LEGISLATIVE PROPOSALS TO PROMOTE ACCOUNTABILITY AND TRANSPARENCY AT THE CONSUMER FINANCIAL PROTECTION BUREAU

HEARING

BEFORE THE

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

OF THE

COMMITTEE ON FINANCIAL SERVICES

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

FEBRUARY 8, 2012

Printed for the use of the Committee on Financial Services

Serial No. 112–99

U.S. GOVERNMENT PRINTING OFFICE

75–071 PDF WASHINGTON : 2012

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

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LEGISLATIVE PROPOSALS TO PROMOTE ACCOUNTABILITY AND TRANSPARENCY AT THE CONSUMER FINANCIAL PROTECTION BUREAU

Wednesday, February 8, 2012

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:01 a.m., in room 2128, Rayburn House Office Building, Hon. Shelley Moore Capito [chairwoman of the subcommittee] presiding.

Members present: Representatives Capito, Renacci, Royce, Hensarling, McHenry, McCotter, Pearce, Luetkemeyer, Huizenga, Duffy, Canseco, Grimm; Maloney, Gutierrez, Hinojosa, Baca, Miller of North Carolina, Scott, Velazquez, and Carney.

Ex officio present: Representative Bachus.

Also present: Representatives Neugebauer and Green.

Chairwoman CAPITO. This hearing will come to order. I would like to thank the members of the subcommittee and our witnesses for joining us today.

The title of this morning's hearing is, "Legislative Proposals to Promote Accountability and Transparency at the Consumer Financial Protection Bureau," which is better known to all as the CFPB.

We will be considering three bills: one, legislation which is authored by Mr. Neugebauer; two, legislation which is authored by Mr. Renacci—two of these bills address the funding of the Bureau and responsibilities of the Bureau's Director; and three, legislation introduced by Mr. Huizenga that seeks to address an oversight in the Dodd-Frank Act to ensure that information shared with the Bureau is protected by the attorney/client privilege and work product immunity.

A little over a month ago, President Obama used his executive power to appoint Richard Cordray to be Director of the Consumer Financial Protection Bureau using a recess appointment. However, it is still unclear whether or not the Congress was technically in recess when he made that appointment. While this may seem like a technicality to many across the Nation, it will undoubtedly lead to significant, I think, litigation, further damaging the credibility of this Bureau. I stated nearly 6 months ago that I felt that the Administration had mishandled the appointment of the Bureau's

Director from the beginning. The complexities of moving a nominee through the United States Senate are not new.

For an agency that was supposed to be the crown jewel of the Dodd-Frank Act, waiting until the last minute to appoint a nominee and then subsequently dismissing constitutionally mandated procedures for appointment, I think creates an uncertainty over the Bureau and its actions until it is resolved. The legislative proposals before us today are an important step in improving the accountability for this new agency. The first measure, H.R. 1355, sponsored by Mr. Neugebauer, will remove the Bureau from the Federal Reserve and place it within the Department of the Treasury, where the Bureau will subsequently be subject to regular authorization, budget, and appropriations processes.

The Bureau's stated goal is to regulate financial products. And it is prudent for Members of Congress to have some say over the budget of an agency that could decide which financial products are appropriate for their constituents.

The second measure, H.R. 2081, as sponsored by Mr. Renacci, moves the Bureau Director off of the FDIC Board and fills the vacancy with the Chairman of the Federal Reserve. The primary goal of the FDIC is the safety and soundness of the institutions that benefit from the Deposit Insurance Fund. And it is appropriate to have all of the prudent regulators represented on the FDIC Board.

Finally, I would like to thank Mr. Huizenga for the third bill we will consider today, H.R. 3871. We have worked with Mr. Huizenga to address an issue of an oversight of the Dodd-Frank Act to ensure information that is shared with the Bureau is treated as privileged information and cannot be shared with third parties.

It is our intent to move this legislation quickly, especially given Mr. Cordray's recent statement that, "Congress may want to look at a legislative fix." We hope our colleagues across the aisle will work—and we have already been talking about this—with us on moving this forward without delay. I would like to thank the three sponsors of the bills before the subcommittee today for their leadership, and I look forward to hearing the testimony of the witnesses.

At this time, I would like to yield to my good friend and colleague, Ranking Member Maloney, for the purpose of giving an opening statement.

Mrs. MALONEY. I want to thank the gentlelady for yielding and I welcome the panel of witnesses. There are three bills before us today, which according to the title of this hearing will "promote accountability and transparency." However, two of these proposed bills are seriously misguided and meant to distract from the CFPB's important work to protect the American consumer. But I would argue that for the most part, they do nothing to further that goal of transparency because the CFPB is already the most accountable agency in our government. The first bill will ensure that privileged documents used in CFPB exams maintain that privileged status.

I support the goal of this bill, but I want to make sure that we are amending the right part of the law. In the Senate, Senator Shelby has a bill that does the same thing, but it amends the FDI. I believe this is a better way to provide for this protection as that is where the OCC, the FDIC and the Federal Reserve have this protection. The bill before us amends Dodd-Frank. I do not support the other two. The second bill takes the CFP Director off the FDIC Board and replaces him with the Federal Reserve (Fed) Chairman. The purpose of giving a seat to the CFPB Director was to enable him to interact with the prudential regulators who conduct exams of financial institutions. And this would eliminate the ability of consumer and prudential bank regulators to work together for consumers and safety and soundness.

Finally, we have the most blatant attempt to dismantle the Bureau, which would move it out of the Fed and put it under the Treasury Department, where it would be subject to the political and uncertain appropriations process. I oppose this bill and this change to the law. To subject a regulatory agency, and the CFPB in particular, to appropriations in this Republican-led Chamber is to put it on a chopping block. I remind you that all of my colleagues on the Republican side voted against this bill and this would leave the American people without an effective watchdog and put this country back on the path that led to the financial crisis. This bill also eliminates the Consumer Financial Civil Penalty Fund, which holds the proceeds from enforcement actions and directs those funds back to victims.

Many of my colleagues talked about how we needed to help the victims from Madoff and other scandals, but this would eliminate that. And if the victims can't be identified, this would go to financial literacy and consumer education, a stated goal of this committee. But I would note that the CFPB already has unprecedented accountability, and since opening its doors, the CFPB has issued its semi-annual report justifying its budget. It has testified before Congress 14 different times. It has provided its financial operating plans to the Office of Management and Budget. It has a budget cap, and the Bureau is subject to potential vetoes on rulemakings by the Financial Stability Oversight Council. And it has already been audited by the Comptroller General. This is all in accordance with the rules as set forth in Dodd-Frank.

I fail to understand why my colleagues want to try to dismantle the power of the CFPB. I would like to place in the record some of their accomplishments, a whole list of them, such as opening up an office to help veterans, opening up an office to help students, coming out with a one-pager for mortgages that people understand, coming out with information so that students understand the dangers of financial products and how they can go into debt. I have a list here of many, many different things that they have done that help our economy, help our consumers, and help our country. So, I would ask unanimous consent to place it in the record.

Chairwoman CAPITO. Without objection, it is so ordered.

Mrs. MALONEY. I yield back.

Chairwoman CAPITO. I would like to recognize the chairman of the full committee, Mr. Bachus, for 2 minutes for an opening statement.

Chairman BACHUS. Thank you, Madam Chairwoman, for holding this hearing on three bills that our committee continues to advance. We think they are reforms that will bring much needed oversight, accountability, and transparency to the Consumer Financial Protection Bureau.

I think all of us agree on the need to protect consumers. But I think in honesty, we have to go beyond that and say that at times, it was not a priority for the Federal regulators. At times, they focused on safety and soundness and they should have done that, but I think consumer protection was sacrificed, probably particularly as it dealt with non-banking companies.

There has also been criticism—Professor Wilmarth, you discuss this in your written testimony—that they sometimes focused on profitability of the banks as opposed to consumer protection. I associate myself with your remarks, Professor, saying that you can have both and it has to work for both parties. And if it doesn't work for the consumer, ultimately it won't work for the financial institution. I think that there are other witnesses at the table who would agree. What these bills do—actually the bill that forms the commission is exactly what we passed out of the House; an overwhelming vote was for a bipartisan commission.

And I will say that, because we resisted the formation of this board as a group—that I am sure that our colleagues express some skepticism now. But I will tell you that I actually, in 2005 proposed a subprime lending bill and we encountered resistance from the regulators and the institutions, and I think there was a push back. I want to close by commending Mr. Huizenga and Mr. Renacci and Mr. Neugebauer for their strong work on these bills, and hopefully we can come to some consensus. I think we have an agency where maybe the recess appointment is questionable, and we could have lawsuits for years about that. That is not going to benefit anyone. But I will acknowledge that we didn't always put consumer protection—we didn't elevate it to the level we should have. Thank you.

Chairwoman CAPITO. Thank you, Mr. Chairman.

I would like to recognize Mr. Hinojosa for 1 minute for the purpose of an opening statement.

Mr. HINOJOSA. Thank you.

Chairwoman Capito and Ranking Member Maloney, I thank you both for holding today's hearing on examining the accountability of the new Consumer Financial Protection Bureau.

I believe we should continually strive to ensure the strength, the independence, and the accountability of the Bureau, and holding hearings such as this contributes to that effort.

After the financial collapse in 2008, it became apparent that consumers were left holding the bag, and that the agencies charged with their protection were too fragmented to be effective.

The Consumer Financial Protection Bureau was created in response to this fragmentation, to hold the protection of American consumers as its sole priority. The American public needs to be informed of the House Majority's attempt to cut the funding of the CFPB, which can help prevent another financial crisis like the one that started at the end of 2007.

It is our duty to make certain the Bureau follows through on its mission. However, subjecting the Bureau's budget to the appropriations process in order to reduce its funding, and stripping the Director of his membership on the FDIC Board of Directors, is counterproductive to the mission of the Bureau and will weaken its ability to guard consumers against fraud and predatory practices.

I look forward to hearing today's testimony and our distinguished panelists' response to our concerns.

I yield back the remainder of my time.

Chairwoman CAPITO. Thank you

I recognize Mr. Renacci for 1 minute for the purpose of an opening statement.

Mr. RENACCI. Thank you, Madam Chairwoman.

I would like to begin by emphasizing that I am fully committed to consumer protection. I recognize that consumers are the driving force behind our economy, and I believe consumers depend on a sound financial system.

Main Street consumers are the ones most impacted by the reckless decisions made on Wall Street. As the financial system crumbled around them, consumers were the ones who lost their jobs, lost their homes, and were unable to access credit.

It is for this reason that we must enact sound policies of protecting the entire financial system and put an end to special interest carve-outs that favor one segment of the economy over the other.

Therefore, I offered H.R. 2081, a bill to ensure the safety and soundness of our financial system.

During the creation of the CFPB, the proponents argued for an agency whose sole purpose was consumer protection. By placing the CFPB Director on the FDIC Board, whose mandate is safety and soundness, the bill drafters created a conflict of interest when the CFPB Director was making decisions during the FDIC Board meeting as to which mandate should he follow.

The best thing we can do for consumers is to ensure a transparent banking system that protects their savings, provides access to credit, and creates safe and innovative products.

One of the best things we can do for the CFPB Director is to allow him to do his job with no perceived conflict of interest.

I look forward to hearing your comments on all three proposals. Again, thank you for your testimony.

Chairwoman CAPITO. Thank you.

Mr. Scott is recognized for 3 minutes for the purpose of making an opening statement.

Mr. SCOTT. Thank you very much, Madam Chairwoman.

The American people basically have spoken and have declared that we really need consumer protection in this country and unfortunately, these three measures before us are, to me, a declaration of war on the CFPB, the Consumer Protection Bureau. They clearly want to move it out of the Federal Reserve, they want to put it into Treasury. They want to revoke the automatic and unrenewable annual funding of the agency. They want to repeal the establishment of the consumer financial protection fund and the consumer financial civil penalty fund. They totally weaken the educational effort in this bill. They reduce the resources that are available to consumers. They remove some of the oversight of the CFPB and its reach for accountability and its reach for transparency. They omit fairness and openness and totally weaken the entire thrust of this bill, which is to provide unfettered protection for consumers.

We must remember how we got into this situation in the first place. It was because of abusive kinds of actions. Now, I don't mind us moving on and trying to correct some things and certainly, to enable the financial services industry to better to do its job, but we cannot re-alter and re-shape this agency so that it cannot do its job.

This agency must be allowed to breathe. These measures simply put this agency into a form of a straitjacket so that they cannot do it.

And I understand my friends on the other side have never approved of this agency, they don't want this agency, they have been trying to kill this agency ever since it has been here.

But let us be real, our American people deserve protection.

There is nothing more complex than some of these financial instruments, and this is especially true in very tough economic times. We have all kinds of financial products and services and to be honest, we have some unscrupulous actors in this field. Not all, but some. I would hope that we can look at this. I would be interested in—not only during my questions—to find your opinions about this and some of my comments, but I believe firmly that they are true.

I am one who is willing to work with the financial services industry to make sure that they can do their job. But I am also one who wants to make sure that this agency lives and breathes and is able to do its essential job of protecting the American people from financial abuses.

I yield back, Madam Chairwoman.

Chairwoman CAPITO. Thank you.

I would like to recognize Mr. Royce for 1 minute for the purpose of an opening statement.

Mr. ROYCE. Thank you.

The Administration just went to great lengths to usurp regular order and recess-appoint the head of the CFPB, and what was the Senate asking for in return that elicited such a step that many argue violates the Constitution itself? They were looking to subject the CFPB's budget to the normal appropriations process and to move the agency from a Director to a board, and these are the steps, frankly, that were originally envisioned by Mrs. Warren and Secretary Geithner.

The real worry we have in terms of the way that this has been done is it is going to undermine safety and soundness. It is going to take away the inputs of the prudential regulator.

So these reforms would reduce the potential abuses that may come from this agency, which unlike any other regulator now has an independent budget, has broad regulator authority over a number of different types of institutions, and is run by a single individual. I am encouraged by the bills being discussed today which get at what Senate Republicans were trying to achieve in the first place, which was to provide added transparency to the CFPB and ensure safety and soundness regulation remains the chief function of our regulatory structure. I would argue that lack of proper safety and soundness regulation, the lack of efficient prudential regulation, is also what helped bring on the original crisis, so it needs to be addressed, and we can't walk down this road again with bifurcated regulation as we did with Fannie Mae and Freddie Mac without the prudential regulator having the necessary authority to protect safety and soundness.

Thank you, I yield back.

Chairwoman CAPITO. Thank you. I will recognize Mr. Green.

Mr. GREEN. Thank you, Madam Chairwoman, and I thank you for allowing me to become a part of the committee. I would also like to thank the witnesses for appearing today.

I would like to associate myself with the comments made by the ranking member, and I would like to say to the persons listening, whereever they happen to be, whomever they happen to be, I believe the President did the right thing.

More than 40 Senators indicated that they would approve no one until certain things were done that can be done legislatively, but there was an understanding that without leadership, the organization could not function. There had to be leadership for the organization to function.

Leadership is key to any organization's being efficacious. The President did the right thing. He made the appointment. And for those who think that the wrong thing was done, the courts are available to sort these things out.

Funding is important to the existence of any organization. If you assault leadership and you can circumvent funding, you can thwart the efforts of the organization.

These measures assault leadership and funding. This agency is designed to help people, people on Main Street, but also people on a third street. We talk about Wall Street and Main Street, but there is a street called "Home Street" where people have their houses that are being foreclosed on. They understand the need for the Consumer Financial Protection Bureau because they understand what they have gone through, and even if their homes are not directly impacted, they are indirectly impacted by other homes on their blocks that have been foreclosed upon. Leadership and funding are key.

I thank you for the time, I yield back.

Chairwoman CAPITO. Thank you.

Mr. Huizenga, for 1 minute, for an opening statement.

Mr. HUIZENGA. Thank you, Madam Chairwoman, and Ranking Member Maloney. I appreciate this important hearing and the legislative proposals that will create some piece of mind, I think, for our financial institutions.

CFPB as created under Dodd-Frank has been identified to fail the safeguards from proprietary information given to the Bureau by financial institutions.

Let me be clear. We all agree that we need to have stringent consumer protections, but these reforms are much-needed commonsense measures, I believe. Specifically, my bill, H.R. 3871, the Proprietary Information and Protection Act, immediately closes a loophole created under the CFPB creation.

Unlike current statutes regarding other Federal agencies assessing relevant information, Dodd-Frank failed to provide such protections. The simple truth is that the CFPB could largely legally share privileged information with third parties at this point. Absent specific congressional legislation, the courts have permitted this practice in the case of other Federal agencies.

Richard Cordray, Director of the CFPB, appointed by President Obama, recently testified that this was an "oversight." And, that he supports a legislative solution to ensure privileged information is not leaked to third parties through the CFPB. My bill is that real legislative solution, a common-sense fix that would put an end to needless uncertainty and legal costs to both the CFPB and to financial institutions.

I appreciate the opportunity to be here today.

Chairwoman CAPITO. Thank you.

Mr. Canseco, for 1 minute?

Mr. CANSECO. Thank you, Madam Chairwoman.

Last March, Elizabeth Warren told this committee, with a straight face I should add, that the CFPB was the most accountable agency in government. And needless to say, there has been some disagreement over that assertion. In the past year, this committee has led several efforts to bring transparency and accountability to the Consumer Financial Protection Bureau. And each time, these efforts have been rebuffed, either by a crusading President, or by a Democratic caucus that for a five-member commission before they were against it.

And so, what we have now is a rogue agency, headed by a rogue Director who operates with almost no accountability, and whose mandates will be subject to the whims of whomever happens to be sitting in the czar's throne—excuse me, the Director's chair.

This is an unacceptable way for a Federal agency to run, and I look forward to considering more measures that would shine a little more light on the CFPB.

Thank you.

Chairwoman CAPITO. Thank you.

Mr. Grimm is recognized for 1 minute for the purpose of an opening statement.

Mr. GRIMM. Thank you, Madam Chairwoman.

I appreciate you holding this hearing to examine proposals to improve accountability and oversight of the CFPB. The CFPB, created under Dodd-Frank, I think is a classic example of an ever-expanding Federal bureaucracy. It is given a funding stream directly from the budget of the Federal Reserve, which removes from Congress one of its most basic and fundamental powers, the ability to appropriate funds to a Federal agency as it sees fit; and by extension, the ability for the Congress to hold that agency accountable for its performance, or for the lack thereof.

Therefore, I welcome the proposal of Chairman Neugebauer to place the CFPB under the Department of the Treasury and restore Congress' rightful role in determining the funding of this agency and its direction going forward.

I look forward to hearing from the witnesses their thoughts on the bills today before us, and I yield back the balance of my time.

Thank you.

Chairwoman CAPITO. Thank you.

Mr. Neugebauer, for 1 minute, for an opening statement.

Mr. NEUGEBAUER. Thank you very much.

This hearing is not about consumer protection; it is about accountability, accountability that the American people desire. Our country was founded on the principles of checks and balances. And, we now have an agency that has basically unlimited powers, which is being run by a person who has not been constitutionally ratified to hold that position. And people are expecting us to do something about that.

For example, this new agency just put out its very first rule and it turns out that it is going to take 7.7 million manhours to comply with this new regulation. I would remind you that it took just over 7 million manhours to build the Empire State Building. So the accountability and responsibility is an important part of our government. As my good friend, Mr. Scott, said, "automatic funding."

The American people are tired of automatic funding. In fact, that is kind of how we got into these record deficits is automatic funding. And so, moving this agency to the budget, going through the normal appropriations process is the right thing to do. And I encourage my other colleagues to support H.R. 1355.

Chairwoman CAPITO. Thank you.

Our final opening statement is Mr. Duffy for 1 minute.

Mr. DUFFY. Thank you, Madam Chairwoman.

To echo what has been said before, we all agree that we want to have sound consumer protections in place. We want our family members, our friends, and our constituents to be dealt with fairly when they deal with a financial institution in a transparent way.

But we hear heightened rhetoric in this room. We hear comments like, we want to put the CFPB in a straitjacket. We hear comments like, we are going to de-fang the CFPB. And I guess I would like the panel to talk about, when agencies like the SEC, the CFTC, the FTC, the FCC, and the EEOC all are agencies that are funded by Congress, how that has put them in a straitjacket that doesn't allow them to effectively do their jobs?

We also hear a concern about this agency being run by a commission, and then therefore, how the Federal Reserve is ineffective because it has a board, or the FDIC is ineffective because it has a five-member board. Or the SEC, or the CFTC, NACU—all of these agencies run by a board.

I would like to hear the panel talk about how they are so ineffective because they have a board or a panel which runs the agency. Or, those panels that receive their money through the appropriations process, how they, too, are ineffective.

I would like to hear the panel talk about that throughout the hearing.

I yield back.

Chairwoman CAPITO. Thank you. Thank you, Mr. Duffy.

That concludes our opening statements, and I would now like to introduce our panel of witnesses for the purpose of giving a 5-minute opening statement. I will introduce you individually before you speak.

First, Mr. Michael G. Hunter, chief operating officer of the American Bankers Association. And I would like to remind the witnesses that if you can pull the microphones close to you, it is easier for us to hear you in this room.

Thank you. Welcome, Mr. Hunter.

STATEMENT OF MICHAEL J. HUNTER, CHIEF OPERATING OFFICER, AMERICAN BANKERS ASSOCIATION (ABA)

Mr. HUNTER. Thank you. Chairwoman Capito, Ranking Member Maloney, and members of the subcommittee, my name is Michael

Hunter. I am the chief operating officer of the American Bankers Association. I come before this subcommittee not only as a representative of the banking industry, but also as someone with experience in government at both the State and Federal levels. I served in both the Oklahoma House as Oklahoma's secretary of state, and was chief of staff to Congressman J.C. Watts, a former member of the House Financial Services Committee.

