Statement
of the
U.S. Chamber
of Commerce

ON: **PERSPECTIVES ON THE CONSUMER FINANCIAL PROTECTION AGENCY**

TO: **U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON FINAINCAIL SERVICES**

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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 more than three million businesses and organizations of every size, sector, and region.

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 112 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 Frank, Ranking Member Baucus, and Members of the House Financial Services Committee, thank you for the opportunity to appear before you today on behalf of the U.S. Chamber of Commerce to address the Consumer Financial Protection Agency Act ("the Act").

The Chamber strongly supports the Administration's goal of enhancing consumer protection. Even before the financial crisis hit, the Chamber's Center for Capital Markets Competitiveness called for regulatory reform, including strengthening consumer protections. The crisis has clearly illuminated the shortcomings of our outdated regulatory system. Millions of consumers and investors were harmed, in part because of regulatory gaps but just as much or even more because of regulators' failure to exercise the authority – especially the enforcement authority – that they already possess.

The Chamber believes that consumers need:

- Clearer disclosure and better information;

- More vigorous, effective enforcement against predatory practices and other abuses; and

- Elimination of regulatory gaps that allowed some financial services entities to escape regulation applicable to their competitors.

We need smarter, more effective regulation. Adding new regulatory layers and enacting expansive, and duplicative, regulatory authority will not produce that result. Rather, it is likely to lead to confusion, uncertainty, and a regulatory system that imposes heavy burdens on business without providing the protections that consumers need.

On September 23rd, the Chamber released a study conducted by Thomas Durkin, an economist who spent more than 20 years at the Federal Reserve. Durkin concluded that regulatory burdens associated with a lack of preemption and legal uncertainties created by new, vague, and undefined statutory terms would reduce the ability of financial institutions to extend consumer credit, and would likely increase the cost of credit that is available.

Moreover, this reduction in credit would impact small businesses as well, because it would affect the very consumer financial products that small businesses use to supplement business credit, which often is not available to small and new enterprises. At the very time when we need these job-creators the most in order to restore growth to our economy, we will be hobbling their efforts by reducing their access to the credit that is essential to fuel that growth. I have submitted a copy of Mr. Durkin's study with my testimony.

The Chamber opposes the CFPA legislation in its current form because it believes the current bill is the wrong way to enhance consumer protection, and it will have significant and harmful unintended consequences for consumers, for the business community and for the overall economy.

Chairman Frank's September 22 memorandum identified a number of the specific concerns that we have expressed. However, illustrating the complexity of these issues and the need for careful assessment of the impact of proposed provisions, the changes made in the bill do not address the concerns discussed in the memorandum.

I will focus my remarks on six areas:

- The scope of the current draft legislation;
- the vague regulatory burdens that it would impose;
- the requirement that covered businesses offer particular products;
- the lack of coordination among federal regulators;
- the creation of new state regulatory authority; and
- the lack of preemption.

Scope

The scope of H.R. 3126 as introduced is sweeping, giving the CFPA authority to regulate businesses and professionals far beyond traditional consumer finance.

The bill does not focus on entities that are solely, or even principally, engaged in financial services activities. Rather, it casts an extremely broad net that would encompass a vast segment of the entire economy.

We appreciate the recognition of this overbreadth in Chairman Frank's September 22 memorandum. Unfortunately, the revised bill does not solve the problems created by the underlying bill's expansive approach. Here are just a few examples of the many I can cite:

- Merchants and Retailers

Although Section 124(a) provides that the CFPA does not have authority "regarding credit or other financial activity issued **directly** by a merchant, retailer or seller of nonfinancial services to a consumer" (emphasis added), the definitions of "extending credit" and "covered person" remain unchanged, leaving open the possibility that a merchant could be found by the CFPA to "indirectly" engage in financial activity or to be a "material service" provider to a covered person. For example, a business that merely accepts credit cards could meet either of those qualifications – either indirectly engaging in a financial activity (the provision of credit by the credit card network) or providing a material service to the credit card network.

In addition, although businesses that *sell* stored value cards are now exempt, businesses that *issue* stored value cards – or that merely allow their names or trademarks to be used on stored value cards – remain subject to regulation as a "covered person."

- Accountants, Lawyers, and Tax Preparers

Section 124(e) exempts accountants, lawyers, and tax preparers, but provides that the exemption "shall not apply….to the extent such person is" engaged in a "financial activity" or is otherwise subject to the existing federal consumer laws. That means that any activity by an accountant or lawyer that falls within the broad "financial activity" definition – provision of tax planning advice in connection with estate planning, for example – or any activity that the Agency classifies as a financial activity under its rulemaking authority would trigger the applicability of the statute.

Moreover, although tax preparation services are no longer expressly included in the definition of "[a]cting as a financial advisor" (Section 101(18)(H)), such services are not expressly excluded from that definition. Accordingly, there is a risk the Agency could simply interpret the broad language of the definition ("providing financial and other related advisory services") to include tax preparation.

- Real Estate Brokers and Auto Dealer

The exemptions for real estate brokers and auto dealers suffer from the same flaw as the one for accountants, lawyers, and tax preparers: they do not apply if the person is engaged in a financial activity or otherwise subject to the existing federal consumer laws.

In addition, even the limited protection provided by the exemptions fails to encompass activities in which these individuals routinely engage. Thus, the "real estate broker" exemption does not include negotiations relating to financing and the auto dealer exemption does not apply to lease transactions and excludes activities relating to the arranging of financing. That means that auto dealers likely will be covered by the statute for *all activities other than all-cash vehicle sales*.

