Statement
of the
U.S. Chamber
of Commerce

ON: **"Who's Watching the Watchmen? Oversight of the Consumer Financial Protection Bureau"**

TO: U.S. House Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs

DATE: **May 24, 2011**

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.

Mr. Chairman, Ranking Member Quigley, 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 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 looks forward to working with the Consumer Financial Protection Bureau ("CFPB" or the "Bureau"), once it is up and running, to meet these goals while avoiding the imposition of duplicative and unjustified regulatory burdens that divert resources essential to fueling economic growth and, perhaps even more importantly, preventing small businesses from obtaining the credit they need to expand—and creating the new jobs that our economy so desperately needs.

We are heartened that the Bureau has endorsed these goals. But, of course, good intentions by themselves cannot ensure good results. The ability of a regulatory agency to carry out its mission successfully is influenced by—among other things—its organizational structure; its ability to coordinate effectively with other agencies operating in related areas; and the ability to maintain over the long term a consistent, evidence-driven approach to regulatory and enforcement issues.

The CFPB as currently structured fails these long-established, commonsense tests. Indeed, the House recognized these problems in the last Congress, adopting a structure for the Bureau very different from the Senate-passed approach that was included in the final legislation.

The House Financial Services Committee has approved three proposals for reforming the CFPB's structure—the "Consumer Financial Protection Safety and Soundness Improvement Act of 2011" (H.R. 1315); the "Responsible Consumer Financial Protection Regulations Act of 2011" (H.R. 1121); and "The Bureau of Consumer Financial Protection Transfer Clarification Act" (H.R. 1667). These proposals afford an opportunity to reinstate the multi-member commission approach endorsed by the House in the last Congress—an approach that has proven so successful for a wide variety of regulatory agencies—as well as to address other structural issues essential to the success of the Bureau's mission. The Chamber supports their enactment.

I. NEED FOR CHECKS AND BALANCES

The CFPB can achieve robust consumer protection that is economically sound and preserves consumer choice, but only if Congress puts in place the appropriate controls and oversight.

The threats of agency tunnel-vision, overreach, and politicization are real—and inherent to all bureaucracies. And if these risks are not properly addressed at a *structural* level, they will over time inevitably lead to the Bureau's abandonment of sound regulatory principles.

Aware of these inherent risks, Congress has historically 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 in this context. 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 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.

That is not to say that all of the initial steps taken in setting up the Bureau have been flawed. For example, the CFPB recently announced that it will commence testing prototypes of a simplified mortgage cost disclosure form merging the disclosures currently required under the Truth in Lending Act and the Real Estate Settlement Procedures Act. The clarification and simplification of current mortgage disclosures, in addition to being required under the Dodd-Frank Act, is also sound policy.

On the other hand, initial discussions regarding the allocation of regulatory authority between the Federal Trade Commission and the Bureau, and the Bureau's indications regarding the rules it plans to establish for its complaint database—rules that differ significantly from those long adhered to by the FTC—are troubling We are especially concerned that regulated businesses that want to comply with the law will be forced to consult with several federal agencies, and State Attorneys General as well, in order to determine the "rules of the road."

Significantly, the very reason for the creation of the Bureau was the view that the prior structure for consumer protection was seriously flawed. Replacing one flawed structure with another simply makes no sense.

II. DANGERS POSED BY THE CFPB'S CURRENT STRUCTURE

In light of these considerations, we have deep concerns about how the CFPB is now structured.

1. The CFPB's Structure is Unprecedented for a Federal Regulator of the Private Sector

The Bureau's structure has a number of features that, taken together, are unprecedented for a federal agency regulating private entities and individuals:

- Independent regulatory agencies like the CFPB typically are headed by a multi-member bipartisan commission whose members serve for fixed terms. That is the structure of the Federal Deposit Insurance Corporation ("FDIC"), the Federal Reserve System, 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"), and numerous other agencies. The Bureau, by contrast, will be headed by a single director with tenure protection and a five-year fixed term. Significantly, although located formally within the Federal Reserve, the Bureau is completely insulated from the Federal Reserve's supervision and control.

- The Bureau also is exempt from the congressional budget process. It is funded by a transfer of money from the Federal Reserve in an amount to be determined by the Director, subject only to a cap that in the first year exceeds $500 million, and will increase to over $600 million by FY 2012.

I am 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, some regulators—for example, the Office of the Comptroller of the Currency ("OCC") and the soon-to-be abolished Office of Thrift Supervision ("OTS")—have single directors. Further, members of the commissions heading independent regulatory agencies generally serve for fixed terms and have tenure protection. And the agencies charged with prudential regulation are generally funded outside the appropriations process.