I appreciate the opportunity to present the ABA's views on several pieces of legislation that would improve the accountability of the Bureau of Consumer Financial Protection. Let me first begin by emphasizing that the banking industry fully supports effective consumer protection. Americans are best served by a financially sound banking industry that safeguards customer deposits, lends those deposits responsibly, and processes payments efficiently.

No bank can be successful without treating customers fairly. It is no surprise, therefore, that two-thirds of banks in this country have been in business for more than 50 years, and one-third for more than a century. The Consumer Financial Protection Bureau will play a pivotal role in setting new rules that will affect access and availability of consumer financial products.

We appreciate the work of Congressmen Renacci and Neugebauer to put forward options to address concerns about the role of the Bureau and its exercise of power; and to Congressman Huizenga for his work in the area of privileged information. We strongly support an effective mechanism of checks and balances for the Bureau and we applaud congressional efforts to achieve this goal.

Let me comment briefly on each of the three bills. First, H.R. 2081 would replace the Bureau Director with the Chairman of the Federal Reserve as one of the five members of the FDIC Board. Maintaining a safe and sound banking system is at the heart of protecting the FDIC insurance fund. Therefore, regulators with safety and soundness responsibilities are important for directing the FDIC, which is the rationale for including the Fed.

What is missing on the FDIC's Board is representation from the banking industry. Banks bear the full cost of the FDIC without any taxpayer assistance. Yet, banks have no voice in the priorities, policies, and staffing of the agency. We would be happy to work with the subcommittee on how this might be accomplished.

The second bill, H.R. 1355, would move the Bureau under Treasury, and subject it to the appropriations process. At the heart of this bill is the need to ensure accountability for Bureau decisions and ensure that the funds used are done so effectively.

On the question of accountability, there are many ways to achieve this. The ABA has long advocated the use of a commission or a board structure to accomplish this, as currently there is too much power vested in one person to fundamentally alter the financial choices available to consumers. Such a structural change would provide an effective check and balance.

ABA supports H.R. 1121, introduced by Chairman Bachus, which created a five-member board for the Bureau. This bill passed the subcommittee, the full committee, and later the full House as part of H.R. 1315.

The last bill, H.R. 3871, is intended to clarify for the Bureau the protection of confidential information. Banks currently have legal protection that allows them to be comfortable in voluntarily turning over privileged documents upon the request of banking agencies. While the Bureau has expressed its willingness to address this issue through regulation, the ABA believes it is appropriate to add certainty by enacting the same express rules regarding privilege of information for the Bureau as those already established for the other Federal banking supervisors.

In testimony before the House and the Senate, we note that Richard Cordray has indicated his support for such action. We appreciate Representative Huizenga's work on this important issue. We would suggest a technical modification to the bill to address the privilege issue with respect to the sharing of information with other Federal agencies. The bill currently only addresses one of the two statutory provisions that would put the Bureau on equal footing with the other banking agencies.

We look forward to working with Congressman Huizenga and the subcommittee on this very important issue. Thank you for the opportunity to testify. I would be happy to answer any questions.

[The prepared statement of Mr. Hunter can be found on page 47 of the appendix.]

Chairwoman CAPITO. Thank you.

Our second witness is Mr. Andrew Pincus, partner, Mayer Brown LLP, on behalf of the United States Chamber of Commerce.

Welcome.

STATEMENT OF ANDREW PINCUS, PARTNER, MAYER BROWN LLP, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Mr. PINCUS. Thank you.

Chairwoman Capito, Ranking Member Maloney, and members of the subcommittee, thank you for the opportunity to testify today on behalf of the U.S. Chamber of Commerce and the hundreds of businesses that the Chamber represents.

The Chamber, too, strongly supports consumer protection. At the same time, we have to recognize that consumer protection regulation must be efficient and focused. Unjustified regulatory burdens harm all Americans by diverting the resources that are essential to fueling economic growth, and perhaps even more importantly in this context, by preventing 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 subject of this hearing address significant problems confronting the CFPB. Although they certainly don't address all of the Chamber's concerns about the Bureau, they will resolve several important issues. And I would like to talk first about the attorney-client privilege issue.

As Mr. Hunter has said, the critical issue here is that statutory protection that exists in the bank examination process, with respect to interactions with the prudential Federal regulators in terms of the protection of the attorney-client privilege, were not extended to the examination processes that the Bureau administers, both with respect to federally-regulated banks, and with respect to the many other non-bank institutions as to which the Bureau can exercise examination authority.

The Bureau has addressed this issue as best it can in a July 4th guidance bulletin that was issued, saying that its analysis was that the submission of information to it in the examination process does constitute the waiver of any attorney-client or associate privilege But of course, as useful as that guidance document is, it does not provide the certainty that a statute does. The situation that Congress confronts here is very similar to the one it confronted in 2006 with respect to the banking regulators. There, the OCC in 1991 had issued an opinion letter very similar to the one that the Bureau has issued here saying, "We believe that there is protection against a waiver."

But Congress in 2006 recognized that providing statutory certainty was critical, and therefore enacted the provision, Section 1828(x), that provides that certainty. And I think what is critical is extending that statutory protection to the examination interactions that the Bureau is having with the entities that it is examining.

I think, just being a lawyer for a minute, the reason for this is that any general counsel, although comforted by the Bureau's opinion, is going to be a little nervous about interactions that involve important, critical, privileged documents. And it would just be cautious for the company to say to the examiners, "Gee, we would really—can we do this another way?"

And that obviously is going to burden the examination process. It is going to take longer and eliminate the flow of information back and forth that I think everyone agrees is what makes the examination process work. So providing the statutory certainty is not only good for businesses; it is going to be good to make the examination process work effectively.

Let me turn next to H.R. 1355, which would subject the Bureau's expenditures to the congressional appropriations process. I think it is a fundamental principle of American government that those who exercise power have to be accountable to the people through their elected representatives.

And for that reason, every government agency that Congress has created has historically been subjected to various robust checks and balances to ensure their accountability to the people and to provide oversight of their fidelity to the law.

Here, I think it is undisputed that the Bureau Director lacks all of these accountability mechanisms. He has sole decision-making authority about rulemaking, enforcement, hiring, and every other matter. He has policy independence to the President, and can only be removed from office for "inefficiency, neglect of duty or malfeasance," and has the ability to spend more than half a billion dollars without getting approval of anyone, Congress or the President.

And there is no regulatory agency that has this same combination of features as the Bureau that oversees the private sector, and certainly none that has the extraordinarily broad oversight, not just of the financial services sector, but of large, other segments of the economy that this agency has.

And it is important to note that one of the important constraints in the statute, advice and consent, was eliminated by the recess appointment. H.R. 1355 begins to address this by addressing the appropriations process. And that is critical because, as I note in my testimony, the Appropriations Committee noted in its report that it received no information from the Bureau about how it plans to spend hundreds of millions of dollars in the next fiscal year. Thank you, and I would be happy to answer any questions.

[The prepared statement of Mr. Pincus can be found on page 54 of the appendix.]

Chairwoman CAPITO. Thank you, Mr. Pincus.

Our next witness is Mr. Chris Stinebert, president and chief executive officer, American Financial Services Association.

Welcome.

STATEMENT OF CHRIS STINEBERT, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMERICAN FINANCIAL SERVICES ASSOCIATION (AFSA)

Mr. STINEBERT. Good morning, and my appreciation as well to the chairwoman and the ranking member for holding these important hearings on these important proposals. Like my colleagues, AFSA is certainly committed to consumer protection. AFSA's members include consumer finance companies, auto finance companies, mortgage lenders, and credit card issuers.

Before the passage of the Dodd-Frank Act, most AFSA members had been regulated, licensed, examined, and supervised by the State banking agencies. They are funded by putting their own capital at risk, not dependent on federally-insured deposits.

Importantly, this testimony should not be taken as kind of a negative comment about the professionalism of the civil servants at the CFPB, many of whom have been veterans of many administrative agencies.

Unlike traditional agencies governed by a bipartisan commission, the CFPB is directed by a single regulator. Unlike the traditional independent agency model, the CFPB is guaranteed a percentage of the Federal Reserve Board's budget. Therefore, there is no congressional oversight through the normal budgetary process.

We are grateful to the chairwoman for her co-sponsorship of H.R. 1121, the Responsible Consumer Financial Protection Regulations Act, which replaces the single Director of the CFPB with a five-member commission, a structure similar to the FTC.

The original plans to create a consumer agency—as has been pointed out numerous times, including the Administration's proposal and the Wall Street Reform Consumer Protection Act of 2009—all structured the agency as a commission.

AFSA also supports H.R. 1335, introduced by the Oversight and Investigations Subcommittee, which would move the CFPB into the Treasury Department in a structure similar to that of the Office of the Comptroller of the Currency. Doing so would provide congressional oversight and budgetary accountability.

AFSA members are also concerned about the treatment of confidential information collected during the examination process. There are certainly precedents for maintaining this confidentiality in the long-standing practice by the Federal banking agencies and claiming privilege with regard to bank examination records. We are pleased that the recent CFPB bulletin states that institutions providing privileged information in response to a supervisory request will not waive any privilege; however, it is unclear whether the CFPB is a Federal banking agency under the Federal Deposit Insurance Act, which governs the treatment and waiver of privilege for depository institutions.

In a recent CFPB bulletin, the Bureau asserts that it has the authority to demand privileged documents from supervised institutions without the privilege being waived, despite the fact that the CFPB is not a Federal banking agency. It is also doubtful whether this body of law extends to the non-depository companies that AFSA currently represents.

We are encouraged that Director Cordray has indicated a desire to work with Congress to include CFPB among covered agencies for the purpose of maintaining privilege We are also pleased to offer enthusiastic support of H.R. 3871. This Act would clarify the law to say that the submission of confidential information to the CFPB in the course of its supervisory process does not waive any privilege to any regulated entity.

The House of Representatives passed H.R. 10, the Regulations From the Executive in Need of Scrutiny Act of 2011, co-sponsored by the chairman. This bill prevents Federal agencies from implementing major regulatory initiatives without congressional approval, and ensures that new, major rules that impose annual economic costs in excess of $100 million cannot take effect unless Congress passes a joint resolution approving this regulation.

And finally, most regulatory agencies promulgate rules under the Administrative Procedure Act (APA). Unfortunately, the APA provides little for protection when agencies exceed their congressional mandates. But there is a model that does just that. Perhaps, it would be helpful for the Congress to look at the FTC with the Magnus and Moss Warranty Act, which imposes procedural safeguards on FTC rulemaking.

Madam Chairwoman, I yield back the rest of my time. Thank you.

[The prepared statement of Mr. Stinebert can be found on page 64 of the appendix.]

Chairwoman CAPITO. Thank you. For our final witness, I want to welcome back to the committee Mr. Arthur E. Wilmarth, who is a professor of law at the George Washington University.

Welcome.

STATEMENT OF ARTHUR E. WILMARTH, JR., PROFESSOR OF LAW AND EXECUTIVE DIRECTOR, CENTER FOR LAW, ECONOMICS & FINANCE, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. WILMARTH. Chairwoman Capito, Ranking Member Maloney, and members of the subcommittee, thank you very much for inviting me to participate in this important hearing. For the reasons set forth in my written testimony, I strongly oppose enactment of H.R. 1355 and H.R. 2081. I do not oppose enactment of H.R. 3871.

Congress created the CFPB because a previous dispersion of consumer protection responsibilities among several bank regulators produced a systematic failure of the consumer protection function during the credit bubble leading up to the financial crisis.

Title X of Dodd-Frank authorizes the CFPB to issue regulations, perform investigations, create public education programs, and prosecute enforcement proceedings in order to protect consumers against unfair, deceptive, abusive, and discriminatory financial practices.

Title X promotes the CFPB's independence from both political and industry influence by granting the CFPB autonomy in its policymaking, rulemaking, and enforcement functions, and by giving the CFPB an assured source of funding from the Fed.

H.R. 1355 would severely weaken the CFPB in several ways. Section 2(1) would repeal the CFPB's status as an independent Bureau, and move the CFPB from the Fed to the Treasury. Thus, it would transfer the CFPB from an independent agency that is relatively insulated from political influence, to an Executive Branch agency that is highly susceptible to political intervention.

Section 2(2) would remove critical statutory protections that enable the CFPB to function as an autonomous bureau when setting policy. However, H.R. 1355 would not make any similar changes to the Office of the Comptroller of the Currency, which is an autonomous bureau within Treasury.

Federal statutes prohibit Treasury from preventing or delaying the issuance of any OCC regulation. And they also bar Treasury from intervening in any matter, including any enforcement matter pending before the OCC. If H.R. 1355 deems it essential to remove the CFPB's autonomy and to subject the CFPB to Treasury's unlimited oversight, why doesn't H.R. 1355 contain similar provisions removing OCC's policy-making independence as well? Can this apparent anomaly be explained by the fact that the OCC is widely viewed as the most committed and vehement regulatory champion for the interests of major banks? Indeed, those same banks have devoted enormous lobbying resources to oppose the CFPB's creation and to seek to undermine it since it has been created.

Section 2(3) would seriously impair the CFPB's ability to attract qualified employees by requiring the CFPB to pay its employees in accordance with the general schedule for civil service employees. The CFPB would then become the only Federal financial regulator that is not exempted from civil service restrictions on pay. And the agency would find it extremely difficult, if not impossible, to attract the best, most experienced, and most talented employees.

Section 3 of H.R. 1355 would remove the CFPB's assured source of funding from the Fed and make the CFPB's entire budget subject to congressional appropriations. Except for the CFTC and the SEC, no Federal financial regulator is subject to congressional appropriations. Congress has undermined the effectiveness of the CFTC and the SEC for more than 2 decades by frequently failing to provide those agencies with adequate funds.

At congressional oversight hearings in December, CFTC Chairman Gary Gensler and SEC Chairman Mary Schapiro expressed great doubts about their agencies' ability to adopt and enforce the new Dodd-Frank provisions unless Congress gives them major increases in their budgets. Republicans and banks took a very different position when they pushed for legislation to create the Federal Housing Finance Agency because they wanted a new and more powerful and independent regulator for Fannie Mae and Freddie Mac.

Republicans and banks insisted that FHFA must have independent, secure funding that was not subject to congressional appropriations. They pointed out that Fannie and Freddie had often used their political clout to persuade Congress to cut the budget of FHFA's predecessor, thereby undermining that predecessor's enforcement efforts. When Congress created the CFPB, as a Senate committee report explains, Congress drew directly on FHFA's secure funding model.

Briefly turning to H.R. 2081, there are two big problems. One is that removing the CFPB Director from the FDIC's Board will deprive the banking industry and consumers of the beneficial interaction between the consumer regulator and the safety and soundness regulators. I thought that is what the CFPB's opponents wanted. I thought they wanted interaction between the safety and soundness function and the consumer protection function.

The other major problem is it is a very bad idea to put the Fed Chairman on the FDIC's Board. The Fed already has tremendous influence in deciding whether to grant bailouts and other support and forbearances to major institutions.

When the systemic risk exception comes into question, when regulators decide whether to bail out uninsured creditors of a too-big-to-fail bank, the Fed already gets a vote on that. They make their recommendation. It then goes to the FDIC.

Putting the Fed Chairman on the Board of the FDIC would give the Fed two bites at the apple. As my written testimony indicates, during the financial crisis, it was the Fed and the Treasury that were constantly pushing for more aggressive bailouts. And it was the FDIC that was constantly saying, "We don't think this is necessary. We don't think it is a good idea." We shouldn't undermine the FDIC's independence by putting the Fed Chairman on the FDIC's Board, as H.R. 2081 would do.

Thank you very much, again.

[The prepared statement of Professor Wilmarth can be found on page 70 of the appendix.]

Chairwoman CAPITO. Thank you.

Thank you all, and I would like to recognize myself for 5 minutes for questioning. I would like to go to the funding issue because in 2012, the CFPB could access 11 percent, or over $500 million. In 2013, it goes up to $597 million.

When we have tried to investigate how much is actually drawn down and where this money is being spent, what we have found is that they actually drew down in 2011, $161.8 million. But I don't know if Members of Congress and the general public are aware that after they draw the money down, if the money is not spent, it goes into a fund that can then be invested. So the money never goes back to the Treasury or to the Federal Reserve, where it could be used for paying down the debt and other issues.

To me, this sort of evokes—I don't want to use the term, but I will say it anyway—a "slush-fund" sort of situation, and a lack of accountability on that. Could you all speak to the way the mechanism is and how we could get more transparency and accountability—when, really, the Bureau doesn't have to speak to Congress or ask Congress in any way to justify the expenditures that they have over the course of a year?

Mr. Pincus, I will start with you, because you talked about this.

Mr. PINCUS. Thank you, Madam Chairwoman.

I guess a couple of points—I think what is troubling is that there is this lack of accountability, as I say, in all directions. Once the Bureau Director is appointed, he is not accountable to Congress because the appropriations process has been avoided. And he is not accountable even to the President because the President can only remove him if there is this very tough standard. So just in terms of our constitutional structure and accountability to the people, it is very troubling.

I think the way the process works is just as you have described. The money is drawn down, it goes into a fund, and there is very little transparency.

And even on a forward-looking basis, as I laid out in my testimony, and as I am sure you are familiar with from reading the documents, the Appropriations Committee was very concerned that a plan to draw down over $300 million was supported by about 15 pages, most of which were white space and certainly nothing close to the budget justifications that agencies ordinarily have to give to justify their appropriations. So, I think that it is very troubling.

And I guess one short-term solution—obviously we believe that this kind of statutory accountability is essential and I know Mr. Wilmarth talked about political influences.

But that is just a—sort of a derogatory—about talking about the people's influence. It is—this money that comes from the Fed is not a gift. If it wasn't spent, any surplus that the Fed generates goes into the Treasury and is used, as you say, to pay down the debt. So this money is really, in terms of its economic effect on the government's finances, indistinguishable from money that is appropriated and paid out.

If it wasn't paid out, the government would have it and could use it to reduce the debt. So I think that is critical. And I think the other thing that is critical is perhaps a threshold step as the statute provides for some reports by the Bureau to OMB. It doesn't say that those reports have to be provided to the Congress, but one short-term way to get at least some transparency might be to ask the Bureau to provide those statutory reports to the committee as well.

Chairwoman CAPITO. Does anybody else have a comment on that?

We will go to Mr. Stinebert, and then to Mr. Wilmarth.

Mr. STINEBERT. To comment a little bit on what is being said here, I have never really understood why putting it under appropriations is going to, for example, gut or hurt the Bureau or hurt consumers in the long run. I see no evidence of that.

In the cases where it has been done before, it can actually bring efficiency and effectiveness to the program, knowing that there is some oversight. We have never done a great job of throwing money at a problem and having an unlimited budget and that resulting in only good things. I think the accountability to Congress would help the Bureau in the long run.

Chairwoman CAPITO. Thank you.

Mr. Wilmarth? I have 30 seconds left.

Mr. WILMARTH. Yes, certainly.

The OCC and the FHFA operate in exactly the same way. They don't return money to the Treasury, and the FDIC keeps its money as well. Now, some of that goes into the FDIC's Deposit Insurance Fund, but there is no return of the money to the Treasury.

So as I said, there are only two financial regulators who are not given an independent, secure funding source: the SEC; and the CFTC. And as I said in my written testimony, I don't think anyone can seriously contest that those agencies have been greatly weakened and seriously underfunded for a very long time.

I will give a third example. The Consumer Product Safety Commission is widely viewed as a very ineffective and weak agency because it wasn't given the budget that it needed.

So I have given you three examples of agencies that have been undermined by a lack of secure funding. And in each case, there was very strong industry push back against the agency. I point out in my testimony that the financial sector has been the biggest contributor to political campaigns—congressional campaigns since 1990, the biggest lobbyists since 1990—

Chairwoman CAPITO. My time has expired.

Mr. WILMARTH. —but anyone who thinks that they are not effective, I—

Chairwoman CAPITO. Ranking Member Maloney for 5 minutes?

Mrs. MALONEY. Thank you.

This bill by my good friend, Mr. Neugebauer, would really subject the CFPB to a double standard. No other banking agency is subject to the appropriations process, not the OCC, the FDIC, or the Federal Reserve, for purposes of independence and not being compromised by political pressure.

As Mr. Wilmarth pointed out, the SEC and the CFTC, although they have many more responsibilities, have been seriously underfunded. And we have to recognize the reality that the Republican Majority voted against Dodd-Frank and financial reform. They voted against the CFPB. And they probably wouldn't fund it, as they haven't appropriately funded the SEC and the CFTC.

And as my good friend, Mr. Green, pointed out about the confirmation process, I have never seen such an abuse of the confirmation process, where they literally said they would not confirm a Director unless you made changes to the law. So they were trying to get through the confirmation process what they couldn't achieve in the passage of the law, and literally signed letters to that effect.

Now, many of my colleagues and panelists have said that the CFPB is not subject to enough oversight. I would argue that it has extensive accountability standards that were put in place in the reform bill and I am going to list them for you.

They have more accountability standards than any other agency. The President can remove the Director for cause. The Director must appear before Congress biannually and report on, among other things, its budget and list of significant rules. Not only do we have this requirement, but we can call them any time we want. They have been before Congress 14 times.

The GAO is required to audit the financial services, including the CFPB. It is the banking regulator. It is the only banking regulator that has a funding cap. The final rules of the CFPB are subject to financial judicial review.

The CFPB is subject to the Regulatory Flexibility Act, the Paperwork Reduction Act; the Inspector General of the Federal Reserve monitors the CFPB. And the CFPB budget is statutorily capped. The Financial Stability Oversight Council can review and overturn any CFPB regulation. I don't know of any other regulator that has that ability of an oversight board to reverse their decisions.

The CFPB is required to consider the impact of proposed rules on banks and credit unions with $10 billion or less in assets as well as the impact on consumers in rural areas during the rulemaking and issue reports on what they have done in these areas.

