



Statement of the U.S. Chamber of Commerce

ON: Legislative Proposals to Improve Transparency and Accountability at the CFPB

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

BY: Andrew Pincus

DATE: May 21, 2014

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. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage 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 issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

Madam Chairman, Ranking Member Meeks, 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 Subcommittee today on behalf of the U.S. Chamber of Commerce's Center for Capital Markets Competitiveness and the hundreds of thousands of businesses that the Chamber represents.

I will address two basic topics:

- First, why problems stemming from the uniquely unaccountable structure of the Consumer Financial Protection Bureau (CFPB) make it necessary for Congress to improve transparency and accountability at the Bureau; and
- Second, how the legislative proposals before the subcommittee at this hearing will improve transparency and accountability at the CFPB.

I. Congressional Action is Needed Now to Improve Transparency and Accountability at the CFPB

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 also firmly believes, however, that consumers benefit from access to a broad range of competitive financial products and services. Access to credit allows small businesses to thrive, kids to go to college, and young couples to buy homes for their expanding families. The Chamber believes that such access to credit is best preserved when regulators allow competitive and transparent markets to flourish within the bounds of clear and consistently enforced rules of the road. Notably, Congress shared this belief when it established the CFPB, as it specifically tasked the Bureau with implementing and enforcing “Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.”¹

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), Pub. L. 111-203 § 1021(a) (July 21, 2010); 12 U.S.C. § 5511(a).

In order to implement and enforce Federal consumer financial law “consistently,” to ensure consumers have access to financial services, and to ensure that the markets for financial products and services remain “fair, transparent, and competitive,” the CFPB must:

- Provide clear rules of the road for financial services companies;
- Solicit input from stakeholders, including small businesses, prior to taking action;
- Perform appropriate cost-benefit analyses to determine the prudence of any contemplated regulatory activity;
- Respect Americans privacy and avoid unnecessary risks of identity theft and financial fraud;
- Respect the limits of its jurisdiction and authority.

The entire marketplace will benefit if the CFPB meets these basic standards.

Unfortunately, rather than transparency, accountability, and understandable standards that create a level playing field for businesses and a consistent level of protection for consumers, the CFPB’s actions have often been marked by the absence of all three of these characteristics. Frequently, the CFPB has utilized a closed decisionmaking process, ignored or circumvented limits on its authority, and announced vague standards that provide no guidance for law-abiding companies.

As this Subcommittee has heard many times before, the CFPB’s unique structure – with its absence of the checks and balances that apply to other federal agencies – facilitates insular, vague policymaking that often fails to consider how Bureau actions will impact consumers’ and small businesses’ access to credit.

First, the CFPB repeatedly has chosen to set policy by imposing after-the-fact liability through enforcement actions, rather than through notice-and-comment rulemaking, guidance, or any other process designed to gather public input and analyze the costs and benefits. As the Bipartisan Policy Center has explained, bad policy is the inevitable result.² Every market participant considering whether to offer low-cost and innovative credit products must take into

² Bipartisan Policy Center, *The Consumer Financial Protection Bureau: Measuring the Progress of a New Agency*, at 5, 19 (Sept. 2013) (“[W]hen the Bureau made unilateral decisions, rolled out initiatives, rules, or processes as a result of a more closed, internal deliberation process, the results were far more likely to be problematic” than if notice-and-comment rulemaking was undertaken).

account the risk of future second-guessing by the Bureau in “gotcha” enforcement actions. This legal uncertainty inevitably will increase consumers’ costs, reduce product offerings, and restrict credit availability across the full array of financial products. For example:³

- The Bureau has declined to seek public comment on or clarify the meaning of its abusiveness authority through a transparent process. Instead, the CFPB has preferred to develop the meaning of this term through enforcement actions. In doing so, the CFPB has appeared to enforce the very kind of suitability requirements that this Committee and Congress rejected in crafting the Dodd-Frank Act.
- The CFPB has not sought public comment on nor fully explained how it determines whether an indirect auto lender is in compliance with the Equal Credit Opportunity Act or how impermissible disparate impact may be identified in a lending portfolio. Lenders work hard to comply with Fair Lending laws and it is not fair for an agency to hold them to an invisible, statistical standard.
- The Bureau has not sought public comment on or provided meaningful guidance on the compliance systems that covered institutions should put in place to oversee third-party service providers properly and avoid vicarious liability. Instead, the CFPB appears to have taken the view that financial institutions may be held strictly liable for any error by a service provider, no matter how stringent the institution’s compliance system.
- The Bureau has not established a no-action letter process or other means of providing authoritative guidance to financial institutions facing specific and complicated compliance questions arising under the statutes and regulations that the CFPB enforces.
- The CFPB has not been transparent regarding its study of arbitration contracts. As a result, stakeholders cannot give specific input into the areas that the Bureau is studying and the CFPB accordingly is working in an informational vacuum. A legitimate study process would facilitate the submission of such information.⁴

³ For a fuller discussion of these issues, see Letter from David Hirschmann to Hon. Richard Cordray (Feb. 12, 2014), *available at* <http://www.centerforcapitalmarkets.com/wp-content/uploads/2014/02/2014-2.12-CFPB-Letter.pdf>.