But I am not aware of any other federal agency charged with regulating private sector activity that possesses all of these features. It is a dangerous combination, rendering the CFPB virtually immune from the well-established checks and balances that traditionally have been relied upon to guide and constrain agency action.

No agency should have such unconstrained authority. But the CFPB's extraordinary powers and large budget render the concerns raised by the absence of normal constraints particularly serious.

Significantly, the Bureau is not limited to regulating banks and other financial service businesses. It also will have the authority to regulate a number of activities that are common to Main Street businesses well outside the financial services sector (for example, over-the-counter financing of goods purchases), and in some cases to regulate the service providers to those companies.

And the standard it will be charged with enforcing is very broad—the prevention of "unfair, deceptive, or abusive acts or practices" in the market for consumer financial products. The CFPB will have sole discretion to issue rules establishing what these terms mean and how they will be applied. While unfair and deceptive practices have been proscribed for years by the FTC, with decades of case law to guide the CFPB's rulemakings on these standards (as well as compliance and enforcement), the "abusive" standard is new and will require immediate interpretation by the Bureau. In issuing this interpretation, the CFPB will be writing on what is essentially a blank slate—and the standard likely will continue to evolve into the future. Misuse of these powers could lead to substantial harm for all the participants in the markets for consumer financial products—including consumers themselves.

In carrying out the CFPB's regulatory, enforcement, and supervisory activities, moreover, the Director will have very substantial spending authority. To put the Bureau's potential $500 million-plus (soon to top $600 million) budget in perspective, in FY 2010, the budget of the Consumer Products Safety Commission was $118 million and the budget of the FTC was $292 million. Both of those agencies are, of course, subject to the appropriations process.

2. Myths About the CFPB's Structure

In considering whether the current statutory regime is adequate to ensure the CFPB's accountability, it is important to dispel some of the myths that have been advanced in recent months.

A. Myth #1: There is nothing unusual about the CFPB's structure.

Some have claimed that there is nothing unusual about the CFPB's structure, pointing to the OTS, the OCC, the Federal Reserve, and the FDIC as supposed precedents. But the significant differences between those entities and the CFPB in fact demonstrate clearly the extent to which the CFPB's structure marks a radical departure from established practice.

Both the OTS and the OCC are part of the Department of the Treasury, and the Executive Branch has taken the position that that the heads of both components serve at the pleasure of the President (although the U.S. Code is silent on the subject of their removal). *See* Memorandum Opinion for the General Counsel, Department of the Treasury, and the Chief Counsel, Office of Thrift Supervision, *Re: Post-Employment Restriction of 12 U.S.C. § 1812(e)* (Sept. 4, 2001). By contrast, the President can remove the CFPB Director only "for inefficiency, neglect of duty, or malfeasance in office"—a restrictive standard.

These dramatically different standards have important real-world consequences. If the President believes that the Comptroller or the OTS Director has adopted a dangerous regulatory approach that threatens significant economic harm, there is no doubt that he can remove that person. By contrast, if the President reaches the same conclusion about the CFPB Director, he may well be powerless to exercise the power of removal (unless the approach is so unreasonable as to satisfy the "for cause" standard)—or to do much else to prevent the harm.

As the Supreme Court has recognized, "[t]he power to remove officers . . . is a powerful tool for control." *Edmond v. United States*, 520 U.S. 651, 664 (1997). And the authority to remove at will—which the President has over the Comptroller and the OTS Director—is a much more powerful tool for control than the authority to remove for cause.

Moreover, other significant accountability checks apply to both the OCC and the OTS that do not apply to the CFPB. The Secretary of the Treasury, not the Comptroller and the OTS Director, appoints the Deputy Comptrollers and the OTS Deputy Directors. And the Comptroller and the OTS Director carry out their duties under the Secretary's "general direction" (Comptroller) and "general oversight" (OTS), although they enjoy some measure of protection from his interference in their enforcement and rulemaking activities. By contrast, the CFPB's Director will appoint the Bureau's Deputy Director. And the Board of Governors of the Federal Reserve can exercise no direction or oversight over the CFPB—despite its status as a part of the Federal Reserve System.

Thus, for multiple reasons, the Comptroller and OTS Director are politically accountable—both to the President directly and indirectly through the Secretary of the Treasury—in a way that the CFPB Director simply is not. The fact that defenders of the CFPB's current structure have identified these two agencies as its closest analogues, despite the obvious differences in conception and function, simply highlights the unprecedented nature of this new entity.

Banking regulators such as the Federal Reserve and the FDIC supply even weaker precedents. To be sure, like the CFPB, they are outside the budget process. But they have bipartisan, multi-member leadership, and thus are subject to the very significant protection provided by collective decision-making—a protection that simply is not present when a single director is in charge. Indeed, the precise goal of H.R. 1121 is to create a structure for the CFPB that more closely resembles that of these agencies.