The CFPB rules are subject to the Small Business Regulatory Enforcement Flexibilities Act, Small Business Panel Review process. The CFPB must review potential rules with affected small businesses prior to the publication of such proposed rules.

I would say that everyone here has said that consumer protection, everyone is for it, but it often was a secondary thought or a third thought or wasn't thought about at all.

So to have one agency working with the safety and soundness regulators, which is important that they be on the FDIC is something that is helpful.

I would like to ask Mr. Hunter—of the items that the CFPB has done, have you reacted to them—such as your members—the efforts to streamline the mortgage-disclosure documents; has that been a positive for your industry? What about the shopping sheet to compare credit card rates?

What about the information sheets to know before you owe for students who are in school and often get into debt over their heads? What has been the reaction of your members to these, I would say, improvements really for the financial institutions; for our economy as a whole; and certainly for consumers? Have these been actions that your members and consumers and bankers see as a positive step forward?

Mr. HUNTER. We are working, Congresswoman, in a very interactive constructive fashion with the CFPB on almost a daily basis.

We recognize the authority that Congress has chosen to repose in the CFPB. Our concern long term is that there is too much power and authority reposed in one person and that there ought to be more checks and balances with respect to that person's decisionmaking.

If you are going to repose that much authority and power in an entity, it makes more sense to have a commission. I think that is a political science proposition that has stood the test of time.

Mrs. MALONEY. My time has expired. But I would say the CFPB is already one of the most accountable Federal agencies with the list that I gave you, the oversight that is there and I think they have worked hard, Mr. Stinebert, would you say to reach out to—

Chairwoman CAPITO. The gentlelady's time has expired.

Mrs. MALONEY. —stakeholders for their influence?

Mr. STINEBERT. Actually, we have been very encouraged by the CFPB and how they have reached out to impacted industries in a cooperative way.

In some instances, we have had some field hearings and others which, I think all of us have received about a 24-hour notice of some hearings that were somewhat disconcerting, but I think we have been encouraged by what the Director has said, and we are hopeful that will continue.

But going along with my colleagues—

Chairwoman CAPITO. The gentlewoman's time has expired, so I am going—

Mrs. MALONEY. Thank you.

Chairwoman CAPITO. —to try to keep it moving here.

Mr. Renacci, for 5 minutes?

Mr. RENACCI. Thank you, Madam Chairwoman.

I want to kind of zero in on H.R. 2081, and it is interesting because as I have listened to my colleagues and also the testimony—this bill basically replaces the CFPB Director with the Chairman of the Fed on the FDIC Board. And that is important, in my opinion, for 3 reasons: expertise; potential conflict of mandate; and a potential conflict of interest.

So, it is very simple. It doesn't weaken the CFPB board or Director and it potentially strengthens the FDIC Board.

With that in mind, Mr. Hunter, does the inclusion of the CFPB on the FDIC Board jeopardize in any way, in your opinion, the FDIC's focus on safety and soundness?

Mr. HUNTER. As our testimony indicates, Congressman, that is the principal responsibility of the FDIC Board. We think the Fed is better positioned to serve on that commission based on its responsibilities.

There is certainly something to be gained by forcing the Director of the CFPB to have frequent dialogue with the prudential regulators. It is our preference that a banker serve on the FDIC Board, but there is certainly more to be gained by someone whose focus is safety and soundness.

Mr. RENACCI. So you would agree that the mandate for the CFPB is consumer protection, and the mandate for the FDIC Board is safety and soundness of the banking system—two separate mandates?

Mr. HUNTER. We think that the two better approaches would the Fed or a banker.

Mr. RENACCI. All right.

Mr. Wilmarth, you indicated at one point that—and it is interesting because if there was a perceived or even actual conflict of interest—wouldn't you agree that it would be better not to have that?

Mr. WILMARTH. I actually don't think there is a conflict of interest. And I agree with a comment that Chairman Bachus made; that viewed in the long term, and from the broadest perspective, consumer protection and safety and soundness are inseparable and completely consistent.

So actually, I didn't agree with this notion that somehow there was this terrible conflict of interest, but for the—

Mr. RENACCI. But if there was conflict of interest—if there was, you would agree, even if it is perceived, that it would be better not to have the same—

Mr. WILMARTH. My view is that any perceived conflict is so minor as to be greatly overwhelmed by the other problem I pointed out, which is that putting the Fed Chairman on the FDIC's Board is going to undermine the independence of the FDIC, and I can give three very specific examples of how that could have really aggravated the financial crisis—if you would allow me.

First, was that in the period leading up to the crisis, the FDIC was the only agency fighting for tough capital requirements, including leverage requirements. And if you want to know the one thing that differentiates—

Mr. RENACCI. I am going to run out of time. I don't mean to cut you off, but I am looking at the time running away from me.

You also talked about not having the ability to communicate. Wouldn't you believe on the FSOC Board, there is opportunity for the Director of the CFPB to get his influence with the other members?

Mr. WILMARTH. There is some communication there, but I think the FDIC deals much more with the type of institutions that the CFPB is dealing with on a daily basis and therefore there would be much more beneficial interactions on the FDIC Board as compared to FSOC, which deals with the financial giants of the world.

Mr. RENACCI. Okay.

Mr. Hunter, I am going to move back to you because I know you talked about expertise and you mentioned that several members are already there because of their expertise.

Do you believe there is the requirement today that the Director of the CFPB have any experience as a safety and soundness regulator or even a requirement that a potential Director have any banking experience at all?

Mr. HUNTER. I don't think that requirement is in the Act, Congressman.

Mr. RENACCI. All right.

So with that, you could have someone serving on the FDIC Board without the experience that the Chairman of the Fed would have by being on that same board?

Mr. HUNTER. That is a hypothetical probability, sir.

Mr. RENACCI. Yes.

The Federal Reserve as a prudential regulator is keenly aware of how regulatory policy can impact the likelihood and cost of bank failures. Would the Fed, rather than the Director of the CFPB, be able to contribute more meaningfully to the FDIC's mission? Wouldn't the Chairman of the Fed?

Mr. HUNTER. As a general proposition, yes.

Mr. RENACCI. Yes.

Do you feel—I know I you mentioned this earlier—but do you feel there is a conflict of interest, even a perceived conflict of interest at this point in time?

Mr. HUNTER. I guess if you start with—

Mr. RENACCI. Because of the mandate? I know I am running out of time—because of the mandate?

Mr. HUNTER. Quickly, if you start with the statutory responsibilities that have been placed with the Director, there aren't safety and soundness responsibilities. So it is certainly, as I say—it is certainly a situation where he could be in conflict with what his legal responsibilities are as Director.

Mr. RENACCI. Okay, thank you.

Chairwoman CAPITO. Thank you.

I recognize Mr. Hinojosa for questions.

Mr. HINOJOSA. Thank you.

My first question is addressed to Professor Wilmarth.

Some of my colleagues have argued that the Consumer Financial Protection Bureau lacks accountability. However, in creating this Bureau, this body inserted several measures to ensure its accountability while also maintaining it as an independent regulator.

In fact, the Consumer Federation of America contends that the CFPB is the subject of more oversight than any banking regulator. Some would like to see the Bureau's budget brought under the appropriations process, as I mentioned in my opening remarks, supposedly to increase accountability, even though no other banking regulator has a budget which is subject to appropriations.

I would like to ask you, what are the advantages for the banking regulatory system to have regulators such as the FDIC, the OCC, the OTS, and now, the CFPB, to have budgets outside the appropriations process?

Mr. WILMARTH. Yes, thank you.

I would make two comments. One is that I believe the President's power to remove the CFPB's Director is actually broader than has been indicated because in the Supreme Court case of *Bowsher* v. *Synar* in 1986, where the statutory language concerning an administrative official's removal was very similar, the Supreme Court viewed that as a very broad removal power. Inefficiency or maladministration provides the President with broad discretion to remove the CFPB's Director.

Moving to the appropriations issue, as you say, no other Federal bank regulator is subject to appropriations and we know that the three regulators I have mentioned have been greatly weakened by industry influence because they do not have secure funding.

We also know that OFHEO before it was replaced by the FHFA was greatly weakened by the influence wielded by Fannie and Freddie. I pointed out that no one can contest that the financial sector has had unbelievable political influence and power over the last 20 years and more.

The statutory drafters for all the other bank regulators realized that because these regulators have such a critical public interest and because in fact they are trying to properly restrain very powerful regulated institutions for the public interest, there will inevitably be push back through the political system. And if you don't give some meaningful insulation and independence to the regulator, they are not going to be as successful in doing their job.

Mr. HINOJOSA. I remember in the second term of the Bush Administration, when Henry Paulson, the Secretary of the Treasury, came to talk to us and asked for $800 billion within a week to be able to save the financial system.

And one of the things that came out at that hearing was the fact that we had wanted a smaller government, less involvement by the Federal Government. And so, the end result was that we didn't have the people to enforce the regulations and we got into the mess that we did. This seems to be the wrong route to take to improve consumer financial protection.

I would like to ask my second question to Mr. Michael Hunter. In my district in deep south Texas, we have sought to protect consumers from predatory payday lending while partnering with community banks and credit unions, and also we have worked to increase the financial literacy and capability of our residents. The Consumer Financial Protection Bureau recently held a field hearing to examine pay day lending and CFPB is moving forward with its supervision and examination of non-bank financial companies.

How do community banks view the efforts of the CFPB to examine these non-bank competitors and level the playing field? And the last part of the question, does the ABA anticipate a budget cut will affect the ability of this Bureau to monitor these non-bank companies such as payday lending companies and others?

Mr. HUNTER. The membership of the American Banker's Association looks forward to Mr. Stinebert's members joining the club of the most highly regulated industry in this country. And we applaud the efforts of the CFPB in beginning to impose its jurisdiction on non-banks. With regard to the implications of a budget cut, as a general proposition—and I used to teach political science—I think the democratic process works.

I think the appropriations process works and the idea that we ought to have these independent agencies to protect Congress from themselves is just a proposition that I have never been in favor of.

Mr. HINOJOSA. You can understand—

Mr. HUNTER. Excuse me, I am—

Mr. HINOJOSA. —you can understand why I am concerned about budget cuts to weaken this Bureau. Because we saw it in 2007. We saw it in 2008, that we didn't have the regulators to enforce the regulations. So, I think my time has expired and with that, I yield back.

Chairwoman CAPITO. Thank you.

Mr. Hensarling is recognized for 5 minutes for questions.

Mr. HENSARLING. Thank you, Madam Chairwoman. And I certainly thank you for holding this hearing.

I think one of the lessons that we know from Dodd-Frank is that when you essentially give unfettered, unprecedented discretionary powers to unelected bureaucrats, they have a tendency to use it. That in some respects is the subject of this hearing, and a hearing later this afternoon in the Capital Markets Subcommittee as well.

I guess the first question I would want to pose is, frankly, the controversy surrounding the appointment of the Director of the CFPB. I know back in 2005, then-Senator Barack Obama said that recess appointments were "the wrong thing to do." He also went on to say that a recess appointment "is somebody who couldn't get through a nomination in the Senate." And I think that means that we will have less credibility.

And so the question that I really want to ask, as I am concerned about the regulatory uncertainty that we already have in this particular process, we have some questioning the constitutionality of Mr. Cordray's appointment and Dodd-Frank is explicit that the CFPB Director must be "confirmed by the Senate." Many legal scholars say a recess appointment is not a Senate confirmation and there are further clouds on whether or not Congress was in recess.

As I might also note, for the record, the latest extension of the U.I. in payroll was done during a pro forma session. So the first question I am—I guess I will pose it to you, Mr. Hunter, have the members in your organization concluded unequivocally that this is a constitutionally valid appointment? Or is there some controversy? And if there is controversy, is that uncertainty hindering your membership?

Mr. HUNTER. Congressman, the president and CEO of the ABA, Frank Keating, expressed concern after the appointment occurred. It is certainly a subject of debate. Until a court of original jurisdiction tells us that Mr. Cordray isn't the legal authority for the CFPB, our responsibility is to recognize it and work in as constructive and cooperative a way as we can.

Mr. HENSARLING. Next question—I have seen a recent interview with Mr. Cordray. He was quoted in the Associated Press as saying, "Frankly, there is a lot of fraud that is committed in the marketplace that is not, on its face, necessarily technically illegal."

My question is: If we have a Director of CFPB who may or may not be constitutionally appointed who now says that his agency essentially has the ability to regulate activities that are not necessarily technically illegal, how does this impact your members, particularly product development, that they may have their profitability, their survivability?

Mr. Stinebert, I will start with you. Is that a chilling comment to you?

Mr. STINEBERT. It was a very interesting statement. As far as I know, fraud is technically illegal and I don't know of any wiggle room there. It is either fraud or it is not fraud. Certainly, we have laws on the books now which protect against fraud. So it does cause some concern when we read that statement.

I think that since that time, he has corrected that statement to a better understanding. But going along with what our colleagues here have stated—and I did not know we were not members of the club to begin with—but if being State-regulated is entirely different than being federally-regulated, it still is being regulated.

Mr. HENSARLING. I will let you gentleman work out that disagreement in your own time. In the remaining seconds I have, one of the reasons I am a strong supporter of Mr. Neugebauer's bill to bring in greater accountability and transparency is the unfettered powers that this agency has been given. I am hearing from a lot of community financial institutions in the fifth district of Texas that I represent, particularly about their unfettered powers to essentially ban debit cards, overdraft protection, reward checking, and identity-theft products.

My community bankers are telling me they are at a low-time profitability due to monetary policy, due to the interchange regulations. And so my question is—without that oversight, could the CFPB's ability to essentially ban these products impact profitability and the safety and soundness of community financial institutions? Mr. Hunter?

Mr. HUNTER. The concern that we have generally speaking, Congressman, is that in our membership, there is a very troubling ratio that is developing out there and I will be quick. And that ratio that is developing that we are seeing in our banks is a one-to-one relationship between bank employees who are there to serve customers and bank employees whose responsibility is compliance.

I don't think that is good for banks and I certainly don't think it is good for customers. And at the end of the day, we are hopeful that this can work, this being the CFPB. Again we think it is important that if you are going to have an independent agency with this kind of power and authority, the better approach is to have a commission and have some oversight. They should have, as opposed to reporting responsibility, accountability to Congress with regard to expenditures.

Chairwoman CAPITO. The gentleman's time has expired.

Mr. Gutierrez, for 5 minutes.

Mr. GUTIERREZ. Thank you.

Welcome to you all.

I just wanted to follow up very quickly because as best as I can recall, and I didn't know we were going to go into this part of the conversation, Goldman-Sachs and others reorganized themselves and some bank holding companies so that they would have access to the discount window, not for $1 billion, not for $10 billion, but for hundreds of billions of dollars in order to acquire liquidity.

And now, people complain. We can't have it. You can't go to the government when you get in trouble, have the government bail you out, then continue to reorganize yourself under government rules so that you have more access to the government and their money, and then expect the American taxpayer and the people to say, "We are going to let you do whatever you want."

So, I think we should have a little more balance in terms of our conversation that we are having in terms of the most regulated. You are also one of the greatest beneficiaries of the American taxpayers supporting who you are today, or you would have simply have died and gone away just like the dinosaurs had it not been for the intervention of this Congress and specifically Members on this side of the aisle who many times have said, "Okay we are going to do it, but we are going to watch carefully." So let us remember where we are at because there was a crisis; it was 2002.

I know that everything has changed and it is kind of tough because everybody on Wall Street is complaining that it was "only $75,000; only $75,000, I am quitting." That is the bonus, and people are complaining? Tell that to the rest of America, that it is only $75,000.

Having said that, I want to make sure that what we are talking about today is the Consumer Financial Protection Bureau. And it is just mind-boggling. The Bureau has been fully operational for 34 days, yet we have brought them here to speak 14 times. I think it is interesting that my colleagues on the other side of the aisle and representatives of the financial industry continue to shout about how the CFPB has insufficient oversight.

Fourteen times in 34 days—do the math—they have been brought before the Congress. That seems to me to be pretty diligent oversight on our part. The bills before us today are really nothing new. Another attempt by the Majority to weaken the Bureau so it doesn't look over the shoulder of their friends in the banking industry. I get it.

If you are a payday lender, guess what? If you are a payday lender, you are back there saying, "Thank you." If you are somebody out there giving people loans that you shouldn't be, you are clapping. If you are out there exploiting consumers, you are clapping. Those are the only people who are really clapping. Let us get that absolutely clear. Those that don't, want to follow rules.

People want less scrutiny of big money companies that do business with the average American consumer. One of the bills before us today brings the CFPB under the authority of the Treasury Department and makes its funding subject to congressional appropriations.

Let us not split hairs here. This isn't about making sure that Congress can watch the CFPB even closer than it already does—14 hearings in 34 days. This is about making sure that the financial industry lobbyists have access to people who make the appropriations decisions, i.e., Members of Congress.

Instead of strengthening the Bureau or making it more accountable to Congress, the bill would undermine the Bureau's independence and make it more vulnerable to pressure from powerful lobbyists. We have seen that.

Pick up the newspapers. Open them up and you see what the lobbyists here in Washington, D.C., do. Abramoff is kind of walking around telling everybody, "I really didn't mean it." Oh no, he is repentant. It is Washington, D.C. So I would like an independent authority, the way we have done it.

And lastly, let me just say that George Bush was President for 8 years. And you know what? He used the system more times than President Barack Obama has ever done in terms of appointing recess appointments.

And you know what? Lastly, I think we should make sure that we all understand that the Minority Leader in the Senate, the gentleman from Kentucky, has stated that his goal is to make Barack Obama a one-term President, and that he is going to do everything to make sure that he fails and that he is defeated. That is not an exaggeration. That is exactly what he said.

So you know what? They are playing politics over there. They won't even give Mr. Cordray or anybody the time to have up or down votes. They are obstructionist, and the American people have had enough of it. I am happy the President appointed him, and I hope he gets to his work and you can have a hearing every week, because I know he doesn't care. Thank you.

Chairwoman CAPITO. I thank the gentleman.

I will have to say I am not certain—I would like to see the 14—we certainly haven't had 14 meetings in 34 days in this committee. And—

Mr. GUTIERREZ. —in this committee; in Congress.

Chairwoman CAPITO. In Congress—14 meetings in 34 days.

Ms. VELAZQUEZ. Fourteen hearings.

Chairwoman CAPITO. Fourteen hearings.

Mr. GUTIERREZ. Fourteen hearings.

Chairwoman CAPITO. You said in "34 days?"

Mr. GUTIERREZ. Fourteen. They have been in existence for 34 days.

Chairwoman CAPITO. Right.

Mr. GUTIERREZ. Fourteen hearings in the last year.

Chairwoman CAPITO. Next, we have—

Mr. GUTIERREZ. Those are all facts. I can bring them down.

Chairwoman CAPITO. You said, "14 hearings in 34 days."

So you are correcting yourself? I am just clarifying.

No? Just clarifying.

Mr. GUTIERREZ. Well, I—

Chairwoman CAPITO. For the record. I am sure you want to be accurate.

Mr. GUTIERREZ. I absolutely do.

Ms. VELAZQUEZ. He is accurate.

Chairwoman CAPITO. You said 14 hearings in 1 year?

Ms. VELAZQUEZ. 34 days in existence.

Mr. GUTIERREZ. It has been 34 days in—

Ms. VELAZQUEZ. Go to the record and check.

Mr. GUTIERREZ. 14 hearings in the last—

Chairwoman CAPITO. Right. Not in the last 34 days.

All right.

Mr. GUTIERREZ. We all agree there have been 14 hearings in the last year?

Chairwoman CAPITO. —question about that—for a year.

Mr. GUTIERREZ. You will catch up quickly. I am sure we will have more hearings on this.

Chairwoman CAPITO. Half a billion dollars—I think we should. Your time has expired.

Mr. Huizenga, for 5 minutes.

Mr. HUIZENGA. Thank you, Madam Chairwoman.

And frankly, I hope there are another 14 hearings because this is one of the most expansive steps that government has taken. And I am sorry my colleague is leaving.

It just seems to me—I am not quite sure that I understand whether the CFPB is a five-member board versus a single individual, how exactly that is going to ensure the President's reelection or non-reelection. So I think that we are seeing obviously some heated rhetoric.

And I have seen some positive elements on my bill specifically, H.R. 3871. We have had everybody—the Credit Union National Association, the Consumer Bankers Association—just recently both put letters in; appreciate your support—the resounding endorsement of Professor Wilmarth. I think that one sentence, "I don't oppose"—I will take that as well.

And I know that there has been some concern. I think somebody earlier had expressed that all three bills really chip away at the CFPB. And I just want to make sure that my colleagues aren't more concerned about keeping out any amendment to Dodd-Frank versus trying to make sure that we make it workable and do the right thing, which is exactly what H.R. 3871 is trying to do.

And frankly, I am happy to entertain the notion of a belt-and-suspenders approach to amending both the CFPB Act and the FDI Act. But it seems to me that, as I think—I can't remember; I am sorry. It was Mr. Stinebert, I think, who noted on page four of your testimony—I had it up here at one point, but maybe you can comment a little bit on that, sort of the background of why we do need to not just do this with FDI and the deposit insurance side of things, but why we need to amend the CFPB and why maybe we shouldn't be so deathly afraid of changing a sentence or a jot or tittle in this.

It is not holy writ that has come down from the heavens. This is the work of very fallible men and women who come in here trying to do the right thing, but let us try to make sure that it is workable. So, if you care to comment?

Mr. STINEBERT. I think that the oversight that Congress has shown about CFPB, I think also highlights the problems that some of the industry has with it, and certainly we do. We have never had a bill that is quite as large, where the scope is basically unlimited, as we do with this piece of legislation.

They can act right now within the confines, as the ranking member has pointed out, initially in a very finite way, which might be a good direction. But that doesn't necessarily mean that the Act itself as drafted, as written, is basically carte blanche to do anything in this area that might impact consumers in any way for their financial services.