⁴ *See generally* Letter from David Hirschmann and Lisa A. Rickard to Ms. Monica Jackson re. Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration

- By electing not to undertake formal rulemakings, the CFPB has side-stepped the Small Business Regulatory Enforcement Fairness Act. Moreover, the CFPB has treated SBREFA as a burden, not as an opportunity to improve policy outcomes.⁵ As a result, even where the CFPB has been in technical compliance with the law, it repeatedly has pursued its preferred policy ends without meaningful input from small businesses and others whose input Congress has specifically sought to guarantee.

Second, the CFPB is not respecting the statutory limits on its jurisdiction and authority. As a result, the CFPB is imposing regulatory costs and legal uncertainty upon segments of the economy that Congress specifically excluded from the Bureau’s jurisdiction. For example:

- The CFPB has treated its lack of jurisdiction over auto-dealers as nothing more than a technical impediment to be overcome, circumventing this clear statutory restriction by using its jurisdiction over financial institutions that provide indirect auto loans as a lever to try to force change in the compensation model used by dealerships.
- The CFPB has paid little heed to the statute’s merchant exclusion.⁶ The purpose of this exclusion was clear: Congress intended for the CFPB to have authority over banks, credit card companies, and other financial services companies, but not to be able to use the incidental provision of financial services as a means of gaining authority over any type of company. The CFPB has not respected this limitation, however. For example, in undertaking a rulemaking on debt collection, the CFPB has indicated its willingness to treat merchants who try to collect on defaulted accounts in the same manner as third-party debt collectors who have no customer relationship with the debtor.⁷
- The CFPB has collected data during its supervisory examinations without, as required by statute, first issuing an appropriate rule or order

Agreements, No. CFPB-2012-0017—Supplemental Submission (Dec. 11, 2013), *available at*

http://www.instituteforlegalreform.com/uploads/sites/1/2013_12.11_CFPB_-_arbitration_cover_letter.pdf.

⁵ *See generally* Letter from Trade Associations to the Hon. Sam Graves and the Hon. Nydia Velázquez (Aug. 1, 2012), *available at* <http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/2012-8.01-Joint-Letter-House-Small-Business-re-CFPB.pdf>.

⁶ *See* Dodd-Frank Act § 1027(a).

⁷ *See generally* Letter from Jess Sharp to Ms. Monica Jackson re. Advance Notice of Proposed Rulemaking, “Debt Collection (Regulation F),” No. CFPB-2013-0033 (Feb. 28, 2014).

to that end.⁸ Relatedly, the CFPB limited a request for data to nine institutions so that it would not have to comply with the requirements of the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3521, which limits the paperwork burden that the federal government may impose on American businesses.⁹

Third, the CFPB has gathered enormous amounts of Americans’ personal financial information, thereby unnecessarily increasing the risk of government abuse of private data and of a data breach that will result in identity theft and financial fraud. The CFPB likewise has refused to be transparent about its handling of this data. For example:

- As noted above, the CFPB has collected vast amounts of information during its supervisory examinations, and repeatedly has failed to explain why it is necessary to gather such volumes of information.¹⁰
- The CFPB now is working with the Federal Housing Finance Agency on a mortgage database that tracks enormous quantities of Americans’ personal and financial information on an ongoing basis.¹¹

This lack of transparency and accountability extends beyond the Bureau’s treatment of the private sector – and includes its treatment of requests by Members of Congress. Despite the repeated requests from countless members of Congress from both sides of the aisle, the CFPB has declined to give a detailed description of how it performs its disparate impact analysis in the indirect auto lending context.

II. Legislative Proposals to Improve Transparency and Accountability at the CFPB

The CFPB’s history to-date has confirmed the Chamber’s fears that the Bureau’s unprecedented structure with its lack of routine checks and balances would produce agency action inconsistent with federal agency norms. The Chamber consequently has supported legislation that would incorporate the controls and

⁸ See generally Letter from David Hirschmann to Hon. Richard Cordray (July 19, 2013), available at <http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/2013-6-19-CFPB-letter-on-data-collection.pdf>.