- New "Related Person" Provision

The bill includes a new provision, defining the term "related person" (Section 101(30)), which is applicable to all entities other than bank holding companies, credit unions, and depository institutions. It includes:

  - "any director, officer, employee charged with managerial responsibility, or controlling stockholder of, or agent for, such covered person" and "any shareholder, consultant, joint venture partner, and any other person as determined by the Director who materially participates in the conduct of the affairs of such covered person."

- Also included is "any independent contractor (including any attorney, appraiser, or accountant), with respect to such covered person, who knowingly or recklessly participates in any" violation of "any" law or regulation or breach of fiduciary duty.

Any person who is a related person "shall be deemed to be a covered person for all purposes of" the new law and the existing federal laws.

This provision has extremely broad implications. It allows the Agency to impose fees on, and require reports from, employees, shareholders, directors and others. And it broadly subjects shareholders and directors to the Agency's authority, even with respect to activities <u>unrelated</u> to the covered person with which they are associated.

The portion of the definition relating to independent contractors casts the net even farther: independent contractors are transformed into "covered persons" – and become subject to regulations that didn't previously apply – if they "recklessly" have "participated" in a violation of any law. How can these entities protect themselves? Any association with a covered person that engages in wrongful conduct could trigger regulatory obligations that the contractor previously ignored, based on a very vague and uncertain standard. More importantly, that standard can be invoked in an action seeking damages by the Agency, a State Attorney General, or a plaintiffs' lawyer to whom a State Attorney General has outsourced the case. This is a huge expansion of potential liability.

We recognize that there is a similar concept, institution-related party, in the banking law. But the proposed use of the concept here is much broader – including imposing all of the Agency's regulations on a previously-unregulated party and subjecting that party to liability for class-action type damages.

- <u>Agency Authority to Expand its Own Jurisdiction</u>

Another troubling aspect of H.R. 3126 is that it gives the Agency the authority to expand its own jurisdiction, including within the scope of "financial activity" "any other activity that the Agency defines, by regulation as financial activity for the purposes of this title." That opens the door to ever-expanding jurisdiction through regulatory fiat and without congressional review.

The revised draft includes standards that the Agency must meet to expand its authority, but those standards impose no real limitations. The Agency need only find that:

- "the activity has, or there is likelihood that the activity will have, a material adverse impact on the creditworthiness or financial well-being of consumers," or
- "the activity is incidental or complementary to any other financial activity regulated by the Agency," or
- "the activity is entered into or conducted as subterfuge or with a purpose to evade" the provisions of the bill or existing consumer protection laws.

These new standards for expanding the Agency's authority are vague and vulnerable to varying interpretations – the "substantial likelihood" test gives the Agency the ability to hypothesize adverse consequences and then extend its regulatory reach based on its own suspicions. And given the broad-based authority of the Agency, there could be a relatively low threshold for defining activities as "incidental" or "complementary" (a term that appears to be drawn from banking law, where it did receive a broad interpretation).

Vague Statutory Standards

Another aspect of H.R. 3126 that provoked considerable concern is the provision that, without any action by the Agency, would have imposed vague regulatory standards upon covered persons—standards that would have required businesses to determine the extent to which consumers comprehended particular information.

Although this provision (Section 132(b)) has been removed from the revised bill, new language has been added to Section 138(1) making it "unlawful for any person" to engage in any unfair, deceptive or abusive act or practice. This provision imposes broad liability on anyone – not just a covered person – any time the Agency later determines that person's conduct is "unfair", "deceptive" or "abusive," even if there was no regulation requiring a particular disclosure or prohibiting the particular practice. <u>It thus subjects businesses to broader and vaguer standards than the language deleted from the bill.</u>

Requirement of "Plain Vanilla" Products

The revised bill does not include the provision of H.R. 3126 that imposed the "plain vanilla" product requirement (Section 136). But nothing in the revised bill prevents the Agency from imposing that very same requirement, or otherwise pushing consumer products toward standardization, by using its broad authority to prevent "abusive" acts and practices (Section 131), which includes the imposition of "requirements for the purpose of preventing such acts or practices" or by invoking its "fair dealing" authority (Section 137). Furthermore, the elimination of preemption of state law means that States would be free to impose a "plain vanilla" requirement even if the Agency did not do so, <u>and 50 different such requirements at that.</u>

Regulatory Coordination

Separating the regulation of financial products from regulatory expertise regarding the safety and soundness of financial institutions threatens consumers as well as the stability of the entire financial system. The vast majority of consumer protection issues also implicate safety and soundness concerns. Frequently, the issues are two sides of the same coin: pricing a product to reflect its cost and risk may promote safety and soundness but also may implicate consumer protection concerns.

The revised bill attempts to address this issue by creating a dispute resolution process. It is not clear whether that process could be effective – even the bill recognizes that it could take 60 days for an issue to be resolved, and experience with statutory deadlines indicates that they are rarely met.

More importantly, Section 123(c)'s resolution procedure applies only to conflicting "material supervisory determinations" between the CFPA and a federal banking agency. It *does not* apply to "any regulation or guidance, or order of general applicability" – and therefore would not apply to the significant risk that the CFPA would adopt regulations that conflict with safety and soundness principles.

Lack of Preemption

At a time when harmonization has been identified by all stakeholders as a goal of regulatory reform, the proposed CFPA will do exactly the opposite. Rather than adopting a new national standard and eliminating multiple and conflicting state laws, the new agency would set the floor, creating inconsistencies, duplications, and conflicting mandates between the federal and state agencies.

Thus, the bill rolls back 150 years of banking law by subjecting national banks for the first time to a labyrinth of state consumer protection mandates. And if that were not problematic enough, the bill gives States independent power to interpret and enforce the federal standards – even if they adopt an interpretation different from the Agency's.

Again, thank you for the opportunity to testify, and I look forward to answering the Committee's questions.