So when we look at the Act, we look at trying to put a little bit of belts and suspenders around it, a little bit somewhat of insurance. When we asked our members at a recent meeting if they could rank the biggest concerns they had, it is always the uncertainty. And the uncertainty is because not of what CFPB has done, but what it could do.

All of these Acts and the provisions we are talking about today really are a way to bring some oversight, to bring some accountability, so not because of what they have done, but what is so wide open in the future.

Mr. HUIZENGA. Sorry. Thank you. And just so we are clear, my bill, H.R. 3871, you view as one of those elements to provide clarity?

Mr. STINEBERT. Absolutely. Yes. It is an essential element.

Mr. HUIZENGA. All right.

Professor Wilmarth?

Mr. WILMARTH. I just wanted to point out that I think that Mr. Stinebert was probably referring to the so-called UDAAP authority. But I have described it at some length, and I can describe it if the committee wishes.

There are very tight limitations and very specific findings that have to be made before the Bureau can issue a UDAAP rule. And also, a very detailed cost-benefit analysis. They have to consult with Federal prudential regulators. FSOC has a potential veto. So I don't this authority is nearly as wide open as that statement might suggest. Thank you.

Mr. HUIZENGA. But you certainly don't see a problem with us providing that clarity?

Mr. WILMARTH. Oh, no. I think the idea about protecting the privileged materials so that the privilege is maintained when institutions share them with their regulator, that to me seems perfectly sensible.

Mr. HUIZENGA. I appreciate that. And I think that, to my colleagues on both sides of the aisle, I know we are having much broader conversations about whether the CFPB should or shouldn't exist, whether Dodd-Frank was good or bad, all those other things. But the simple fact is there is a hole, in my opinion and in the opinion of virtually everybody who deals with this, that has to be fixed.

Let us go do it. Let us go prove to the American people that we can set aside bickering and go get something done that is going to protect the consumer and protect those who are serving the consumer. So, I appreciate that.

And the last little quick reminder—we are seeing a lot of heated rhetoric. And I just want to remind everybody that we are in the same boat. Banking lenders, non-banking lenders, you name it. There is a lot of stuff that is getting thrown out there.

I just caution everybody to make sure that you realize we are trying to all be on the same team here to make sure that we are protecting consumers, and also protecting businesspeople, men and women who are in this industry who are providing that service. So thank you very much, Madam Chairwoman.

Chairwoman CAPITO. Thank you.

Mr. Hinojosa, for 5 minutes.

Mr. HINOJOSA. I have already spoken.

Chairwoman CAPITO. Excuse me. Mr. Scott.

Mr. SCOTT. Thank you very much.

I certainly concur with much that has been said. And my friends on the other side of the aisle, it is important that we all try to work to try to bring some justice and reason and fairness and protection to the American people.

But two of these measures—particularly H.R. 1355—are drastic overkill. H.R. 1355 goes right at the core of the agency to remove it from the Fed, put it under Treasury, to make it subject to lobbyist pressure. It takes away the very vital need of independence.

Now, we talk about accountability. I think it is important for us to set the record straight. We have accountability now. Our ranking member, Mrs. Maloney, went through in detail with many of these areas of accountability.

But I want to hit a couple of them so that the people will know, because some statements have been made that they don't report to Congress—they must report to Congress. The Director must report to Congress, not once every year, but twice: every 6 months. And he has to appear before both committees; both finance committees in the House and the Senate.

And at these hearings, he must not just talk. He has to submit reports to each of our committees and to the President. And not just any reports. These reports must include a justification for the CFPB's budget, a list of the rules that the CFPB has adopted, and a detailed list of public supervisory enforcement actions in which the CFPB has been involved.

Then, there must be an audit each year. The GAO must audit the total finances of the CFPB. It has to have access to all of the CFPB's personnel, their data, their records, their papers. And this audit must be submitted, and all of the other numerous things that have been mentioned.

The accountability controls are there. So that is why you have to be—we must fight. This effort is not designed for greater transparency. How much more transparency and accountability can we have than what we already have? These efforts are here to basically gut the intent and the purpose and the effectiveness of this agency.

And I don't mind those on the other side of the aisle having their own opinions in their areas, but the American people must be told the truth about this. This is not an effort to increase accountability as if there is none there. This agency has the most oversight of any agency, as we have just gone through.

Professor Wilmarth, let me just ask you, particularly in regards to this audit. As you know, the CFPB is subject to annual GAO audits of its financial transactions, its statements, and to the private sector, an independent audit of its operations and budgets. Are you familiar with these audits?

Mr. WILMARTH. I am afraid that I am not an expert in that area, except to note that they are very extensive.

Mr. SCOTT. All right.

Let me just ask you, in terms of this overall committee, just for the record, our effort here is to promote accountability and transparency. Do you feel that these bills will achieve that goal any more than what we currently have?

Mr. WILMARTH. As we have discussed, in structuring Federal financial regulators, there is a balance that has to be struck between accountability and independence. I think that has been a consistent theme for all the bank regulators, because we know that the banking system is so critical to the success of our economy. We also know that banks and politics have been entwined since the very beginning of this Nation.

There is always political pressure involved where banks are involved. And so, if regulators can't have a degree of independence, that can be fatal.

Mr. SCOTT. And if H.R. 1355 were adopted, what would be the impact on the consumers?

Mr. WILMARTH. A very severe one, in my opinion. I think some of the provisions we haven't talked about are the direct taking away of any policy-making independence. So, if you put the CFPB under the Treasury, the Treasury could then veto rules, remove officers and officials, reorganize the agency, and interfere with enforcement proceedings. It would have none of the autonomy that the Office of the Comptroller of the Currency has within the Treasury.

Again, my question is—the Office of the Comptroller of the Currency is an enormously powerful agency, headed by one person who regulates all of the largest financial institutions in this country. Many of them are also among the largest financial institutions in the world. And yet, there are detailed provisions giving the OCC all types of autonomy. So why are we taking away all the autonomy from the CFPB, but preserving all of it for the OCC?

It was interesting that when the Treasury General Counsel criticized in a comment letter a proposed rule that the OCC put out, Members on the other side of the aisle leaped to the OCC's defense, and told Treasury to stop interfering with the OCC. The Treasury was strongly criticized for allegedly interfering with the OCC's autonomy. So why is there so much solicitude for the OCC but none at all for the CFPB?

Chairwoman CAPITO. Yes.

Mr. SCOTT. Thanks. Thank you.

Chairwoman CAPITO. Thank you.

Mr. Canseco, for 5 minutes?

Mr. CANSECO. Thank you, Madam Chairwoman.

Today, we are talking about how the CFPB is supposed to be an agency that protects consumers. This is an agency that on top of so many rules and laws that are already designed to protect both State laws and Federal laws to protect our consumers. We have to recognize as the politicians sitting up here and as the legislators sitting up here, that there is a very delicate balance that needs to be maintained.

And every time that we flip that balance in any direction, whether it is in favor of the consumer or in favor of the financial servicers, we are always hurting the consumer. Because of that, I really need to stress the need for all of us as Members of this body that we understand the American economy and its financial systems. Because otherwise, we are going to trip into bad laws and bad rules.

So with that said, I want to ask Mr. Hunter, the CFPB has a complaint handling process for banks with over $10 billion in assets. And this includes the reporting of general trends to Congress about complaints they are receiving about financial institutions. Given that the CFPB can essentially do whatever it wants, what concerns do you have over this complaint process? And is there a possibility that the wrong impressions could be given to consumers, thereby harming them?

Mr. HUNTER. I am happy to answer that question, Congressman. I guess one of the most profound concerns—and as we say out West, "The livestock are out of the barn," with regard to the delegation of authority to the CFPB in this area—but how this authority is exercised is what this hearing is about. I would like to confine my remarks to that proposition.

With this much current authority vested in one person, that person's style, that person's approach to this job is going to be critical. And you could have somebody whose approach would be—as opposed to compliance and supervision—enforcement, which not to be too melodramatic, could involve scalp-hunting. You are punishing people to make an example.

The tradition in banking is you have a supervisory and compliance approach. So as you say, because all this kind of authority is reposed in one person, the whim and caprice of that individual with regard to how he or she is going to approach this job is troubling. And it is something we are having a hard time getting our head around, which is why we are participating in this hearing, and why we suggest a better approach to how that authority is exercised would be a commission.

Mr. CANSECO. Thank you.

So, handling complaints is just one of the services that banks provide to their customers. Yet, the CFPB has decided to make a public display of all the complaints received from banks, and about banks. Are you concerned that publicly, the CFPB is only focusing on negative aspects of banks' relationships with their customers, and not seeing the whole big picture of all the good things and the efforts that they do?

Mr. HUNTER. If there is going to be a public inventorying of complaints, it ought to be holistic; which is to say, if there are complaints that are determined to show that there is no fault of a bank, and there is a good story there, there ought to be a holistic approach to that. And our concern is it is going to be all of the bad and none of the good, Congressman.

Mr. CANSECO. So it is going to paint financial institutions in a very bad light?

Mr. HUNTER. Sure.

Mr. CANSECO. And complaints are a natural concurrence, are they not?

Mr. HUNTER. That is a concern we would have about the template that is in place.

Mr. CANSECO. Thank you. Thank you, sir.

Now, Mr. Pincus, I would like to ask you about the overall structure of the Bureau and revisit something this committee has been in favor of for a long time. This committee has been fighting for almost a year to create a five-member commission at the CFPB, only to be rejected by the Senate and the President. So I would like to point out some differences between the Board of Governors at the Federal Reserve, and the CFPB.

The Fed's Board consists of an academic, a former community banker, a State financial regulator, a former Fed District President, and a former Clinton Administration official. And by contrast, Mr. Cordray has spent his career suing banks and other private sector participants. What does this lack of diversity at the CFPB mean about the direction this agency will take in its relationship with the private sector?

Mr. PINCUS. I think it is a real concern, Congressman. I think, given the very broad power that the agency has—and I know it has been labeled a bank regulator, but as you know from the legislation that is moving through Congress, this agency regulates much more than banks or even the financial institutions. It regulates really the whole economy, to a large extent.

And so, giving that authority to one person, who by definition is going to have limited experience, is a recipe for disaster. And I think one interesting analogy—I do a little antitrust law. And if you compare the Antitrust Division of the Justice Department, which is headed by one person, to the FTC, which is of course a commission, most people would say that because of the input from multiple people and people from different backgrounds, the FTC has charted in the antitrust law a much more consistent, measured path, while the Justice Department has sort of swung back and forth, depending on Administrations.

And I think that is a real problem here, and it is why every agency that you can think of, in which there are these restrictions on appointment authority, also have multi-member commissions for just that reason.

Mr. CANSECO. Thank you very much.

My time has expired.

Mr. RENACCI [presiding]. I recognize Ms. Velazquez.

Ms. VELAZQUEZ. Thank you.

Mr. Pincus, I try to understand the argument as to why the budget for the CFPB should be—instead of being by fee assessment, it should be appropriated? And when we look at those regulators such as the OCC, the FDIC, and the Federal Reserve that in some ways have jurisdiction over consumer compliance laws, they were not subjected to appropriations. So, my question to you is, since Dodd-Frank transferred those jurisdiction and responsibilities to the CFPB, should Congress now defund all these Federal agencies and make them subject to appropriations?

Mr. PINCUS. I think a couple of answers, Congressman. First of all, in terms of accountability, which is really—appropriations is one part, in all those other agencies. There are other accountability mechanisms.

For example, with the OCC, although it is true that it is funded outside the appropriations process, there aren't the restrictions on the removal of the Comptroller. The President has blanket removal authority, the Justice Department has said and also the Treasury Secretary has general oversight as well as authority over appointing deputies.

So, there is a control there that doesn't exist in the Bureau. And I think the critical problem is, with those authorities transferred to the Bureau, it is now an agency that has both no appropriations oversight and no policy oversight in terms of effective governance.

And just one last point if I may, this is not any longer just a bank regulator. And so, I think the appropriate comparison is really other consumer regulators, as you said. And if you look across the government, the FTC, the CSPC, the Justice Department, all of those entities are subject to the appropriations process.

Ms. VELAZQUEZ. As a regulator—the CFPB is a regulator. And as long as the National Bank Charter has been in the system—in fact, all the way back to 1864 when the OCC was established by a Republican, under a Republican President—the budget has been funded through assessment, not appropriation. In its wisdom, Congress passed the law that way, to give the independence to that agency.

Yes, sir?

Mr. WILMARTH. It seems to me that the experience of the FHFA is also very applicable. Congress determined that we needed a strong, independent regulator and a single regulator who would be accountable and would be strong enough to take effective action against these enormous, government-sponsored enterprises. In my view, the largest banks today, which the OCC regulates, have many similarities to the government-sponsored enterprises. They are widely viewed as being too-big-to-fail.

And so why is a single-Director model good for the FHFA and not for the CFPB? The single-Director model focuses accountability and prevents the Director from saying it is somebody else's fault if things don't go well.

Ms. VELAZQUEZ. Professor, prior to the Dodd-Frank Act, bank regulators often had to choose whether to use limited resources to enforce safety and soundness, or consumer protection laws. In your opinion, do the proposed bills undermine the advantages of having a separate regulator dedicated to each mission?

Mr. WILMARTH. Yes. Unfortunately, and I think everyone seems to have agreed on that point today, the Federal prudential regulators gave very short shrift to consumer protection; they didn't seem to think it was that important. They didn't seem to think it would have systemic effects.

We now know that a systemic failure to protect consumers will eventually have a systemic negative effect on the financial system. Congress created this regulator to provide accountability and focus for consumer protection, but then if you take away the secure budget, you end up with the problems the SEC and the CFTC are dealing with.

Ms. VELAZQUEZ. Thank you.

Mr. WILMARTH. They have an important mandate that they can't carry out. They have said so. They can't carry it out because they don't have enough money.

Ms. VELAZQUEZ. Under the revised funding provided by H.R. 1355, non-bank financial institutions like mortgage companies and check cashers could escape CFPB oversight if the agency lacks sufficient funding to extend oversight to these entities. What are the risks to consumers if these entities are not brought under Federal supervision in a timely manner?

Mr. WILMARTH. I would expect the CFPB's Director to focus on the largest institutions, for obvious reasons. They have the largest overall impact on consumers. But then we would go back to the same situation we had before the crisis when to some extent, banks were regulated, but there were large groups of non-bank providers, such as payday lenders, such as non-bank mortgage lenders, that were very lightly regulated and very inconsistently regulated.

And without an annual CFPB budget, I think you will see something similar, because the Bureau will be forced to put more of its attention on the banks, and it won't be able to put enough attention on the non-banks. And that actually won't help the banks. It will actually be to their disadvantage.

Ms. VELAZQUEZ. Thank you. I yield back.

Mr. RENACCI. Thank you.

I recognize Mr. Duffy for 5 minutes.

Mr. DUFFY. I thank the Chair.

We engaged in this conversation about transparency and accountability with the CFPB and my friends across the room here keep indicating that the CFPB has been in 14 times over the course of the last year. And they hold that up as a great example of the accountability that we have over the CFPB.

But the bottom line is, they are coming in and having a congressional conversation. There really is no oversight when they come in and speak with us. There is no teeth that we have when they come and have a conversation with us. And I think that is one of our concerns. Though they come in and share in a question-and-answer session, we really can't do anything if we have a concern about the activity of the CFPB.

I think a great example of oversight is with the $350 million CFPB budget. How long was their disclosure? Seven pages—seven pages for $350 million; and we are supposed to clap our hands and say, "This is wonderful oversight, transparency, accountability; isn't this great?" This is a perfect example of how we don't have any accountability here. There is no oversight. I think that is our concern on our side of the aisle. And I know there is a concern that we want to keep politics out of this.

We want to keep it immune from political activity. But really what that means is we want it to be immune from congressional oversight. This body is made up of the elected Representatives in the country, and it is our responsibility to make sure we do our job. And if we don't do our job, we are held accountable by our constituents.

Mr. Wilmarth, would you say that you agree that we should have a single Director and we should keep the funding outside of Congress and just stay with the Fed? You would agree with that?

Mr. WILMARTH. Yes, I have no problem with the current set-up.

Mr. DUFFY. And your rationale, quickly, on the Director side is—versus a commission is what?

Mr. WILMARTH. In my opinion, a single-Director model focuses accountability on the individual who is given the mandate. You can tell whether that individual is carrying out the mandate or not. When you have a commission, the responsibility is diffused. In my longer article that cited—administrative lawyers have gone back and forth about the merits of single directors and multi-member commissions. You can find both types of agencies.

Mr. DUFFY. Wonderful.

And to the rest of the panel, do you think that the Federal Reserve Board has been less effective because it is a board? To any of the three?

Mr. PINCUS. Congressman, I think that brings great benefit in terms of bringing different experiences and different perspectives to bear on very important decisions. And just to respond for a minute to Mr. Wilmarth's point about accountability, the problem is that the Director isn't accountable to anyone.

So, under the current structure, since the President can't fire him and neither can Congress and the appropriations are protected, it is nice to know who the decision-maker is, but there is nothing anyone can do about it. And so in that situation, it is even more important to have multiple people with input into the decision, which is why all of these regulatory agencies that you can think of are structured that way.

Mr. DUFFY. And I guess I also haven't heard a lot of complaints about the FDIC having a five member commission as well; that they are pretty effective as a commission, though power is not consolidated in one Director. Mr. Hunter, would you disagree with that?

Mr. HUNTER. I think that the current situation really, Congressman, underscores the fallacy if you will of placing all this responsibility on one person and deciding or arguing that that is a good thing because one person is responsible.

If you are going to have an independent entity like this, which I think Congress should do in only exceptional circumstances, and this may or may not be one, but if you are going to have an independent agency, you ought to have a commission so that the power and authority, in this case which is virtually unprecedented, is shared between a group of people as opposed to one person.

So that person's—and we are all human beings—idiosyncrasies, that person's whim and caprice, don't direct the administration of his authority and responsibility.

Mr. DUFFY. And I want to—I only have a few seconds left.

Mr. Wilmarth, did you follow the later Bush years; and did George Bush attempt to make some judicial appointments? But was he unable to do that because the Senate went into a pro forma session?

Mr. WILMARTH. I am not familiar with that incident, I am sorry.

Mr. DUFFY. You are not aware of that?

Mr. WILMARTH. I am not familiar with it. It may have happened; I am not familiar with it.

Mr. DUFFY. Okay.

Mr. STINEBERT. Congressman, I just wanted to point out some other advantages to having a commission. One is I am sure there would be staggered terms. Continuity is a big issue. Right now, you have a single Director whose term is going to end.

You are going to start completely over again with whomever the new Director is. If you have a commission or a panel, you are going to ensure some continuity; you are going to have some more balance; you are going to have some more thought-provoking experience to a commission. And I think that can only be to the advantage of this body.

Mr. DUFFY. And one last comment, at some point there will be a Republican President who will appoint a commissioner and my friends across the aisle may not like that. I think it is important to share that power so we don't have this continual divide in a very important agency. And I yield back the time I don't have.

Chairwoman CAPITO. Thank you.

Mr. Green is recognized for 5 minutes.

Mr. GREEN. Thank you, Madam Chairwoman. You are very generous with the time.

Again, I thank the witnesses. I do want to look closely at the proposition that the Consumer Protection Financial Bureau has no oversight and this is of concern because I believe in oversight. I think oversight is of paramount importance. I think oversight helps to avoid arbitrary and capricious acts, so I stand with those who stand for oversight.

So, perhaps I am incorrect. And one of the ways I try to find out exactly where I am is to pose questions to a panel, and I do so as lawyers do when they examine jurors—the process known as voir dire or voir dire, depending on where you are from. In Texas, it is voir dire. So I am a transplant, and I am a now voir dire person.

So with this and 3 minutes and 50 seconds left, does everyone agree that there is an entity known as the Financial Stability Oversight Council?

If there is disagreement, kindly extend your hand into the air. I ask that the record reflect that no hand has been extended into the air, hence I conclude that all agree that there is an institution known as the Financial Stability Oversight Council.

If you agree that the Financial Stability Oversight Council has oversight in the sense that it can review and overturn any regulation of the CFPB, do you agree that it can review and overturn any regulation of the CFPB?

If someone—

Mr. HUNTER. They would have to prescribe, if I can, Congressman—

Mr. GREEN. If you would let me have my time—

Mr. HUNTER. Yes.

Mr. GREEN. —for just a moment, I may yield to you.

But I just want you to tell me, as—by the way, as other Congresspersons ask their questions and they get answers, I would like to have a similar opportunity.

Do you agree that the Financial Stability Oversight Council can overturn any regulation of the CFPB?

If you differ and say that it cannot, then you should raise your hand.

Let the record reflect that no one differs. The Financial Stability Oversight Council can review and overturn regulations of the CFPB. I think it is worthy of noting who is on the Financial Stability Oversight Council. The Treasury Secretary chairs the Financial Oversight Council, and it is composed of: the Chairman of the Federal Reserve Board; the Comptroller of the Currency; the Chairman of the Federal Deposit Insurance Corporation; the Chairman of the Securities and Exchange Commission; the Chairman of the Commodities Futures Trading Commission; the Director of the Federal Housing Financing Agency; the Chairman of the National Credit Union Administration; and a Senate-confirmed independent member with insurance expertise that will segue into something you and I might discuss in just a second, Mr. Hunter, if I have time.

But these persons, all of whom have great expertise, sit in judgment of the Consumer Financial Protection Bureau. And it is ironic that the style of the entity that they happen to sit on has within it the word "oversight," the Financial Stability Oversight Council. That is oversight. I don't know how we can conclude that there is no oversight.

Now, perhaps someone could make the argument that it is not enough to have all of these persons with all of this expertise, but I find it difficult to make the argument that there is none, zero, that is a difficult argument I think to make successfully.

I wish I could go to you, Mr. Wilmarth, but I can't.