⁹ See 44 U.S.C. § 3502 (defining “collection of information” to include obtaining “answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, *ten or more* persons, other than agencies, instrumentalities, or employees of the United States”) (emphasis added).

¹⁰ See *id.*

¹¹ See Letter from David Hirschmann to Mr. Alfred M. Pollard re. “Privacy Act of 1974; System of Records – Notice of Revision and Request for Comments re. the National Mortgage Database,” No. 2014-N-03 (May 16, 2014), available at <http://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/5-16-14-Comment-re-FHFA-database.pdf>.

oversight that apply to other federal regulatory agencies, which would in turn ensure far greater stability over the long-term for those who provide and rely on consumer credit. For example, the Chamber strongly supports H.R. 3193, the Consumer Financial Freedom and Washington Accountability Act. That bill, which the House of Representatives passed in February, would bring the CFPB in line with other independent agencies, including by codifying the commission structure that was originally proposed by this Committee and by restoring congressional control over the CFPB's budget.

The Chamber likewise welcomes other proposals that would:

- Increase the agency's transparency;
- Increase the CFPB's accountability to Congress;
- Strengthen checks and balances on the exercise of the CFPB's authority;
- Limit the CFPB's discretion to impose new requirements and burdens on financial institutions without first soliciting public input;
- Protect Americans' privacy; or
- Clarify legal requirements imposed by the Dodd-Frank Act.

To that end, the Chamber thanks the sponsors and cosponsors of the bills that are the subject of today's hearing. These bills represent an important step in the debate about ensuring an open, transparent, inclusive policymaking process at the CFPB, and we appreciate the sponsors' willingness to reach across the aisle in many cases to address targeted, practical issues that will improve outcomes for businesses and consumers.

A number of these measures would directly address the Bureau's lack of transparency:

- **H.R. 4262 – The Bureau Advisory Commission Transparency Act**, introduced by Representative Duffy, would close the statutory loophole exempting the Bureau's advisory committees from the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App., which generally requires federal agencies to hold meetings of advisory committees in public and to satisfy various other procedural requirements. Because FACA exempts the Federal Reserve and the CFPB technically is housed within the Federal Reserve, FACA does not apply. The CFPB has taken advantage of this loophole in

FACA and has held meetings of this advisory board behind closed doors, with a carefully choreographed public session only occurring at the end of the meeting.

But the statute's exemption of the Federal Reserve, like its exemption of the CIA, is a product of the sensitive economic and national security issues discussed by their respective advisory committees. There is nothing to distinguish the Bureau's advisory committees from those of the Federal Trade Commission, Securities and Exchange Commission, or any other federal agency. Indeed, given the fact that the statute expressly provides that the Federal Reserve cannot exercise any authority over the CFPB, there is no basis for permitting the Bureau to invoke the Federal Reserve's FACA exemption.

- **H.R. 4539 – The Bureau Research Transparency Act**, introduced by Representative Fitzpatrick, would require the CFPB to share the data behind the reports it generates. Data sharing is a basic component of any reliable and credible research review process. To date, however, the CFPB has been unwilling to share the data behind its research reports. That prevents scrutiny of the CFPB's analysis. Of course, any data released by the Bureau should be scrubbed of any personally-identifiable information and sensitive business information.
- **Discussion Draft – The Bureau Guidance Transparency Act**, circulated by Representative Stutzman, would require the Bureau to provide an opportunity for public notice and comment before issuing interpretive guidance – and to publish the data underlying conclusions in any such guidance. As I have discussed, the Bureau repeatedly has announced interpretive guidance without previously giving public notice or soliciting meaningful stakeholder input. This measure would require the Bureau to gather information about the impact of its planned guidance before the guidance may be issued.
- **H.R. 4383 – The Bureau of Consumer Financial Protection Small Business Advisory Board Act**, introduced by Representatives Pittenger and Heck, would require the CFPB to create a small business advisory board. The Chamber repeatedly has urged the CFPB to improve its outreach to small business and this measure would create an important mechanism for increasing the voice of small business at the CFPB.

- **Discussion Draft – The Bureau Arbitration Fairness Act**, circulated by Representative McHenry, addresses the Bureau’s authority to ban or regulate arbitration under Section 1028 of the Dodd-Frank Act. The statute requires the Bureau to undertake a study of arbitration prior to exercising this regulatory authority and serious concerns have been raised about the fairness of the study process. While the Bureau did invite public comment on how it should conduct the study, it has never identified the topics it is studying or invited public comment on those topics. Indeed, the Bureau has been more transparent about a consumer survey that it is planning to conduct – because the Paperwork Reduction Act imposes specific notice and comment requirements – than it has been about the much broader arbitration study.

