view counsels strongly in favor of a multi-member commission structure, particularly given the legal difficulty, technical complexity, and political sensitivity of the Bureau's consumer protection mandate. As the historical practice suggests, decisions regarding such technical issues are more likely to be sound if they are the product of collaborative deliberation among individuals with diverse views, expertise, and backgrounds. Through discussion and compromise, the decision-making of multi-member agencies tends toward intellectual rigor, impartiality, and moderation. By contrast, leadership by an individual director is more likely to lead to extreme swings in approach. Without the need to accommodate multiple viewpoints, there is no check against a regulatory agenda driven by possibly idiosyncratic or even ill-considered policy views. That is especially true in light of the inability of either the President or Congress to exercise oversight through the appropriations process.

A robust deliberative process is particularly important in the context of the Bureau's activities because of the inherent tradeoffs and informational challenges involved in the regulation of consumer finance. For example, more stringent rules and stricter enforcement would protect some credit users from fraud and, in some cases, the consequences of their own poor choices. It would also lead to higher prices and reduced access to credit—with potentially significant adverse implications for consumer well-being and economic growth. The Bureau must balance these considerations in deciding where to draw the appropriate regulatory line. Smart, evidence-based decision-making in this complex area depends on full consideration of a diversity of inputs and views. Only a multi-member Commission can guarantee that such a process will take place.

3. Minimize Risk of Regulatory Capture. In a coauthored 2008 law review article, *Making Credit Safer*, Professor Warren observed that a major challenge in establishing a unified federal regulator of consumer credit products is "minimizing the risk of capture."[1] The Chamber agrees, and believe that a multi-member commission is the best way to address this risk. As Professor Rachel E. Barkow of NYU Law School recently noted, "having only one person at the apex can . . . mean that the agency is more easily captured."[2] The reason is simple and obvious: it is much easier for special interests on one side of an issue or another to capture one person than five people—particularly if those five have diverse viewpoints and political leanings. A multi-member commission further protects against the threat of capture by embedding an early warning system into the fabric of the agency's governance. A dissent against questionable agency action, which by definition cannot occur when a single director is in charge, can alert Congress and the public that the agency is off course and merits closer scrutiny.

4. Ensure Continuity and Stability. Enactment of the Bachus Bill would also facilitate continuity and stability in the Bureau's regulatory approach. Agency heads gain experience and effectiveness as they accumulate years on the job and develop familiarity with the regulated industry and the agency's personnel and practices. This process of acculturation and education is particularly important in the context of the Bureau, which has a vast regulatory mandate—including many parts of the economy outside the financial services sector. New directors are unlikely to have deep familiarity with all aspects of the regulatory environment. Yet, as the Bureau is currently structured, all of the accumulated knowledge gained by the Director during his or her tenure will be lost upon departure. The result will almost inevitably be discontinuity and an extended period of agency drift while the new appointee settles in and gets up to speed on the issues. Moreover, if a vacancy coincides with a different party assuming the Presidency, the departure of the incumbent director will likely lead to significant substantive policy shifts. In particular, there is a risk that a new administration unenthusiastic about the agency's mission could undermine its effectiveness through a single appointment.

[1] Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. 1, 99 n.325 (2008).
[2] *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 38 (2010).

A multi-member commission with staggered terms, by contrast, ensures the continuous presence of a significant number of experienced members at all times and prevents any gaps in agency effectiveness. The commission structure helps ensure that a change in the party affiliation of the President does not lead to sharp changes in regulatory approach, but rather a period of transition that is smooth and gradual.

DUFFY BILL

The Duffy Bill, H.R. 1315 would authorize the FSOC to overrule Bureau regulations by a majority rather than two-thirds vote, and would exclude the Bureau's Director from that vote. The bill also would lower the substantive standard necessary for the FSOC to overrule Bureau regulations—to a standard of "inconsistent with the safe and sound operations of United States financial institutions"—and would require, not just authorize, the FSOC to act when that standard is met.

The Chamber supports the Duffy Bill because it would enhance the FSOC's ability to serve as a critical check on unsound Bureau rulemaking that threatens the financial system. Even if Congress replaces the current single-director structure with a multi-member Commission, it is still essential for the prudential regulators to have an effective mechanism for ensuring that Bureau regulations do not put at risk the safety and soundness of U.S. financial institutions. If every prudential regulator opposes a proposed regulation, that regulation should not stand, and a majority requirement based on a vote of nine of the FSOC's members would permit that result. The bill would require them to do so any time the Bureau's regulations are inconsistent with safety and soundness—thus ensuring intervention when it is warranted.

I would point out that the Duffy Bill does not address the Dodd-Frank Act's failure to allow FSOC to intervene when the Bureau takes ***enforcement action*** that threatens safety and soundness. Professor Warren has already explained that the Bureau will not be adopting a "rules-based approach" to regulation. That means a heavier reliance on enforcement, and enforcement actions meant to establish broad guidance can impinge on safety and soundness, just as regulations can. The Chamber urges the Committee to consider modifying the bill to address this loophole.

DISCUSSION DRAFTS

The discussion drafts would delay the transfer of consumer protection functions to the Bureau until a Director has been confirmed, and would remove the current authorization for the Bureau and prudential regulators to include Bureau examiners in examinations of large financial institutions on a sampling basis prior to the designated transfer date.

With respect to the first proposal, the Chamber agrees that consumer protection functions should remain with their existing agencies until the leadership of the Bureau (in the form of a multi-member Commission) has been confirmed. Section 1066(a) of the Dodd-Frank Act authorizes the Secretary of the Treasury to perform the Bureau's functions until a Director is appointed. It is the view of the Inspectors General of the Treasury and the Federal Reserve that this provision authorizes the Secretary to exercise those consumer protection functions transferred to the Bureau on the designated transfer date. We believe that the existing agencies are the more appropriate repositories for these significant powers until the Bureau has Senate-confirmed leadership.

As for the second proposal, we agree that it raises concerns for Bureau examiners to participate in examinations of large financial institutions prior to the designated transfer date. Accordingly, the Chamber would support legislation along these lines.

CONCLUSION

Well-regulated, transparent, efficient capital markets are the lifeblood of the American economy. There was wide agreement both on the need for financial regulatory reform and more effective consumer protection. Both businesses and consumers will benefit from the right reforms which include ensuring regulators are structured to function effectively and are required to work well together. The CFPB is no exception to this. We urged Congress to work on a bi-partisan basis to ensure we have transparent, accountable, and effective regulators.

Thank you again for the opportunity to testify before the Subcommittee today. The Chamber looks forward to working with Congress as these legislative proposals move forward. I am happy to answer any questions you may have.

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:
Jess Sharp	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.	
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