Mr. Hunter, you mentioned that you would like to see a banker on a given entity, did you not? Which institute was that, please? Someone representing—

Mr. HUNTER. Our preference, Congressman—

Mr. GREEN. Yes, sir?

Mr. HUNTER. —is that someone with banking experience—

Mr. GREEN. Yes, sir?

Mr. HUNTER. —be added to the FDIC—

Mr. GREEN. FDIC?

Mr. HUNTER. —or to the Fed.

Mr. GREEN. Okay, listen, I think you and I should have a conversation about this. I am not a person who opposes bankers having some influence and some opportunity to have their position known.

I support banking. This country needs good banks, but we also need good oversight for the purpose of protecting consumers. But

I would dearly like to visit with you about it and perhaps we can find some common ground to stand on.

And, Madam Chairwoman, thank you for the time.

Chairwoman CAPITO. Thank you.

Mr. GREEN. I want to yield back to you.

You have graciously accorded me the time, so I surrender it to you. Thank you.

Chairwoman CAPITO. Thank you.

I would like to ask unanimous consent to have the following statements placed in the record: the Consumer Bankers' Association; and the Credit Union National Association.

The ranking member also has a unanimous consent request.

Mrs. MALONEY. I ask unanimous consent that the statement of Americans for Financial Reform be made a part of the record.

Chairwoman CAPITO. Without objection, it is so ordered.

Mr. Luetkemeyer is recognized for 5 minutes.

Mr. LUETKEMEYER. Thank you, Madam Chairwoman.

Just to follow up a little bit on Mr. Green's comments, I, too, have concerns about the CFPB Director on the FDIC and quite frankly, I am not a big fan of the Fed Chairman going on there.

I really like the idea of a banker being on there, and the reason is this: We had testimony here last week with regards to an ombudsman program and the ability to connect back with the regulators. And there is a huge disconnect right now with what is going on in the field and what is going on with the regulators.

And I think putting somebody who is more in touch with what is going on the ground would certainly enhance the ability of the FDIC to understand some of those problems. I am not trying to pick a fight here, but I think that it makes sense to have somebody who can add that connection; to be somebody who would add great value to the Board.

So, that is just my first comment.

My second comment would be, Mr. Hunter, can you tell me something about—something we haven't talked about really is the privacy information that Mr. Huizenga is trying to protect here in his bill.

Can you tell me how the banks have been protected in the past up until now; how this is going to impact not only the banks but the customers by what is going to be available to the public which really is probably some information that they really shouldn't see?

Mr. HUNTER. The privileges that attach to information that is shared with bank examiners now is important because it ensures that there is an orderly, highly facilitated flow of information between banks and examiners so that examiners can do their jobs and banks can participate in—

Mr. LUETKEMEYER. That information is very specific to the individual customer, as well, is it not?

Mr. HUNTER. It can be, very frequently.

Mr. LUETKEMEYER. Yes.

And that information then would be available to the public if this bill doesn't go through? Is that a fair statement?

Mr. HUNTER. We strongly support Congressman Huizenga's bill. There does need to be a tweak so that information that is shared with other Federal agencies is also provided that privilege. But yes, Congressman, we support the bill.

Mr. LUETKEMEYER. So in other words, the average citizen who is doing business with an institution, his financial records can be open to the public for everybody to see, which is really an invasion of his privacy with the way the current law is structured for the CFPB, is that correct?

Mr. HUNTER. Conceivably, and that is a great argument for why the—

Mr. LUETKEMEYER. Thank you.

Mr. HUNTER. —privilege needs to exist.

Mr. LUETKEMEYER. Thank you.

Another quick question here with regards to the fines and the penalties that are charged, is there any recourse with regards to an institution which would be charged a fine by the CFPB? Is there any appeals process in place?

Mr. HUNTER. You have opportunities in Federal court in certain situations, but existence of an appeals process there—

Mr. LUETKEMEYER. So there is an ombudsman's program in this like there is with the Fed and those other groups that were talked about the other day?

Mr. HUNTER. I don't believe so. We can check.

Mr. LUETKEMEYER. Very good.

It is interesting. As we go through this process, some of the Members on the other side of the aisle seem to think that the entire financial debacle of a few years ago was caused by consumer-finance problems.

And let us be straight about what consumer finance is here. Consumer financial products here that we are talking about—consumer financial problems are not loan quality; are not investment-quality problems. They are problems with disclosure, and whether an APR is correct or what the fees are for a particular loan—it is all of this discloser stuff that we are talking about.

And so, how that is impacting the world of finance and causing things to go down is beyond me. I think it is a part of Dodd-Frank legislation which was an attempt to try and solve some problems.

But let us be clear. Consumer finance is not going to cause the debacle of—or save us from another debacle down the road. However, it does impact the banking institutions and the lenders at heart.

And Mr. Pincus, I am sure—you, a minute ago, made the comment in your testimony with regards to the regulations and how they restrict credit.

This is another example of some of the stuff here if we continue to push this stuff, how difficult it is for institutions to continue to lend when their hands are hamstrung, why the many things have happened with consumer protections, is that not correct?

Mr. PINCUS. Absolutely, Congressman, and it is a special concern because as you know, small businesses often rely exclusively or certainly principally on consumer lending services or products.

Mr. LUETKEMEYER. Have you seen a restriction with your members with regards to access to credit as a result of some of these consumer finance problems or situations or regulations?

Mr. PINCUS. Absolutely. Small businesses right now are having real problems getting access to credit and a lot of it is the general tightening up of credit for consumers and they are sort of hit in the crossfire because they access consumer credit and our real fear is that rules that are focused on consumers will have this terrible effect in terms of small businesses which, as you know, are the engines of our economy.

Mr. LUETKEMEYER. Very good. Thank you.

And my time is up.

Thank you, Madam Chairwoman.

Mrs. MALONEY. Will the gentleman yield for point of information or the chairwoman?

Chairwoman CAPITO. The gentleman was recognized for—

Mrs. MALONEY. One of my amendments to the Consumer Financial Protection Bureau created an ombudsman. So there is an ombudsman there and they are in the process of putting that in place now in the 34 days they have been in operation.

Chairwoman CAPITO. Thank you.

Mr. McHenry, for 5 minutes?

Mr. MCHENRY. Thank you. I thank the Chair.

And thank you for your testimony.

I know most of the questions have been asked, but I have not asked any questions.

In my Subcommittee on Oversight and Government Reform, we had Mr. Cordray before us and he testified that he certainly has a significant amount of additional willingness to be open about his process than we have seen from other folks who held the temporary position over the last year.

It is my opinion—but I think most folks can judge his testimony before the Senate and before my subcommittee, and additional testimony that he is going to give before a Financial Services Subcommittee—that he has been willing to answer questions. He has been willing to take in ideas. He is willing to add additional transparency.

It still doesn't fix the problem with the CFPB that you have one individual with an inordinate amount of power without restriction. And the only way that FSOC can overrule anything he or she does coming out of there, is if it poses a systemic risk across our economy. Basically, you would have to have one individual promulgate a rule that will bring a cataclysmic event the likes of which we have only seen once—we see once every half a century, in essence. So barring that, they are pretty safe to act.

Now, I have asked in terms of transparency for the CFPB to put forward their rulemaking agenda for the year. The SEC does this. Other regulators do this. And that has gotten a favorable response and they have made some action in that regard. The additional question is the rulemaking process that they have at the CFPB.

Mr. Pincus, I know you have studied this significantly. In terms of how transparent that process is, from your view of what the SEC does to promulgate rules versus what the CFPB seems to be doing—because I don't think there is much clarity—is there a significant difference between that process?

Mr. PINCUS. As you say, Congressman, we don't quite know yet. And I think there is a little bit of good, but some considerable reason for concern in how things are going. And I think, just to take an example, I think everybody agrees that disclosure around mortgages is a myth and has to be dealt with. And one of the things that Dodd-Frank does is it requires it to be dealt with.

So, before starting a formal rulemaking process, the Bureau has engaged in lots of consultations, which is a good thing. I think the concern is the input that it has received on its sort of tentative ideas have not been made public. It has all been kept private. It has not, although the statute requires the so-called soprefa process, the process to protect small business as a critical part of rulemaking, it hasn't been activated in this preliminary process. It hasn't even been enacted yet, and so being sure that small businesses are protected, which Congress was concerned about, hasn't happened yet.

And I think the real concern is that this informal process, which doesn't have a lot of protections in it in terms of disclosure, could become a substitute for the formal process and the real rulemaking process that the statute requires could become a rubber stamp. Everyone could have made up their minds, and so they have 30 days worth of comment and then they just promulgate the proposal that they had at the beginning.

So, I think there is just a real importance in being sure that there is a lot of opportunity for input. The input is clear in how it is dealt with and responded to, is part of an interactive process. And that ultimately, all people do, as the Administrative Procedure Act requires, have an opportunity to be in there and participate.

And just one more point, if I may? We are talking about rulemaking. Enforcement, a lot of agencies, consumer protection agencies and certainly Mr. Cordray's predecessor in the temporary job said that it was her view that she wanted to use enforcement to set standards, rather than rulemaking, because that was more efficient and easier.

And so, there is a real risk and we don't know where this Bureau will find its balance. But enforcement decisions have none of those protections. An agency can bring an enforcement action, either get a settlement or get a decision—obviously, all legitimate companies—

Mr. MCHENRY. It is basically regulation through lawsuit, and the Federal Government already has that authority.

So as the small business panel, I appreciate you touching on that. It is highly important that with every major rulemaking, you impanel small businesses.

Mr. Stinebert, harmonization among regulators to make sure that when you have a CFPB rule promulgated, that it is uniform across institutions and business sets and among the regulators; that there is agreement to that—can you touch on that as my time has expired?

Mr. STINEBERT. Yes, Congressman, thank you for bringing that up. One of our primary concerns is the decades of State regulation and the expertise that has been built up at the State level.

We want to make sure that there is cooperation from the CFPB with those State regulators and that some of that talent and that expertise is utilized and some of that history that was with the

State regulators. We want to make sure that there is a good mix of that going forward.

We have not had an indication so far of that to a great extent. We are very helpful as we go forward we will more of that.

Mr. MCHENRY. Thank you.

Thank you, Chairwoman Capito, for holding this hearing.

Chairwoman CAPITO. Thank you.

Mr. McCotter, for 5 minutes?

Mr. MCCOTTER. Thank you, Madam Chairwoman. And thank you for indulging our colleague, Mr. McHenry, in his 5-minute question.

One of the interesting things that we find in politics is much like you learn when you grow up. Never judge a book by its cover.

Interestingly, we are seeing the Democratic Party actually make a vehement argument in favor of creating an entity that is as far from the people and the democratic process as it can be. I only note that because I find it very odd. It is odd not only because they claim to want popular participation, people empowerment over their own decisions.

It is actually contrary to the wave of the future. And it is in keeping with the founding principles of this country for us to oppose putting one person in power. After all, the first President of the United States stepped down, because he did not wish to be a king, because he understood Lord Acton's Dictum that "absolute power corrupts absolutely."

And yet, here we find ourselves in the 21st Century saying that despite all the changes in our world, despite all the changes in our lives, despite all the changes in our economy, despite the ability to use the social network to make our own decisions to access information, to conduct our own personal transactions based upon that information in nanoseconds around the world, we continue to say that we need one person to save us from ourselves.

That here in the United States of America, a country built upon self-government, in the 21st Century, we are relying on 18th Century concepts that one individual however enlightened and benevolent they may be are necessary for the running of the entire American economy, for the running of every American's life so they can make financial decisions.

Now, I would like to point out that having opposed the Wall Street bailout as absolutely the wrong precedent to set in the first crisis of our globalized economy, in many ways this regulatory scheme is the bitter fruits of misdeeds that occurred during that crisis and precipitated it. So, I have no sympathy necessarily for those who must suffer under the yoke of this new entity.

But I would remind everyone that the central argument that we are really having here about this CFPB is whether or not you can govern your own life, is what is the proper role of government in the 21st Century? How do you match that government with an economy that has become flat, that has become horizontal, that empowers you every day to extents undreamt in human history?

And unfortunately, the answer continues to be much what we heard when President Roosevelt rejected the calls to become a short-term dictator because only one person could get the American economy out of the Great Depression. We have always rejected the concept that it is a person who will save us. And instead of worrying about the person who holds it, be it a Democratic appointee, be it a Republican appointee, worry about the expansion of the powers of the State.

Now, I know that back in the 1980s and 1990s when the Soviet Union was going under, there was a school of thought that said Communism would still work if Stalin hadn't ruined what Lenin put in place. I only bring this up because it continues to reinforce my point.

What we are concerned about here is the expansion of the power of the State. And we know that when you expand the powers of the State, regardless of who is going to be in charge of it, you are going to have problems somewhere down the road, because you have gotten away from the very principles which allow us to be a free people and have this debate.

Now, there are those Members of the Congress who believe that having their duly elected Representatives have oversight over this entity, because we are so inherently corrupt, I would like to ask if they only exclude themselves from that? Or, if they are worried about their own temptation to sin and make the situation worse?

I would ask them to go back to their constituents and say, those bureaucrats who are always so responsive when you have a problem, who always come through? We are going to make them even more powerful now, but the good news is there will only be one to tell us no or to ignore us, or to ignore you.

No, the CFPB's problem is that it is based upon an outdated, antiquated model of government that will not work, especially at a period of time when the wave of the future is individual freedom. It is empowerment. And that is going to continue whether big vertical government likes it or not. And I assure you, regardless of the outcome of this debate or these bills, big government is going to get flattened beneath the power of the people.

I yield back. I have no questions.

Chairwoman CAPITO. The gentleman yields back. I think our final questions have been asked.

The Chair notes that some Members may have additional questions for the panel, which they may wish to submit in writing. Without objection, the hearing record will remain open for 30 days for Members to submit written questions to these witnesses and to place their responses in the record.

I would like to thank all of you. And I think we have had a very productive hearing.

This hearing is adjourned.

[Whereupon, at 12:23 p.m., the hearing was adjourned.]

APPENDIX

February 8, 2012

OPENING STATEMENT OF REP. BILL HUIZENGA

House Financial Services Subcommittee on Financial Institutions and Consumer Credit

Hearing on Legislative Proposals to Promote Accountability and Transparency at the Consumer Financial Protection Bureau

February 8, 2012

Good morning, and thank you Chairwoman Capito and Ranking Member Maloney for holding this important hearing.

We are here today to discuss legislative proposals that will create more peace of mind for financial institutions. The Consumer Financial Protection Bureau, which Congress created under the Dodd-Frank Wall Street Reform and Consumer Protection Act, fails to safeguard proprietary information given to the Bureau by supervised entities. Let me be clear, we can all agree on stringent consumer protections. These reforms that we are discussing today are common-sense measures that will ensure that the bureau fulfills its mission of protecting consumers while being accountable for its actions and use of resources.

Specifically, my bill, H.R. 3871, the Proprietary Information Protection Act, would immediately close a loophole in the law that was created under the CFPB. Currently, information collected by the CFPB from financial institutions is not protected by the same confidentiality provisions that other banking regulators are required to provide. We need a real solution to ensure that privileged information will not be intentionally disclosed to any third party. H.R. 3871 would protect the data that institutions provide during an exam therefore enhancing the Bureau's supervision process and giving financial institutions the much-needed certainty that the information will be kept private.

Unlike current statutes regarding other federal agencies accessing relevant information, the Dodd-Frank Act failed to provide such protections despite the CFPB's claims they won't and wouldn't share such information. The simple truth is that the CFPB could legally share privileged information with third parties. Absent specific congressional legislation, the courts have permitted this practice in the case of other federal agencies.

President Barack Obama's appointed director of the CFPB, Richard Cordray, recently testified that this was an "oversight" and that he would be "supportive" of a legislative solution to ensuring privileged information is not leaked to third parties through the CFPB. My bill is that real legislative solution.

The CFPB recently stated that "the Bureau is prepared to take all reasonable and appropriate steps to assist supervised institutions in rebutting any claim that they have waived privileges by providing information to the Bureau," but until we pass a bill restricting them from doing so we cannot be sure.

This is a common-sense fix that will put an end to the needless uncertainty and legal costs to both the CFPB and financial institutions.

Ms. Chairwoman, thank you again for holding this important hearing and I look forward to hearing from the witnesses today.

February 8, 2012

Testimony of

Michael J. Hunter

On behalf of the

American Bankers Association

before the

Subcommittee on Financial Institutions and Consumer Credit

of the

Committee on Financial Services

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February 8, 2012

Chairman Capito, Ranking Member Maloney, and members of the Subcommittee, my name is Michael J. Hunter, chief operating officer of the American Bankers Association. I come before this subcommittee not only as a representative of the banking industry, but also as someone with experience in government at both the state and federal levels. I served in the Oklahoma House of Representatives, as Oklahoma's secretary of state under Governor Frank Keating, and was chief of staff to Congressman J.C. Watts Jr., a former member of the House Financial Services Committee.

I appreciate the opportunity to present the views of the ABA on legislation that would improve the accountability of the Bureau of Consumer Financial Protection and on legislation that would provide certainty that privileged information provided to the Bureau will not be unintentionally disclosed. The ABA represents banks of all sizes and charters and is the voice of the nation's $13 trillion banking industry and its two million employees.

Let me begin by first emphasizing that ***the banking industry fully supports effective consumer protection.*** We believe that Americans are best served by a financially sound banking industry that safeguards customer deposits, lends those deposits responsibly, and processes payments efficiently. Traditional FDIC-insured banks – more than any other financial institution class – are dedicated to delivering consumer financial services right the first time. Not only do banks have the compliance programs and top-down culture to prove it, banks are required to have the financial wherewithal – in terms of capital, liquidity and asset quality – to be there when our customers need us.

The Dodd-Frank Act has certainly changed the landscape for banking regulation and for consumer protection across all financial institution participants including non-banks. The Bureau of Consumer Financial Protection (Bureau) will play a pivotal role in setting new rules that will affect access and availability of consumer financial products. The bills introduced by Reps. Jim Renacci (R-OH) and Randy Neugebauer (R-TX) address different aspects of the role of the Bureau in making decisions and what the oversight and source of funding should be. These bills are two of many options to address concerns about the role of the Bureau and its exercise of power. An important principle that underlies these and other bills is that there needs to be an effective check and balance on the Bureau's authority. We strongly support this principle of accountability and balance, and applaud Congressional efforts to assure an effective mechanism is in place to achieve it for the Bureau.

Let me comment briefly on each of these bills even though the ABA membership has taken no formal position on them. H.R. 2081 would replace the Bureau head with the Chairman of the Federal Reserve as one of the five members of the FDIC Board. The key question underlying this bill is what expertise is necessary to protect the insurance fund of the FDIC—a fund that is completely financed by premiums paid by the banking industry.

Maintaining a safe and sound banking system is at the heart of protecting the FDIC insurance fund. Safety and soundness regulators, like the Federal Reserve, FDIC and OCC, are keenly aware of how policies impact the likelihood and cost of bank failures. So, representation by these agencies on the FDIC board makes sense. In fact, the Office of Thrift Supervision (OTS) was added to the board when the separate insurance fund protecting savings institutions was merged into the FDIC. The Board became a five-member board, rather than three members; the three member board had included the OCC. The regulator with that responsibility and expertise is now the OCC after Dodd-Frank's re-organization, not the Bureau. There may be several rationales for filling the vacated seat, but none are true to the original purpose to warrant an automatic substitution of the Bureau for the OTS.

Having profitable banks is, of course, at the core of a viable long-term system that minimizes failures. We believe that consumer protection and safety and soundness go hand-in-hand, but there is no question that consumer protection policies could be created that act in conflict with safety and soundness. Avoiding such a conflict would be critical in setting FDIC policies.

What is missing on the FDIC's board is representation from the banking industry. As noted above, the banking industry bears the full cost of the FDIC without any taxpayer assistance, yet has no voice in the priorities, policies, and staffing of the agency. Having stakeholders represented on the board rather than the Bureau or the Federal Reserve would be a better approach.

H.R. 1355 would move the Bureau under Treasury and subject it to the appropriations process. There are two key questions here: (1) how to assure accountability of decisions and assure appropriate limits on the power of the Bureau, and (2) assure that the uses of funds by the Bureau, whether provided through the current source from the Federal Reserve or through appropriations, are used effectively and disclosed fully.

On the question of accountability, there are many ways to assure this. ABA has long advocated the use of a commission or board structure to accomplish this. We believe such a structural change would provide an effective check and balance.

As the law is currently written, the Bureau's director has sole authority to decide the direction and parameters of the consumer financial product market. This vests too much power in one person to fundamentally alter the financial choices available to customers. A board or commission would broaden the perspective on any rulemaking and enforcement activity of the Bureau, facilitate continuity of the organization and enhance predictability about rulemaking over time, and provide the appropriate checks in the exercise of the Bureau's authority.

ABA supports H.R. 1121, the Responsible Consumer Financial Protection Regulations Act of 2011, introduced by Chairman Bachus, which created a five-member board for the Bureau. This bill passed this subcommittee, the full committee, and was later adopted by the full House as part of H.R. 1315.

On funding of the Bureau, we believe that the Bureau should be accountable to Congress to show how it is using its resources and to demonstrate that it is taking a balanced approach to its rulemaking and enforcement. For example, the financial crisis pointed to an enormous gap in the regulation and supervision of non-bank financial providers. The system failed to enforce laws—***already on the books***—against predatory practices by many of those non-banks. Therefore, ABA strongly recommends that the Bureau be held accountable for directing its resources to the most glaring gap in regulatory oversight—a failure to supervise and pursue available enforcement remedies against non-bank lenders committing predatory practices or other consumer protection violations.

Traditional bankers will be examined year-in and year-out for compliance with all of the pre-crisis consumer protection laws—and any new rules forthcoming from the Bureau—while non-bank lenders may once again escape supervision and melt back into the forest. The banking industry already has a compliance culture and financial wherewithal to assure compliance with consumer regulations. The same cannot be said of non-banks. Thus, there needs to be great transparency regarding the Bureau's funding to assure that the focus is on closing the gaps on non-banks, including a break-out of Bureau expenditures attributable to bank versus non-bank regulation and supervision. Mandated transparency on the Bureau's non-bank expenditures will better enable Congress to fulfill its own oversight function.