Other proposals would take important steps toward increasing the Bureau’s accountability:

- **H.R. 3389 – The CFPB Slush Fund Elimination Act**, introduced by Chairman Capito, would prevent the Bureau from using the statutory civil penalty fund as yet another non-appropriated financial resource to be spent as the Bureau wishes without any oversight from Congress, the President, or anyone else. Congress created the fund, in Section 1017(d) of the Dodd-Frank Act, to enable the Bureau to compensate injured investors. But the Bureau has used other authority to accomplish that end¹²; civil penalties that the Bureau collects would be therefore appropriately deposited in the Treasury’s General Fund, and subject to Congress’s oversight and control.
- **H.R. 3770 – The Bureau of Consumer Financial Protection-Inspector General Reform Act**, introduced by Representative Stivers, Representative Walz, Representative Bachmann, and Representative Miller, would create a dedicated Inspector General for the Bureau. The Dodd-Frank Act granted the Inspector General of the Federal Reserve responsibility for oversight of the CFPB. As a result, the CFPB lacks a dedicated oversight entity that focuses exclusively on the specific challenges and shortcomings of the CFPB. H.R. 3770 would remedy each of these flaws.
- **H.R. 4604 – The CFPB Data Collection Security Act**, introduced by Representative Westmoreland,¹³ would require the CFPB to establish an opt-

¹² Chairman Capito introduced this legislation on behalf of herself and Representatives Huizenga, Westmoreland, Cotton, Garrett, Campbell, Luetkemeyer, Duffy, Bachus, Posey, and Pittenger.

¹³ Joining Representative Westmoreland in introducing this legislation were Representatives Duffy, Bachmann, Long, Posey, Bentivolio, and Luetkemeyer.

out list for consumers who do not want the CFPB to collect personally identifiable information about them, as well as establish other important protections. Congress imposed clear limits on the collection of Americans' personally identifiable information,¹⁴ but the CFPB nonetheless has gathered huge amounts of personally identifiable information through the performance of its supervisory function—all while failing to adhere to the statutory requirement that it first issue a rule or order before attempting such a collection.¹⁵ The Chamber and many Members of Congress have expressed concern about the Bureau's access to such information, and the Government Accountability Office has raised concerns about the security of data at the CFPB. This bill responds to those concerns.

- **Discussion Draft – The Bureau Examination Fairness Act**, circulated by Representative Mulvaney, addresses significant concerns about the basic fairness, and compliance with statutory standards, of the Bureau's examination process. These concerns have included:
 - The inclusion of enforcement attorneys in its examinations, changing a collaborative process into a hostile one;
 - The use of multiple, conflicting, and unduly burdensome requests for financial data;
 - The extraordinary length of examinations; and
 - Subjecting supervised businesses to multiple simultaneous examinations of varying scopes and topics.

Addressing these issues of fairness is essential to eliminate unfair and costly burdens that are passed along to consumers in the form of higher prices.

Finally, there are measures that would allow law-abiding companies to understand in advance what the relevant statutes and regulations require, eliminating the “gotcha” approach that uses enforcement to set regulatory standards without prior notice to companies:

- **H.R. 4662 – The Bureau Advisory Opinion Act**, introduced by Representative Posey, would require the Bureau to do what other federal

¹⁴ *See id.*

¹⁵ *See generally* Letter from David Hirschmann to Hon. Richard Cordray (July 19, 2013), *available at* <http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/2013-6-19-CFPB-letter-on-data-collection.pdf>.

agencies did long ago: “establish a procedure to provide responses to specific inquiries by a covered person concerning conformance of prospective conduct with the Federal consumer financial law.”

- **Discussion Draft – The Preventing Regulatory Abuse Act of 2014**, circulated by Representative Barr, relates to the Bureau’s unwillingness to provide companies with any useful understanding of the scope of the statutory “abusive” standard. As I have discussed, companies that wish to comply with the law have no idea what that standard requires because the Bureau’s existing “guidance” consists of a repetition of the broad statutory language, and the Bureau’s filings in enforcement actions appears to adopt an extraordinarily broad definition of the term, encompassing the very suitability standards that Congress removed from the Dodd-Frank Act. Clarification of this standard is essential to avoid an adverse effect on the availability of consumer credit, which is critical to small businesses as well as to consumers, and to provide basic fairness to companies that want to comply with the law.

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Chairman Capito and Ranking Member Meeks, thank you again for the opportunity to testify today on these important legislative proposals to improve transparency and accountability at the CFPB. I would be happy to answer the Subcommittee’s questions.