Let me address a separate issue on the protection of confidential information, which H.R. 3871, is intended to clarify for the Bureau. We appreciate Rep. Bill Huizenga's (R-MI) leadership on this key issue.

To facilitate the Bureau's exercise of its supervisory power, consistent with how Congress has bestowed this power on other agencies, the information provided to the Bureau by supervised entities must retain the same level of protection for legally privileged communications as afforded by other supervisory agencies. Congress's grant of supervisory authority to the Bureau naturally implies protection of this fundamental principle of privilege. Such protection is critical to ensure the supervision process works as intended.

Banks currently have express legal protection that allows them to be comfortable in voluntarily turning over privileged documents upon the request of the banking agencies. While the Bureau has made commendable efforts to address this issue through the regulatory process, ABA believes it appropriate to add certainty and facilitate good communications between banks and the Bureau by enacting the same, express rules regarding privilege of information for the Bureau as those already established for the other federal banking supervisors.

In the past, Congress has wisely acted to lay to rest the threat of wasteful litigation challenging the protections that should be accorded to information shared by a bank with its supervisor. Congress addressed this situation by amending the Federal Deposit Insurance (FDI) Act in two instances. In 1992, Congress enacted 12 U.S.C. 1821(t), which provided for the ability of regulators to share information obtained from a bank with other federal agencies without the privilege on that information being waived. In 2006, Congress, enacted 12 U.S.C. 1828(x), which permits a financial institution to furnish material to any "Federal banking agency" or any state or foreign bank supervisor in the course of a supervisory or regulatory process without privilege being waived.[1] As a result of these two congressional actions, the examination and supervisory processes are able to be carried out more cooperatively, openly, and efficiently.

Unfortunately, 1821(t) and 1828(x) of the FDI Act were not amended to include the Bureau, creating uncertainty in the regulatory process of the Bureau. All parties would like this uncertainty to be removed, and the Bureau should have parallel treatment with the other banking agencies in this regard. Acknowledging the problem, the Bureau issued a bulletin on January 4, 2012, which stated that "the provision of information to the Bureau pursuant to a supervisory request would not waive any privilege that may be attached to such information." The Bureau has also signaled its intent to issue a regulation to expressly protect privilege.

ABA supports the Bureau's non-waiver analysis and its expected effort to incorporate this position in a regulation protecting shared privileged communications. Nevertheless, supplying a statutory confirmation of the protection of privilege would help alleviate needless uncertainty and added legal costs resulting from the current situation, as well as the possibility that the

[1] The specific issue of concern relates to the waiver of privilege—i.e., how a party may waive its right to privilege. Courts have generally held that if the privileged material is given to another party, the right to claim privilege has been waived as to all other parties. Thus, the question arose that if a bank gave otherwise privileged material to a bank regulator as part of, say, an examination, did that waive the right of the bank to claim privilege on that material if a third party sought it in a legal dispute? The banking regulators long took the position that if a bank provided information to them in a supervisory context, under compulsion from the regulator, then privilege was not waived because production was not voluntary. However, over time courts began to hold that privilege was waived in many comparable cases involving other regulators, and that trend began to appear in cases involving banking regulators as well. This uncertainty over privilege was harmful to the examination and supervisory process in that it resulted in needless discussion and negotiation over providing information to the regulators. Neither the banks nor the regulators wanted this needless uncertainty.

Bureau's position might be subject to legal challenge. In recent hearings in both the House and Senate, Richard Cordray stated that he supports such legislation.

We appreciate Rep. Huizenga's work on this important issue. We would suggest a technical modification to the bill to also address the privilege issue with respect to the sharing of information with other federal agencies. The bill currently only addresses one of the statutory provisions noted above. With this addition, the Bureau would be put on equal footing with the other banking agencies. We look forward to working with Congressman Huizenga and the subcommittee on this very important issue.

100 Years Standing Up for American Enterprise

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.
>
> 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

[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.

* * * * *

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.

American Financial Services Association

HOUSE FINANCIAL SERVICES COMMITTEE
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS
AND CONSUMER CREDIT

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Hearing on:
Legislative Proposals to Promote Accountability and Transparency at the Consumer Financial Protection Bureau

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February 8, 2012

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STATEMENT OF CHRIS STINEBERT
PRESIDENT and CEO
AMERICAN FINANCIAL SERVICES ASSOCIATION

My name is Chris Stinebert, and I am the President and CEO of the American Financial Services Association ("AFSA"). I am pleased to offer this testimony on "Legislative Proposals to Promote Accountability and Transparency at the Consumer Financial Protection Bureau." I wish to express AFSA's appreciation to Chairman Capito and Ranking Member Maloney for holding a hearing on these proposals, which are of keen importance to AFSA's member companies.

Statement of Interest

Founded in 1916, AFSA is the national trade association for the consumer credit industry protecting access to credit and consumer choice. Our 350 members include consumer and commercial finance companies, auto finance and leasing companies, mortgage lenders, credit card issuers, industrial banks and industry suppliers. Before the passage of the Dodd-Frank Act, most AFSA members have been regulated and examined by the states. Today, the still embryonic Consumer Financial Protection Bureau (CFPB) will add an additional layer of federal regulation on these companies.

The CFPB's authority has a disproportionate impact on the many AFSA members that are finance companies, sales finance companies or retail installment sales finance companies.

These companies, many of which are small local or regional businesses, are licensed and supervised by state banking agencies or a consumer credit authority. They are not federally chartered and are funded by putting their own capital at risk, not by federally-insured deposits. They had no part in causing the financial crisis the Dodd-Frank Act purports to address. Thanks to the Dodd Frank legislation, the companies find themselves subject to an additional level of federal regulation and enforcement that could dramatically raise their compliance costs and impact the availability of consumer credit.

Even worse, the Dodd-Frank Act failed to give any statutory direction to the new CFPB to determine the adequacy of existing state laws and regulations under which these companies operate before imposing new federal burdens. We note that every dollar spent on additional compliance burdens is a dollar not loaned to American consumers.

We wish to address three major policy concerns. First, reflecting our membership and mission, we will discuss structural improvements to the Consumer Financial Protection Bureau, which we believe would bring that agency's structure in line with the norm for independent federal regulatory agencies. Second, we wish to highlight some ambiguity in the law with regard to the treatment of confidential information in the supervisory process. Finally, we will discuss the need for systemic reform of the regulatory process beyond the CFPB that we believe will restore balance to the regulatory process.

This testimony should not be taken as a comment on the professionalism of the civil servants at the CFPB, many of whom who are veterans of other administrative agencies. We are, however, concerned about the underlying structure of the agency and its lack of oversight.

The Current Structure of the CFPB is Unique among Independent Agencies

Congress has given the CFPB extraordinary authority over all facets of consumer credit. Unlike traditional agencies governed by a bipartisan commission, the CFPB is directed by a single regulator. Unlike the traditional independent agency model, the CFPB is guaranteed a percentage of the Federal Reserve Board's (FRB) budget, hence there is no congressional oversight through the normal budget process.

The CFPB also has independent litigating authority and need not notify the Department of Justice (DOJ) of any proposed action – far outside the usual norms of federal agency practice. AFSA believes DOJ consultation is necessary to coordinate enforcement activities across agencies and to provide a critical check on the CFPB's discretion when a company is exposed to damaging penalties.

Fortunately, a number of proposals address many of these concerns.

We are grateful to Chairman Capito for her co-sponsorship of H.R. 1121, Chairman Bachus's "Responsible Consumer Financial Protection Regulations Act," which replaces the single director of the CFPB with a five-member commission, including the Vice Chairman for Supervision of the Federal Reserve System — a structure similar to that of the Federal Trade Commission.

We note that the original proposals to create a consumer agency, including the administration's proposal and the Wall Street Reform and Consumer Protection Act of 2009, introduced and shepherded through the House by Rep. Barney Frank, all structured the agency as a commission.

AFSA is pleased that a similar bill, H.R. 1315, the "Consumer Financial Protection Safety and Soundness Improvement Act," sponsored by Rep. Duffy, passed the House by a 241 to 173 vote last July.

Unfortunately, this bill languishes in the Senate — necessitating this hearing and the need for further action by the House to provide an alternative road to reform.

For those reasons, we support H.R. 1355, introduced by Oversight and Investigations Subcommittee Chairman Neugebauer, which would move the CFPB into the Treasury Department in a structure similar to that of the Office of the Comptroller of the Currency. Doing so would provide the congressional oversight and budgetary accountability currently lacking in the CFPB's structure, without creating a full independent commission.

We also believe that H.R. 1640, the "Bureau of Consumer Financial Protection Accountability Act." sponsored by Rep. Posey, merits support. This bill would fund the CFPB through an authorization of annual appropriations by Congress, rather than the current autonomous transfer of funds from the FRB, which lacks any meaningful oversight.

Since a preponderance of AFSA members are non-depository companies rather than federally-insured depositories, we do not take a position on H.R. 2081, sponsored by Rep. Renacci, which replaces the CFPB director's appointment to the FDIC Board with the Chairman of the Federal Reserve.

Protecting the Confidentiality of Supervisory Information

AFSA is concerned about the treatment of confidential information collected during the examination process. There is precedent for maintaining this confidentiality in the longstanding practice by the federal banking agencies of claiming privilege with regard to bank examination records.

When challenged, the courts have upheld this privilege. In 1992, the U.S. Court of Appeals for the D.C. Circuit sustained the assertion of privilege by the FRB and Office of the Comptroller of the Currency (OCC) in denying the discovery of confidential supervisory information related to a national bank. AFSA believes that this argument should apply to the supervision and examination of bank and non-bank financial institutions alike.

We are pleased that a recent CFBP bulletin states that institutions providing privileged information in response to a supervisory request will not waive any privilege — and that the CFPB will maintain that information as privileged and confidential. However, we have additional concerns that may have to be addressed by legislation.

It is unclear whether the CFPB is a "federal banking agency" under the Federal Deposit Insurance Act, which governs the treatment and waiver of privilege for depository institutions. In the recently issued CFPB Bulletin 12-01, the bureau asserts it has the authority to demand privileged documents from supervised institutions without the privilege being waived despite the fact that the CFPB is not a "federal banking agency." It is doubtful whether this body of law extends to the non-depository companies that AFSA represents.

We are encouraged that Director Cordray has indicated a desire to work with Congress to include the CFPB among covered agencies for the purpose of maintaining privilege. We are also pleased to offer enthusiastic support for H.R. 3871, the "Proprietary Information Protection Act of 2012," which was introduced by Rep. Huizenga and co-sponsored by the Chair and by Chairman Bachus. H.R. 3871 would clarify the law to say that the submission of confidential information to the CFPB in the course of the supervisory process does not waive any privilege that a regulated entity may claim with respect to such information.

Similarly, Senator Richard Shelby has offered S. 2055, which goes a step further in extending this privilege universally to any federal banking agency, state bank supervisor or foreign banking authority including the CFPB.

Given that the CFPB has already begun its supervision of large depository institutions and is now launching its supervisory program for non-depositories, AFSA urges Congress to enact legislation swiftly to codify the confidentiality provisions of these legislative proposals. We hope that the CFPB will work with this committee to secure quick House consideration of this important measure. Moreover, we would like to use this opportunity to call on the Senate to move in accord with this effort so that we can have these statutory protections on the President's desk as soon as possible.

Other Systemic Reform of the Federal Regulatory Process

The complexity, impact and lack of congressional oversight over the Dodd-Frank Act is merely one example of a broken regulatory process. Without a doubt, this problem is manifested in other major regulatory initiatives impacting all segments of the economy. In fact, the role of the regulators has become so pervasive that: a) management is impeded from making basic operational decisions without checking with and getting approval from regulators; and b) the cost of regulatory compliance has gone up dramatically without any increase in effectiveness. Therefore, AFSA believes that the entire regulatory process is in need of comprehensive, systemic reform.

Happily, the House of Representatives passed H.R. 10, the "Regulations from the Executive in Need of Scrutiny Act" (REINS Act) — co-sponsored by Chairman Capito. That bill prevents federal agencies from implementing major regulatory initiatives without congressional approval. It ensures that new major rules that impose annual economic costs in excess of $100 million or otherwise have significant economic or anticompetitive effects cannot take effect unless Congress passes a Joint Resolution approving the regulation within 90 session or legislative days of the rule's submission to Congress.

We believe enactment of the REINS Act would restore congressional oversight over federal agencies that are, all too often, adopting rules that either exceed their underlying statutory authority or reflect the views of unelected bureaucrats rather than elected officeholders constitutionally charged with creating public policy.

Finally, most federal agencies promulgate rules subject to the Administrative Procedures Act of 1946 (APA), which requires agencies to keep the public informed of their organization, procedures and rules; provides for public participation in the rulemaking process; establishes uniform standards for the conduct of formal rulemaking and adjudication; and defines the scope of judicial review.

Unfortunately, the APA provides little protection when federal agencies exceed their congressional mandates. Happily, there is a model that does so. In 1975, in response to an out-of-control Federal Trade Commission (FTC), Congress enacted the Magnuson-Moss Warranty Act, which imposed procedural safeguards on FTC rulemaking.

Under Magnuson-Moss, the FTC must first show "substantial evidence" before it is able to regulate "prevalent" unfair and deceptive acts. In addition to APA procedures, the Magnuson-Moss Act requires two notices of proposed rulemaking, prior notification to Congress, an opportunity for informal hearings, and importantly, possible cross-examination of witnesses. Magnuson-Moss also requires that the FTC justify a new rule with "particularity" after obtaining objective evidence based on a relevant market taken as a whole rather than the FTC's (and doubtless other agencies') previous reliance on anecdotal evidence.

AFSA believes that the important procedural safeguards of the Magnuson-Moss Act should be extended to other forms of federal regulatory rulemaking.

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Again, AFSA appreciates the opportunity to testify before the subcommittee on the impact of the structure of the CFBP, and I'd be happy to take any questions.

HEARING ON "LEGISLATIVE PROPOSALS TO PROMOTE ACCOUNTABILITY AND TRANSPARENCY AT THE CONSUMER FINANCIAL PROTECTION BUREAU" ON FEBRUARY 8, 2012, BEFORE THE SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT OF THE COMMITTEE ON FINANCIAL SERVICES, U.S. HOUSE OF REPRESENTATIVES

WRITTEN TESTIMONY OF ARTHUR E. WILMARTH, JR.
Professor of Law and Executive Director, Center for Law, Economics & Finance
George Washington University Law School
Washington, D.C.

Thank you very much for inviting me to participate in this important hearing. My testimony[1] will address the following three bills that propose various changes to the operations and funding of the Bureau of Consumer Financial Protection ("CFPB"): H.R. 1355, H.R. 2081, and H.R. 3871. For the reasons set forth below, I strongly oppose enactment of H.R. 1355 and H.R. 2081. I do not oppose enactment of H.R. 3871.

H.R. 1355 would remove CFPB's administrative autonomy and subject CFPB's funding to congressional appropriations, thereby severely undermining CFPB's independence and its ability to fulfill its statutory mandate. H.R. 2081 would remove CFPB's Director as a member of the Board of Directors of the Federal Deposit Insurance Corporation ("FDIC") and would thereby prevent CFPB's Director from receiving the benefit of regular interactions and discussions with federal banking regulators. In addition, H.R. 2081 would increase the influence of the Federal Reserve Board ("FRB") over FDIC and thereby enhance FRB's ability to promote the use of the Deposit Insurance Fund ("DIF") as a potential bailout fund for

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[1] Portions of this testimony are derived from the following article: Arthur E. Wilmarth, Jr., "The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau," George Washington Univ. Law School Public Law & Legal Theory Paper No. 2012-4 (Dec. 22, 2011), available at http://ssrn.com/abstract=1982149. That article will be published in Vol. 31, Issue 2 of the *Review of Banking and Financial Law* (Boston Univ. Law School, Spring 2012).

uninsured creditors of "too big to fail" ("TBTF") banks. Accordingly, in my view, H.R. 1355 and H.R. 2081 would seriously harm the public interest and should not be enacted.

1. Congress Established CFPB to Accomplish an Important Mission, and CFPB's Structure and Powers Are Similar to Those of Other Financial Regulators

Congress created CFPB because the previous dispersion of consumer protection responsibilities among several federal bank regulators produced a systematic failure of the consumer protection function during the credit bubble leading up to the financial crisis. Congress determined that a single federal financial regulator with the sole mission of protecting consumers was essential in light of "the spectacular failure of the [federal] prudential regulators to protect average American homeowners from risky, unaffordable" mortgages during the housing boom.[2] A Senate committee report found that federal banking agencies "routinely sacrificed consumer protection" while adopting policies that promoted the "short-term profitability" of large banks, nonbank mortgage lenders and Wall Street securities firms.[3] The Senate report concluded that "it was the failure by the [federal] prudential regulators to give sufficient consideration to consumer protection that helped bring the financial system down."[4]

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") authorizes CFPB to issue regulations, perform investigations, create public education

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[2] Senate Report No. 111-176, at 15 (2010); *see also* H.R. Rep. No. 111-517, at 874 (2010) (Conf. Rep.) ("The Bureau will have the authority and accountability to ensure that existing consumer protection laws and regulations are comprehensive, fair, and vigorously enforced"), *reprinted in* 2010 U.S.C.C.A.N. 722, 730.

[3] Senate Report No. 111-176, at 15 (2010) (quoting congressional testimony of Patricia McCoy on Mar. 3, 2009). For additional analysis of failures by federal bank regulators to protect consumers during the housing boom that led to the financial crisis, *see, e.g.,* Kathleen Engel & Patricia A. McCoy, *The Subprime Virus* 157-205 (2011); Simon Johnson & James Kwak, *13 Bankers: The Wall Street Takeover and the Next Financial Meltdown* 120-32, 141-44 (2010); Oren Bar-Gill & Elizabeth Warren, "Making Credit Safer," 157 *University of Pennsylvania Law Review* 1, 81-95 (2008); Adam J. Levitin, "Hydraulic Regulation: Regulating Credit Markets Upstream," 26 *Yale Journal on Regulation* 143, 151-69 (2009); Arthur E. Wilmarth, Jr., "The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services," 36 *Journal of Corporation Law* 893, 897-919 (2011), available at http://ssrn.com/abstract=1891970.

[4] Senate Report No. 111-176, at 168 (2010).

programs, and prosecute enforcement proceedings in order to protect consumers against unfair, deceptive, abusive, and discriminatory financial practices. Title X promotes CFPB's independence from political influence by granting CFPB autonomy in its policymaking, rulemaking and enforcement functions and by giving CFPB an assured source of funding from the Fed.[5]

CFPB's governance, powers and funding are comparable to those of other federal financial regulators. CFPB's single-Director model of leadership is similar to the governance structure for the Office of the Comptroller of the Currency ("OCC") and the Federal Housing Finance Agency ("FHFA"). CFPB's regulatory and enforcement powers are comparable to those exercised by OCC, FHFA, FDIC and FRB. Indeed, CFPB's powers are more limited in some respects than those of other federal banking agencies. Unlike FDIC and FHFA, CFPB cannot put any institution into receivership or conservatorship. Unlike FDIC, FHFA, FRB and OCC, CFPB cannot remove or suspend officers, directors and employees of financial institutions or impose industry-wide prohibitions on such persons.[6]

CFPB's ability to fund its operations without relying on congressional appropriations is, again, comparable to the OCC, FHFA, FDIC and FRB.[7] The financial services industry and its allies have strongly defended the governance structure, authority, independence, and assured funding of both OCC and FHFA.[8] Accordingly, it appears that the opposition to CFPB is primarily motivated CFPB's consumer protection mandate, not its structure.

CFPB's opponents have alleged that the bureau will be an unaccountable agency with virtually unlimited powers. On the contrary, Title X of Dodd-Frank imposes significant

[5] Wilmarth, *supra* note 1, at 18-21.
[6] *Id.* at 21-25.
[7] *Id.* at 23.
[8] *Id.* at 29-34, 66-67.

limitations on CFPB's powers and also provides for extensive oversight of CFPB. CFPB must perform a detailed cost-benefit analysis before it adopts any rule. CFPB must also consult with a wide variety of parties, including other financial regulators, before it issues any rule. If any prudential regulator objects to a proposed CFPB rule, CFPB must explain in its final rulemaking how it has responded to that objection. Title X imposes additional restrictions on CFPB's ability to adopt any rule designed to prevent unfair, deceptive or abusive acts and practices. The most significant check on CFPB is the authority of the Financial Stability Oversight Council to suspend and overrule CFPB's regulations. CFPB is the only financial regulator whose rules are subject to override by an appellate body consisting of the heads of other agencies.[9]

Title X also subjects CFPB to extensive oversight by the executive and legislative branches. For example, CFPB must provide semiannual reports to the President and Congress and is audited each year by the Government Accountability Office.[10] Thus, claims about CFPB's alleged lack of accountability are refuted by Dodd-Frank's unambiguous provisions that limit CFPB's authority and impose substantial oversight on CFPB.

2. H.R. 1355 Would Destroy CFPB's Independence and Would Leave CFPB Vulnerable to Political and Industry Influence.

H.R. 1355 would greatly weaken CFPB in several ways. Section 2(1) would repeal CFPB's status as an "independent" bureau and would move CFPB from the Federal Reserve System ("Fed") to the Treasury Department ("Treasury"). Thus, Section 2(1) would transfer CFPB from an independent agency that is relatively insulated from political influence to an executive branch agency that is highly susceptible to political intervention. Moreover, Section 2(2) would remove critical statutory protections that enable CFPB to function as an autonomous bureau in setting policy. Those protections currently (i) prohibit the Fed from intervening in

[9] *Id.* at 25-28.
[10] *Id.* at 28.

examinations, enforcement actions or other proceedings before CFPB, (ii) bar the Fed from appointing, directing or removing any of CFPB's officers or employees, (iii) preclude the Fed from merging CFPB with any of the Fed's other units, and (iv) prohibit FRB from reviewing or interfering with any of CFPB's rules, orders, legislative recommendations or legislative testimony.[11]

Section 2(2) of H.R. 1355 would repeal all of the foregoing guarantees of CFPB's policy-making autonomy. However, H.R. 1355 would not make any similar changes to OCC, which is an autonomous bureau within Treasury. Federal statutes prohibit Treasury from preventing or delaying the issuance of any OCC regulation, and they also bar Treasury from intervening in any matter (including any enforcement matter) pending before the Comptroller of the Currency unless specifically authorized by law.[12] If H.R. 1355 deems it essential to remove CFPB's autonomy and to subject CFPB to Treasury's unlimited oversight, why doesn't H.R. 1355 contain similar provisions removing OCC's policy-making independence as well?

It is noteworthy that Representative Neugebauer, the chief sponsor of H.R. 1355, strongly criticized Treasury for seeking to exert "influence on OCC rulemaking" when Treasury's General Counsel submitted a public comment letter criticizing proposed regulations issued by OCC in June 2011 concerning the preemption provisions of Title X of Dodd-Frank.[13] Why is one federal financial regulator (OCC) deserving of autonomy when another (CFPB) is not? Can this apparent anomaly be explained by the fact that "OCC is widely viewed as the most committed regulatory champion for the interests of major banks,"[14] and those same banks have

[11] *Id.*at 20-21.
[12] *Id.*at 22 (discussing 12 U.S.C. §§ 1, 1462a(b)(3)).
[13] *Id.*at 32 (quoting Rep. Neugebauer's statement in which he also requested "assurances that the Treasury has permitted the OCC to act independently in the rulemaking for this and all provisions of the Dodd-Frank Act").
[14] *Id.* at 29-32 (quote at 29).

devoted enormous lobbying resources in opposing CFPB's creation and in seeking to undermine its effectiveness?[15]

Section 2(3) would seriously impair CFPB's ability to attract qualified employees by requiring CFPB to pay its employees in accordance with the General Schedule for civil service employees. If Section 2(3) were adopted, CFPB would become the *only* federal financial regulatory agency that is *not* exempted from civil service restrictions on pay, and CFPB would therefore find it extremely difficult, if not impossible, to attract employees with the training, skills and experience needed to carry out CFPB's consumer protection mission.

Section 3 of H.R. 1355 would remove CFPB's assured source of funding from the Fed and would make CFPB's entire budget subject to congressional appropriations. Any regulatory agency that depends on Congress for its budget is vulnerable to political influence exerted by the regulated industry through the appropriations process.[16] For example, Congress controls the budget of the Consumer Product Safety Commission ("CPSC"), and since its creation in 1980 that agency has been "chronically underfunded and understaffed. . . . As a result, CPSC has been no match for the industry participants it is charged with regulating."[17]

Except for the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC"), no federal financial regulator is subject to congressional appropriations.[18] Congress has undermined the effectiveness of CFTC and SEC over the past

[15] *Id.* at 5-11, 14-17.
[16] Rachel E. Barkow, "Insulating Agencies: Avoiding Capture Through Institutional Design," 89 *Texas Law Review* 15, 42-44 (2010).
[17] *Id.* at 67; *see also id.* at 42 n.103, 44, 67 (describing CPSC's lack of adequate resources to fulfill its statutory mandate, due to Congress' refusal to increase its budget); Andrew Zajac, "New leadership on U.S. product safety: Obama vows to revitalize ailing CPSC," *Chicago Tribune*, May 6, 2009, at C14 (reporting that CPSC had been "underfunded for years" and had only 430 employees in 2009, compared with 978 in 1980; as a result, the "gutted agency became a docile captive of the industry it regulates").
[18] Sean Lengell, "Schumer: Boost SEC's budget to fight fraud," *Washington Times*, Sept. 4, 2009, at A09.

two decades by frequently failing to provide those agencies with adequate funds.[19] After Republicans took control of the House in the 2010 midterm elections, Republican leaders announced plans to delay implementation of Dodd-Frank's reforms of the derivatives and securities markets by squeezing the budgets of CFTC and SEC.[20]

During 2011, Republicans blocked any significant increases in the CFTC's and SEC's operating budgets.[21] At congressional oversight hearings in December 2011, CFTC chairman Gary Gensler and SEC chairman Mary Schapiro expressed grave doubts about their agencies' ability to adopt and enforce the new regulations required by Dodd-Frank unless Congress approved major increases in their budgets.[22] Republican leaders and the financial services

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[19] Speech by SEC Chairman Mary Schapiro: Brodsky Family Lecture at Northwestern University Law School (Nov. 9, 2010) (stating that, when Ms. Schapiro became SEC chairman in January 2009, the SEC was "underfunded and understaffed . . . . We were behind, and falling further behind"), available at http://www.sec.gov/news/speech/2010/spch110910mls.htm; Testimony by Lynn Turner, Former SEC Chief Accountant, at a hearing on "Enhanced Investor Protection After the Financial Crisis," before the Senate Committee on Banking, Housing, and Urban Affairs (July 12, 2011), at 5, 13 (stating that one reason why CFTC and SEC were "ineffective" during the decade leading up to the financial crisis was that both agencies "lacked adequate funding and resources"; in particular, "SEC was essentially starved by Congress of necessary resources during much of the 1990s," and SEC again lacked adequate funding between 2005 and 2007), available at http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=c7085db2-ae43-471a-aa5c-357f2226a096&Witness_ID=df29c589-0882-4468-b4be-96f53902b567; "Memo to Congress: It's time for SEC to be self-funded," *Investment News*, May 16, 2011, at 0008 (stating that "SEC has been chronically underfunded for years") (available on Lexis); Richard Sansom, "Republicans' return to power threatens CFTC's implementation of Dodd-Frank," *SNL Daily Gas Report*, Jan. 12, 2011 (reporting that "CFTC has been underfunded for at least a decade").

[20] Bruce Carton, "How Can Congress Kill Dodd-Frank? By Underfunding It," *Compliance Week*, Jan. 2011; Kelsey Snell, "Industry Looks to Derail Dodd-Frank Enforcement," *National Journal*, Feb. 15, 2011.

[21] Carton, *supra* note 20; William D. Cohan, "Republicans Try to Starve Wall Street Watchdog, " *Bloomberg.com*, Nov. 27, 2011; Sansom, *supra* note 19; Robert Schmidt et al., "The Great Regulatory Hold-Up," *Bloomberg BusinessWeek*, Feb. 14-20, 2011, at 24; James B. Stewart, "As a Watchdog Starves, Wall St. Is Tossed a Bone," *New York Times*, July 16, 2011, at A1; *see also* Roger Nayak, "The sticky politics of MF Global's demise," *SNL Financial Services Daily*, Dec. 7, 2011 (reporting that "some observers feel that tightened budgets have hamstrung the CFTC and the SEC" in their efforts to implement Dodd-Frank, and noting that the agencies had already missed 71 of 95 deadlines for adopting rules to carry out Dodd-Frank's reforms of derivatives regulation).

[22] Joe Adler, "MF Global, Gensler Dominate Hearing on Derivatives Rules," *American Banker*, Dec. 2, 2011; Lindsey White, "As regulators face Senate, Gensler grilled over MF Global,: *SNL Bank and Thrift Daily*, Dec. 7, 2011; *see also* Kevin Wack, "Reform Implementation and Budget Crunch Collide,"

industry did not disagree with these gloomy assessments of the likely impact of budget stringency on the two agencies.[23]

Republican legislators and major banks took a very different position when they pushed for legislation to create FHFA as a new and more powerful regulator for Fannie Mae ("Fannie") and Freddie Mac ("Freddie").[24] Republicans and their banking allies insisted that FHFA must have an independent, secure funding source that was *not* subject to congressional appropriations. They pointed out that Fannie and Freddie had frequently used their political clout to persuade Congress to cut the budget of FHFA's predecessor agency, the Office of Federal Housing Enterprise Oversight ("OFHEO") and thereby undermine OFHEO's enforcement efforts. Representative Richard Baker (R-LA), a leading proponent of legislation to establish FHFA, declared that OFHEO "historically has been impaired" because it "must come to the Congress for its funding."[25] Mr. Baker emphasized the importance of creating "an independently funded regulator, with all the tools a modern regulator should have to oversee vastly complex financial

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American Banker, July 22, 2011, at 4 (reporting on congressional testimony by CFTC chairman Gensler and SEC chairman Schapiro that their agencies could not fulfill their responsibilities under Dodd-Frank without significant budget increases).

[23] *See* Snell, *supra* note 20 (reporting that CFTC chairman Gensler's "worries" about his agency's ability to implement Dodd-Frank with a constrained budget "are music to the industry").

[24] *See* Wilmarth, *supra* note 1, at 33-34 (describing support by Republicans and major banks for establishment of FHFA as a more powerful regulator for Fannie and Freddie).

[25] 151 Cong. Rec. H 9131 (daily ed. Oct. 26, 2005) (remarks of Rep. Baker). In the following passage, a prominent journalist described how Fannie's supporters in Congress used the appropriations process to hamstring OFHEO's supervisory effort:

> Fannie's allies in Congress . . . made sure that . . . OFHEO, unlike any other [financial] regulator, would be subject to the appropriations process, meaning its funding was at the mercy of politicians – politicians who often took their cues from Fannie. [¶] Not surprisingly, OFHEO was a notoriously weak regulator.

Bethany McLean, "Fannie Mae's Last Stand," *Vanity Fair*, Feb. 2009, at 51; *see also* Binyamin Appelbaum et al., "How Washington Failed to Rein In Fannie, Freddie: As Profits Grew, Firms Used Their Power to Mask Peril," *Washington Post*, Sept. 14, 2008, at A01 (reporting that OFHEO "was required to get its budget approved by Congress, while agencies that regulated banks set their own budgets. That gave congressional allies [of Fannie and Freddie] an easy way to exert pressure" on OFHEO").

enterprises to protect the American taxpayer from unwarranted losses."[26] In 2008, Congress passed legislation to establish FHFA as a "strong, independent regulator" that would be funded by assessments collected from government sponsored enterprises ("GSEs"), and that legislation made clear that FHFA would *not* be subject to the appropriations process.[27]

In creating CFPB, Congress drew directly on FHFA's secure funding model. The Senate committee report on Dodd-Frank declared that "the assurance of adequate funding [from the Fed], independent of the Congressional appropriations process, is absolutely essential to the independent operations of any financial regulator."[28] The Senate report pointed out that the need for independent funding of financial regulators

> was a hard learned lesson from the difficulties faced by [OFHEO], which was subject to repeated Congressional pressure because it was forced to go through the annual appropriations process. It is widely acknowledged that this helped limit OFHEO's effectiveness. For that reason, ensuring that OFHEO"s successor agency . . . would not be subject to appropriations was a high priority for the Committee and the Congress in [passing] the Housing and Economic Recovery Act of 2008.[29]

Several Republican leaders who are now pushing for legislation to subject CFPB to the appropriations process were strong proponents of secure funding for FHFA.[30] Observers have noted that it is very difficult to identify a persuasive rationale for the attempt to remove CFPB's budgetary independence beyond the desire "to undercut an agency [Republican leaders] never liked to begin with."[31]

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[26] *Id.*
[27] House of Representatives Report No. 110-142, at 87-88, 126-27 (2007).
[28] Senate Report No. 111-176, at 163 (2010).
[29] *Id.*
[30] Kate Davidson, "Question of Hypocrisy in GOP Assault on the CFPB," *American Banker*, Mar. 21, 2011, at 1 (noting that Rep. Spencer Bachus (R-AL), Jeb Hensarling (R-TX), Ed Royce (R-CA) and other current Republican House members supported legislation to establish a regulator for GSEs whose funding would *not* be subject to congressional appropriations).
[31] *Id.*

Subjecting CFPB to the appropriations process will make the bureau vulnerable to the enormous political clout wielded by large financial institutions and their allies. The financial sector (including finance, insurance and real estate firms) spent $5.1 billion on lobbying and campaign contributions between 1998 and 2008.[32] The financial sector was the "leading contributor to political campaigns" after 1990,[33] and it accounted for 15% of total lobbying expenditures by *all* industry sectors between 1999 and 2006.[34]

The financial sector employed nearly 3,000 registered lobbyists in 2007.[35] In 2008 and 2009, the six largest banks (Bank of America, JP Morgan Chase, Citigroup, Wells Fargo, Goldman Sachs and Morgan Stanley) employed more than 240 lobbyists who previously worked in the executive branch or Congress.[36] Financial firms that were heavily involved in political lobbying also engaged in more risky activities. An IMF staff study determined that financial firms that engaged in the most intensive lobbying between 1999 and 2006 also made higher-risk mortgage loans, securitized more of their loans, and suffered above-average losses in their stock market values during the financial crisis.[37]

The financial sector received excellent legislative returns on its huge political investments between 1990 and 2007. A second IMF staff study found that lobbying expenditures by financial firms significantly increased the likelihood of passage for bills favored

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[32] Essential Information & Consumer Education Foundation, *Sold Out: How Wall Street and Washington Betrayed America* 6, 15-16, 99-101 (Mar. 2009) [hereinafter *Sold Out*], available at http://www.wallstreetwatch.org/reports/sold_out.pdf.
[33] Johnson & Kwak, *supra* note 3, at 90; *see also* Levitin, *supra* note 3, at 160-61 ("The financial-services industry has been the single largest contributor to congressional campaigns since 1990").
[34] Deniz Igan, Prachi Mishra & Thierry Tressel, "A Fistful of Dollars: Lobbying and the Financial Crisis," IMF Working Paper WP/09/87, Dec. 2009, at 18, 32 (tbl.1a), available at http://ssrn.com/abstract=1531520.
[35] *Sold Out*, *supra* note 32, at 15-16, 100-01.
[36] Kevin Connor, *Big Bank Takeover: How Too-Big-to-Fail's Army of Lobbyists Has Captured Washington* (Institute for America's Future, May 2010), available at http://www.ourfuture.org/files/documents/big-bank-takeover-final.pdf.
[37] Igan, Mishra & Tressel, *supra* note 34, at 4-6, 19-20, 22, 24-27.

by the financial services industry and also increased the probability of defeat for bills opposed by the industry.[38] Lobbying by the financial sector helped to produce a series of landmark political victories between 1994 and 2005, including enactment of (i) interstate banking legislation in 1994,[39] (ii) the Gramm-Leach-Bliley Act ("GLBA") in 1999,[40] (iii) the Commodity Futures Modernization Act ("CFMA") in 2000,[41] and (iv) bankruptcy reform legislation in 2005.[42] In addition to those affirmative victories, the financial services industry successfully blocked passage of more than a dozen bills introduced between 2000 and 2007 that would have imposed tighter restrictions on high-risk mortgage lending.[43]

Federal financial regulators who recommended tougher restrictions on financial institutions during the credit boom experienced strong "pushback" from the financial services industry.[44] Regulators also had strong career-based incentives (including the possibility of being hired for lucrative positions with large financial institutions or their professional service providers) that discouraged them from challenging the formidable political influence wielded by

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[38] Deniz Igan & Prachi Mishra, "Three's Company: Wall Street, Capitol Hill, and K Street," IMF Working Paper, June 2011, at 4, 15-18, available at http://ssrn.com/abstract=1915164 .

[39] *See* Johnson & Kwak, *supra* note 3, at 89 (describing the significance of Congress' passage of interstate banking legislation, which made possible the establishment of large nationwide banking organizations).

[40] For discussions of the importance of GLBA, which repealed key provisions of the Glass-Steagall Act and allowed commercial banks to affiliate with securities firms and insurance companies by forming financial holding companies, see *id.* at 89, 91-92, 133-34.

[41] *See id.* at 8-9, 92, 134-37 (describing CFMA, which largely exempted over-the-counter derivatives from federal regulation).

[42] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") "radically altered the policies underlying consumer bankruptcy . . . , marking a significant shift in favor of creditors," because BAPCA made it much more difficult for consumers to obtain a substantial or complete discharge of their debts in bankruptcy. Ronald J. Mann, "Bankruptcy Reform and the 'Sweat Box' of Credit Card Debt," 2007 *University of Illinois Law Review* 375, 376-77; *see also* Eugene R. Wedoff, "Major Consumer Bankruptcy Effects of BAPCPA." 2007 *University of Illinois Law Review* 31 (surveying the changes made by BAPCPA to consumer bankruptcy statutes).

[43] Igan, Mishra & Tressel, *supra* note 34, at 17-18, 55-59 (Appendix).

[44] Wilmarth, *supra* note 3, at 907-08; *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (Jan. 2011) [hereinafter FCIC Report], at 20-22, 172-73, 307; *see also* Johnson & Kwak, *supra* note 3, at 7-9, 97, 103, 134-37; *Sold Out*, *supra* note 32, at 8, 42-49 (noting that "officials in government who dared to proposed stronger protections for investors and consumers consistently met with hostility and defeat").

major banks and their allies.[45] Many regulators concluded that deregulation and forbearance were safer alternatives, especially during a period of unprecedented political strength for the financial sector.[46] One of the clear lessons from the financial crisis is that direct congressional control over regulatory agency budgets is likely to produce weak and ineffective regulatory control over the giant institutions that currently dominate our financial markets.

3. H.R. 2081 Would Prevent Beneficial Interactions between Consumer and Prudential Regulators and Would Allow FRB to Exert Undesirable Influence over FDIC

H.R. 2081 would remove CFPB's Director from FDIC's Board of Directors and would transfer that board seat to FRB's Chairman. That change would injure the public interest in two very significant respects. First, it would deprive CFPB's Director of the opportunity for regular interactions and discussions with senior federal bank regulators – including FDIC's chairman and vice chairman, the Comptroller of the Currency, and an FDIC director with state bank supervisory experience. The financial services industry and its Republican supporters opposed CFPB's creation because it placed the consumer protection function in a separate agency from safety and soundness supervision.[47] If that separation is truly a matter for concern, the industry and its supporters should welcome the fact that CFPB's Director sits on FDIC's Board of Directors and will therefore regularly participate in discussions of issues affecting bank safety and soundness. Those discussions should help CFPB's Director to understand the safety and soundness concerns of his bank regulatory counterparts. It would therefore be counterproductive to remove the opportunity for these beneficial deliberations and exchanges of views by enacting H.R. 2081.

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[45] Johnson & Kwak, *supra* note 3, at 89-104, 118-19.
[46] *Id.* at 7-9, 97, 103-09, 134-43, 151-52; FCIC Report, *supra* note 44, at 173, 307.
[47] Wilmarth, *supra* note 1, at 5-6.

An equally serious flaw in H.R. 2081 is that it would give FRB greater influence over FDIC's determinations as to whether FDIC should invoke the "systemic risk exception" ("SRE") in the Federal Deposit Insurance Act, codified in 12 U.S.C. § 1823(c)(4)(G). Under the SRE, the Treasury Secretary may, upon the joint recommendation of two-thirds of FDIC's and FRB's boards, reimburse the uninsured creditors of a closed bank if the Secretary determines (in consultation with the President) that a failure to protect those creditors "would have serious adverse effects on economic conditions or financial stability." Funds for reimbursing the bank's uninsured creditors would be drawn from the DIF. As a practical matter, the SRE enables Treasury, FDIC and FRB to use the DIF as a bailout fund for uninsured creditors of a failed TBTF bank – including, potentially, the parent holding company of that bank.[48]

H.R. 2081 would effectively give FRB "two bites at the apple" in determining whether the SRE should be invoked to protect uninsured creditors of a failed TBTF bank. First, FRB's Board of Governors would express its own recommendation on whether to invoke the SRE. Second, FRB's chairman would participate as a voting member of FDIC's Board of Directors in determining whether the FDIC should concur with FRB. FRB's chairman would likely be a highly influential voice during the deliberations of FDIC's Board.

During the period leading up to the financial crisis and during the crisis itself, FRB exhibited a strong propensity to grant forbearance to major financial institutions and to support bailouts of their uninsured creditors. In contrast, FDIC demonstrated a significantly higher degree of independence from industry influence and also expressed a strong aversion to TBTF bailouts. Like CFPB, FDIC has a clearly defined mission and an assured source of funding. FDIC has long viewed its fundamental purpose as protecting bank depositors and defending the

[48] *See* Arthur E. Wilmarth, Jr., "The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem," 89 *Oregon Law Review* 951, 1001, 1022-23, 1042-43 (2011), available at http://ssrn.com/abstract=1719126.

integrity of the DIF.[49] FDIC also has a guaranteed funding source that is not subject to congressional control or industry influence. FDIC collects risk-adjusted assessments from FDIC-insured institutions, and virtually all banks operate with FDIC insurance.[50]

FDIC has frequently demonstrated its commitment to protecting the DIF as well as its willingness to resist banking industry influence. For example, during the late 1990s and early 2000s, FDIC fought hard to maintain stronger capital rules for U.S. banks (including leverage capital requirements) during international negotiations over the Basel II capital accord. FDIC also strongly questioned the reliability of Basel II's "advanced internal risk-based" ("A-IRB") method for determining capital requirements. In contrast, the Fed aligned itself with the largest banks in pushing for incorporation of the A-IRB methodology into the Basel II accord.[51] FDIC's deep skepticism about the A-IRB approach proved to be well-founded when large financial conglomerates relied on internal risk-based models "to operate with capital levels that were 'very, very low, . . . unacceptably low' during the period leading up to the financial crisis."[52]

During the financial crisis, FDIC chairman Sheila Bair disagreed with Fed and Treasury officials on several occasions about the desirability of establishing bailout programs for large troubled financial institutions. For example, FDIC refused to concur with the Fed and Treasury

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[49] David Wessel, *In Fed We Trust: Ben Bernanke's War on the Great Panic* 219-20 (2009) (stating that FDIC Chairman Sheila Bair was "a fierce and relentless defender of the FDIC fund [during the financial crisis], putting protection of that kitty above all else"); Tom Fox, "How the FDIC got to the top of the heap: The No. 1-ranked agency's leader extols his workers' sense of purpose," *Washington Post*, Nov. 24, 2011, at B4 (quoting Acting FDIC Chairman Martin Gruenberg's view that "[t]he great strength of the [FDIC] is that it has a very clear and understandable mission, and that mission is to insure the deposits that people have in federally insured financial institutions").
[50] Richard S. Carnell, Jonathan R. Macey & Geoffrey P. Miller, *The Law of Banking and Financial Institutions* 62-63, 316-18 (4th ed. 2009); Michael P. Malloy, *Principles of Bank Regulation* § 1.11 at 36 (West Concise Hornbook, 3d ed. 2011).
[51] Daniel K.Tarullo, *Banking on Basel: The Future of International Financial Regulation* 99-130 (Aug. 2008); Arthur E.Wilmarth, Jr. "Reforming Financial Regulation to Address the Too-Big-To-Fail Problem," 35 *Brooklyn Journal of International Law* 707, 759 n.203 (2010), available at http://ssrn.com/abstract=1645921.
[52] Wilmarth, *supra* note 48, at 1010 (quoting "Base Camp Basel," *Economist* (Jan 21, 2010), available at www.economist.com/node/15328883).

in using the SRE to protect the bondholders of Washington Mutual ("WaMu") when WaMu failed on September 25, 2008. Chairman Bair insisted that WaMu's bondholders, rather than the DIF and taxpayers, should bear the losses caused by WaMu's reckless lending policies.[53] Similarly, Chairman Bair originally resisted proposals by Treasury and the Fed to use the SRE on two subsequent occasions: (i) on September 29, 2008, when federal officials invoked the SRE to protect uninsured creditors (including bondholders) when Wachovia failed, and (ii) in October 2008, when federal officials approved a program to guarantee debt securities issued by FDIC-insured banks. On both occasions, Fed and Treasury officials exerted great pressure to overcome Chairman Bair's reluctance to expose the DIF to potential losses by invoking the SRE.[54]

FDIC also demonstrated a much tougher attitude than FRB and OCC when the largest banks sought to exit the Troubled Asset Relief Program ("TARP") by repurchasing the preferred stock they had sold to Treasury. From November 2009 to June 2011, FDIC tried unsuccessfully to force several major banks (including Bank of America, Wells Fargo and PNC) to issue to investors at least $1 in new common stock for every $2 of TARP preferred stock they repurchased from Treasury. FDIC insisted on the 1-for-2 ratio in order to "increase the quality" of the seven banks' capital structures and limit the risk those banks posed to the DIF.[55] However, OCC pushed for much more lenient terms for the big banks, and FRB took an intermediate position. Over the FDIC's objections, regulators ultimately allowed the banks to

[53] Wessel, *supra* note 49, at 218-21 (explaining that New York Fed President Timothy Geithner argued strongly that the SRE should have been invoked to authorize FDIC to protect bondholders when WaMu failed, but Fed chairman Ben Bernanke agreed with FDIC chairman Bair's position that the SRE should not be used): FCIC Report, *supra* note 44, at 365-66 (stating that Treasury officials also disagreed with Chairman Bair's position)
[54] Wessel, *supra* note 49, at 221-23, 232-33; FCIC Report, *supra* note 44, at 366-69.
[55] "Exiting TARP: Repayments by the Largest Financial Institutions," SIGTARP Audit Report 11-005 (Sept. 29, 2011), at 17-63 (quotes at 19-30).

repurchase their TARP preferred stock while failing to meet the 1-for-2 ratio advocated by FDIC.[56]

Thus, FDIC's clearly-defined mission and its secure source of funding have encouraged FDIC to act with significantly greater independence from the views of major banks, compared to OCC and the Fed. That independence has manifested itself in the FDIC's much stronger resistance to TBTF bailouts. Two lessons emerge from this story. First, the FDIC's greater willingness to resist industry influence indicates that CFPB's clearly-defined consumer protection mission and assured funding will encourage a similarly independent attitude within CFPB. Congress should not enact any legislation (like H.R. 1355) that would blur CFPB's mission or undermine its autonomy. Second, it would be bad public policy to enact H.R. 2081, because that legislation would give FRB an undesirable influence over FDIC and potentially undermine FDIC's determination to resist TBTF bailouts and protect the interests of both depositors and taxpayers.

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Thank you again for the opportunity to present this testimony.

Arthur E. Wilmarth, Jr. (2/7/12)

[56] *Id.* at 20-63.

CBA | CONSUMER BANKERS ASSOCIATION

Statement of the Consumer Bankers Association
To the
Subcommittee on Financial Institutions and Consumer Credit
of the Committee on Financial Services
U.S. House of Representatives

February 8, 2012

The Consumer Bankers Association ("CBA") appreciates the opportunity to provide the following statement on H.R. 3871, a bill to amend the Consumer Financial Protection Act of 2010 to preserve privilege for information submitted to the Bureau of Consumer Financial Protection ("CFPB" or "Bureau").

CBA is the only national financial trade group focused exclusively on retail banking and personal financial services — banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation on retail banking issues. CBA members include most of the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the industry's total assets.

CBA member banks routinely rely on attorney-client or attorney work-product privilege when seeking legal services, which, if released publicly could be damaging to the institution and potentially used by adverse parties in litigation. The public policy benefit of a privilege is long established, as it allows a person or company to freely communicate with counsel and to receive objective and complete legal advice without fear of disclosure. Removing the privilege would likely hinder that open communication, with potential negative consequences for both the banks involved and ultimately the consumers they serve.

It is well established that a privilege can be waived or destroyed if the information is shared with third parties. Many courts have found an exception, however, when the information is not shared voluntarily, but is compelled during the supervisory process or otherwise by a

CBA | CONSUMER BANKERS ASSOCIATION

financial institution's regulator. To reinforce this exception, Congress amended the Federal Deposit Insurance Act (FDI Act) in 2006 to state, "[T]he submission by any person of any information to any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process…shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information…as to any person or entity other than such agency, supervisor, or authority" (12 U.S.C. 1828(x)(1)). However, since the statute was enacted prior to the passage of the Dodd-Frank Act, it does not define "Federal banking agency" to include the CFPB.

On January 4, 2012, the CFPB issued a Bulletin (CFPB Bulletin 12-01) to address the effect on a covered institution's privilege when information is provided to the CFPB pursuant to a supervisory request.

The Bulletin states, "[T]he provision of information to the Bureau pursuant to a supervisory request would not waive any privilege that may attach to such information." That claim is supported in the Bulletin by several points: First, the Bureau notes that courts have held the supervisory request by a regulatory agency not to be voluntary, and thus not to waive any privilege that attached to the information being requested.

Second, the Bureau states that Congress intended the CFPB's exam authority to be equivalent to the prudential regulators, by transferring to it "all powers and duties" with respect to that authority from the prudential regulators. Since 12 U.S.C. section 1828(x) provides that submission of information to a federal banking agency, defined to include the prudential regulators, would not result in a waiver of privilege as to any other person or entity, it is the Bureau's contention that such authority resides in the Bureau as well.

The Bulletin further states that, when a supervised institution is faced with a claim of waiver, the Bureau will take all reasonable and appropriate actions to rebut such a claim. The Bureau will not consider waiver concerns to be a valid reason for withholding privileged information.

The Bulletin will help to reduce concerns that the privilege would be lost when privileged information is provided to the CFPB. Nevertheless, our member banks remain concerned that the validity of each waiver claim will only be certain following a costly challenge, which they fully expect plaintiffs to attempt, notwithstanding the unequivocal statement by the CFPB. The result may be a great deal of unnecessary litigation.

Absolute and unambiguous protection of the privilege can only arise from Congress's action, specifically statutory modification that would expressly state that persons submitting privileged materials to the CFPB pursuant to a supervisory request will not be deemed to have waived the privilege and that the CFPB is a "covered agency" under 12 U.S.C. 1821(t).

Therefore we strongly urge Congress to take two reasonable and simple actions: First, Congress should adopt HR 3871, which clarifies that the submission of information to the CFPB in the course of any supervisory or regulatory process does not waive or otherwise affect any privilege that may be claimed as to anyone other than the Bureau itself. This will put to rest any question about the potential for the loss of privilege that might otherwise arise. The swift adoption of this measure is necessary, as the CFPB has begun to supervise institutions within its jurisdiction, which include more than one hundred banks, thrifts and credit unions and tens of thousands of nonbank financial services providers, and we fully expect that the supervisory process will involve requests by the Bureau for privileged information.

Second, we urge Congress to amend HR 3871 to include an additional protection accorded to the other Federal banking agencies under section 11(t) of the FDI Act (12 U.S.C. 1821(t)) and not presently available to the CFPB. Under that section, a covered agency, as defined, does not waive any privilege by transferring information to another covered agency or any

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other agency of the Federal government. In short, the section extends the same protections as 12 U.S.C. 1828(x) when the privileged information is subsequently shared with other federal agencies. "Covered agency" is not currently defined to include the CFPB. So even if information does not lose its privilege by virtue of its submission to the CFPB, it may subsequently lose its privileged status if the CFPB shares it with another federal agency or department. Since the CFPB has clearly stated it intends to share information with other agencies and departments under its authority granted by the Dodd-Frank Act, the protections provided by 12 U.S.C. 1821(t) would be necessary to fully ensure that the privilege is not waived when privileged information is provided to the CFPB.

Thank you for the opportunity to present our views on this matter.

CUNA
Credit Union National Association
cuna.org
BILL CHENEY
President & CEO

601 Pennsylvania Ave., NW | South Building, Suite 600 | Washington, DC 20004-2601 | PHONE: 202-508-6745 | FAX: 202-638-3389

February 8, 2012

The Honorable Bill Huizenga
Member of Congress
United States House of Representatives
Washington, DC 20515

Dear Representative Huizenga:

On behalf of the Credit Union National Association (CUNA), I am writing regarding your bill, H.R. 3871, a bill to amend the Consumer Financial Protection Act of 2010 to preserve privilege for information submitted to the Bureau of Consumer Financial Protection (CFPB). CUNA is the largest credit union advocacy organization in the United States, representing nearly 90% of America's 7,300 state and federally chartered credit unions and their 93 million members. CUNA supports H.R. 3871 and appreciates your leadership on this issue.

Section 205(j) of the Federal Credit Union Act protects privileged information submitted by credit unions to the NCUA, any state credit union supervisor, or foreign banking authority; however, this language does not cover submissions to the CFPB. Your legislation will ensure that when credit unions or other persons submit information to the CFPB, doing so will not be construed as waiving, destroying or otherwise affecting any privilege associated with the submission. We understand that CFPB Director Richard Cordray has testified in support of a modification of this nature, and we hope that Congress will act quickly on this legislation.

On behalf of America's credit unions and their 93 million members, thank you very much for introducing H.R. 3871. We look forward to working with you to secure its enactment.

Best regards,

Bill Cheney
President & CEO

AMERICANS
FOR FINANCIAL REFORM
ACCOUNTABILITY • FAIRNESS • SECURITY

Americans for Financial Reform
1629 K St NW, 10th Floor, Washington, DC, 20006
202.466.1885

February 7, 2012

To: Members of the House Financial Services Subcommittee on Financial Institutions

Dear Representative:

Americans for Financial Reform strongly urges you to oppose two bills – H.R. 1355 and H.R. 2081 – that the Financial Institutions Subcommittee is examining in a hearing tomorrow, February 8th. Taken together, this legislation would cripple the ability of the Consumer Financial Protection Bureau (CFPB) to protect consumers from financial traps and tricks, while making it harder for the CFPB to work effectively with the FDIC and other bank regulators.

H.R. 1355 would dramatically alter the way that the CFPB is funded by subjecting it to the appropriations process. (The CFPB currently receives non-taxpayer funding through the Federal Reserve.) It would also move the agency from its place as an autonomous agency within the Federal Reserve System to a non-independent bureau within the Department of Treasury. **H.R. 1355 would increase taxpayer costs, expose the agency to overwhelming pressure by big banks to reduce its budget or back off of strong consumer protection measures, and undermine the agency's ability to act independently on behalf of consumers.**

The sponsors of this bill are applying a double-standard to the CFPB relative to other banking agencies, which will undermine efforts by the CFPB to put in place strong consumer protection measures. As with every other banking agency, the CFPB is currently not subject to the appropriations process. Just like the Office of the Comptroller of the Currency and the Federal Reserve, the CFPB is also protected from interference in its decisions by other agencies. Both of these steps were taken to ensure that the CFPB's independence was not compromised by overwhelming political pressure from the financial services industry or from regulators with different priorities. Moreover, unlike other banking agencies, which can set their own budgets, the CFPB's budget is capped at a maximum amount by law. **H.R. 1355 would inflict a devastating blow to efforts in the Dodd-Frank Act to overhaul a consumer protection structure that failed so spectacularly to make decisions that were independent of financial interests; decisions that would have protected consumers and the economy.**

H.R. 2081 would remove the director of the CFPB from the Board of the Federal Deposit Insurance Corporation and replace this person with Chairman of the Federal Reserve System. **This is an inexplicable move that will eliminate an important source of consumer protection expertise from the FDIC board and inhibit the ability of banking regulators to coordinate effectively.** Given that the financial crisis was caused in part by the failure of banking regulators like the OCC to understand that practices that harmed consumers could also undermine the safety and soundness of the banking system and the stability of the economy, this legislation seems seriously misguided. Moreover, opponents of the CFPB have repeatedly expressed concerns that it would not coordinate effectively with prudential regulators. It makes no sense at all to eliminate the ability of consumer and prudential bank regulators to work together on the FDIC board to achieve both strong consumer protection and safety and soundness regulation.

We strongly urge your opposition to these bills. H.R. 1355 would simultaneously hobble the CFPB and saddle Americans with the cost of funding the agency by requiring that taxpayers fund the CFPB through appropriations, while H.R. 2081 would damage the ability of prudential and consumer regulators to work together effectively **On balance, these bills would weaken the CFPB's ability to curb the kinds of financial abuses that caused the nation's worst financial crisis since the Great Depression.**

Sincerely,

Americans for Financial Reform

Following are the partners of Americans for Financial Reform.

All the organizations support the overall principles of AFR and are working for an accountable, fair and secure financial system. Not all of these organizations work on all of the issues covered by the coalition or have signed on to every statement.

- A New Way Forward
- AFL-CIO
- AFSCME
- Alliance For Justice
- Americans for Democratic Action, Inc
- American Income Life Insurance
- Americans United for Change
- Campaign for America's Future
- Campaign Money
- Center for Digital Democracy
- Center for Economic and Policy Research
- Center for Economic Progress
- Center for Media and Democracy
- Center for Responsible Lending
- Center for Justice and Democracy
- Center of Concern
- Change to Win
- Clean Yield Asset Management
- Coastal Enterprises Inc.
- Color of Change
- Common Cause
- Communications Workers of America
- Community Development Transportation Lending Services
- Consumer Action
- Consumer Association Council
- Consumers for Auto Safety and Reliability
- Consumer Federation of America
- Consumer Watchdog
- Consumers Union
- Corporation for Enterprise Development
- CREDO Mobile
- CTW Investment Group
- Demos
- Economic Policy Institute
- Essential Action
- Greenlining Institute
- Good Business International
- HNMA Funding Company
- Home Actions

- Housing Counseling Services
- Information Press
- Institute for Global Communications
- Institute for Policy Studies: Global Economy Project
- International Brotherhood of Teamsters
- Institute of Women's Policy Research
- Krull & Company
- Laborers' International Union of North America
- Lake Research Partners
- Lawyers' Committee for Civil Rights Under Law
- Move On
- NASCAT
- National Association of Consumer Advocates
- National Association of Neighborhoods
- National Community Reinvestment Coalition
- National Consumer Law Center (on behalf of its low-income clients)
- National Consumers League
- National Council of La Raza
- National Fair Housing Alliance
- National Federation of Community Development Credit Unions
- National Housing Trust
- National Housing Trust Community Development Fund
- National NeighborWorks Association
- National Nurses United
- National People's Action
- National Council of Women's Organizations
- Next Step
- OMB Watch
- OpenTheGovernment.org
- Opportunity Finance Network
- Partners for the Common Good
- PICO National Network
- Progress Now Action
- Progressive States Network
- Poverty and Race Research Action Council
- Public Citizen
- Sargent Shriver Center on Poverty Law
- SEIU
- State Voices
- Taxpayer's for Common Sense
- The Association for Housing and Neighborhood Development
- The Fuel Savers Club
- The Leadership Conference on Civil and Human Rights
- The Seminal
- TICAS
- U.S. Public Interest Research Group
- UNITE HERE
- United Food and Commercial Workers

- United States Student Association
- USAction
- Veris Wealth Partners
- Western States Center
- We the People Now
- Woodstock Institute
- World Privacy Forum
- UNET
- Union Plus
- Unitarian Universalist for a Just Economic Community

List of State and Local Signers

- Alaska PIRG
- Arizona PIRG
- Arizona Advocacy Network
- Arizonans For Responsible Lending
- Association for Neighborhood and Housing Development NY
- Audubon Partnership for Economic Development LDC, New York NY
- BAC Funding Consortium Inc., Miami FL
- Beech Capital Venture Corporation, Philadelphia PA
- California PIRG
- California Reinvestment Coalition
- Century Housing Corporation, Culver City CA
- CHANGER NY
- Chautauqua Home Rehabilitation and Improvement Corporation (NY)
- Chicago Community Loan Fund, Chicago IL
- Chicago Community Ventures, Chicago IL
- Chicago Consumer Coalition
- Citizen Potawatomi CDC, Shawnee OK
- Colorado PIRG
- Coalition on Homeless Housing in Ohio
- Community Capital Fund, Bridgeport CT
- Community Capital of Maryland, Baltimore MD
- Community Development Financial Institution of the Tohono O'odham Nation, Sells AZ
- Community Redevelopment Loan and Investment Fund, Atlanta GA
- Community Reinvestment Association of North Carolina
- Community Resource Group, Fayetteville A
- Connecticut PIRG
- Consumer Assistance Council
- Cooper Square Committee (NYC)
- Cooperative Fund of New England, Wilmington NC
- Corporacion de Desarrollo Economico de Ceiba, Ceiba PR

- Delta Foundation, Inc., Greenville MS
- Economic Opportunity Fund (EOF), Philadelphia PA
- Empire Justice Center NY
- Empowering and Strengthening Ohio's People (ESOP), Cleveland OH
- Enterprises, Inc., Berea KY
- Fair Housing Contact Service OH
- Federation of Appalachian Housing
- Fitness and Praise Youth Development, Inc., Baton Rouge LA
- Florida Consumer Action Network
- Florida PIRG
- Funding Partners for Housing Solutions, Ft. Collins CO
- Georgia PIRG
- Grow Iowa Foundation, Greenfield IA
- Homewise, Inc., Santa Fe NM
- Idaho Nevada CDFI, Pocatello ID
- Idaho Chapter, National Association of Social Workers
- Illinois PIRG
- Impact Capital, Seattle WA
- Indiana PIRG
- Iowa PIRG
- Iowa Citizens for Community Improvement
- JobStart Chautauqua, Inc., Mayville NY
- La Casa Federal Credit Union, Newark NJ
- Low Income Investment Fund, San Francisco CA
- Long Island Housing Services NY
- MaineStream Finance, Bangor ME
- Maryland PIRG
- Massachusetts Consumers' Coalition
- MASSPIRG
- Massachusetts Fair Housing Center
- Michigan PIRG
- Midland Community Development Corporation, Midland TX
- Midwest Minnesota Community Development Corporation, Detroit Lakes MN
- Mile High Community Loan Fund, Denver CO
- Missouri PIRG
- Mortgage Recovery Service Center of L.A.
- Montana Community Development Corporation, Missoula MT
- Montana PIRG
- Neighborhood Economic Development Advocacy Project
- New Hampshire PIRG
- New Jersey Community Capital, Trenton NJ
- New Jersey Citizen Action
- New Jersey PIRG
- New Mexico PIRG
- New York PIRG
- New York City Aids Housing Network
- New Yorkers for Responsible Lending
- NOAH Community Development Fund, Inc., Boston MA

- Nonprofit Finance Fund, New York NY
- Nonprofits Assistance Fund, Minneapolis M
- North Carolina PIRG
- Northside Community Development Fund, Pittsburgh PA
- Ohio Capital Corporation for Housing, Columbus OH
- Ohio PIRG
- OligarchyUSA
- Oregon State PIRG
- Our Oregon
- PennPIRG
- Piedmont Housing Alliance, Charlottesville VA
- Michigan PIRG
- Rocky Mountain Peace and Justice Center, CO
- Rhode Island PIRG
- Rural Community Assistance Corporation, West Sacramento CA
- Rural Organizing Project OR
- San Francisco Municipal Transportation Authority
- Seattle Economic Development Fund
- Community Capital Development
- TexPIRG
- The Fair Housing Council of Central New York
- The Loan Fund, Albuquerque NM
- Third Reconstruction Institute NC
- Vermont PIRG
- Village Capital Corporation, Cleveland OH
- Virginia Citizens Consumer Council
- Virginia Poverty Law Center
- War on Poverty - Florida
- WashPIRG
- Westchester Residential Opportunities Inc.
- Wigamig Owners Loan Fund, Inc., Lac du Flambeau WI
- WISPIRG

Small Businesses

- Blu
- Bowden-Gill Environmental
- Community MedPAC
- Diversified Environmental Planning
- Hayden & Craig, PLLC
- Mid City Animal Hospital, Pheonix AZ
- The Holographic Repatterning Institute at Austin
- UNET

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