B. Myth #2: The CFPB is the "most accountable" agency in the federal government.

Some have claimed that, despite the evidence to the contrary, the CFPB is in fact politically accountable—supposedly, the "most accountable" agency in the federal government. The radical structure of the agency demonstrates that this claim is without foundation.

It is true that the Dodd-Frank Act requires the CFPB to adhere to certain substantive standards in exercising its rulemaking and enforcement discretion. And the CFPB's regulations must be prescribed in accordance with the requirements of the Administrative Procedure Act that govern informal rulemakings. But saying that is saying nothing at all, because it is impossible to imagine an agency that could pass muster under the Constitution that would not have to follow a set of congressionally-mandated substantive and procedural requirements in exercising its authority. That is a basic precondition for the rule of law, not a sufficient guarantee of accountability.

Indeed, the content of these substantive and procedural requirements affords little reason for confidence that they will suffice to constrain overreaching by the

CFPB. For example, the Dodd-Frank Act defines an act or practice as "abusive" if it "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service," or if it takes "unreasonable advantage" of a consumer's "lack of understanding" of the "material risks, costs, or conditions of the product or service" or a consumer's "inability" to protect his own interests "in selecting or using a consumer financial product or service." Dodd-Frank Act § 1031(d). These standards are far from specific—consumers vary greatly in their ability to understand terms, conditions, material risks, and costs and to protect their own interests—and, depending on how they are interpreted by the Bureau and the courts, may do little to constrain the CFPB's regulatory authority.

It is also significant that the requirements governing CFPB rulemakings are less robust than those that the FTC must follow in exercising its authority under section 18(a)(1)(B) of the Federal Trade Commission Act ("FTCA"). That provision, which broadly authorizes the FTC to prescribe rules which define and seek to prevent "unfair or deceptive acts or practices," was the model for the CFPB's authority to prescribe rules that identify as unlawful and prevent "unfair, deceptive, or abusive acts or practices" relating to consumer finance. In fact, even after the transfer date, the FTC will retain its general rulemaking authority under section 18(a)(1)(B) with respect to consumer financial products and services (the Dodd-Frank Act instructs the two agencies to negotiate an agreement to avoid duplication or conflict between their rules). Thus, while the FTC and the CFPB will be exercising overlapping regulatory authority, and will be applying a similar standard in doing so, the CFPB will be subject to less rigorous procedural requirements than the FTC–even though it is the CFPB that has the broader authority to regulate "abusive" acts and practices.

Congress imposed the more elaborate procedures set forth in the FTCA out of a concern that the standard APA procedures were insufficient to protect against the threat that FTC rules would have an adverse economic impact on small businesses and consumers, particularly in view of the broad reach of the Commission's authority. Given the economic importance of consumer finance, and the broader scope of the CFPB's rulemaking authority, there can be little doubt that the CFPB poses an equal if not greater risk than the FTC of misusing its rulemaking power in such a manner. Yet, once again, the CFPB faces weaker constraints than a sister regulator with similar powers.

C. Myth #3: The Federal Reserve will control the CFPB's budget.

Some also have suggested that the CFPB does not control its own budget. The statutory text shows that this claim is highly misleading. The Dodd-Frank Act expressly states (in section 1017(a)) that the Federal Reserve "***shall*** transfer to the

Bureau, from the combined earnings of the Federal Reserve System, the amount determined by the ***Director*** to be reasonably necessary to carry out" the CFPB's functions, up to a cap of between 10 and 12 percent of the Federal Reserve's operating budget. Thus, up to the cap prescribed in the Act, it is clear that the Director—not the Federal Reserve—will decide what the CFPB's budget will be. And that cap is not much of a limit—as noted, it is already over $500 million and will increase to an estimated more than $600 million by FY2012.

D. Myth #4: The FSOC will guarantee the CFPB's accountability.

Finally, some have pointed to the ability of a two-thirds majority of the Financial Stability Oversight Council ("FSOC") to overturn CFPB rules that threaten the safety and soundness of the U.S. banking system or the stability of the U.S. financial system as constituting a strong guarantor of the CFPB's accountability. In fact there are a number of reasons why this review authority is unlikely to place a meaningful constraint on the CFPB.

First, under current law, the FSOC veto applies only to rules, not enforcement actions. And a number of individuals associated with setting up the Bureau have indicated their preference for establishing standards via enforcement actions rather than rulemaking.

Second, the standard for exercising the veto is very restrictive—a rule must threaten the safety and soundness of the entire U.S. banking system or the stability of the U.S. financial system. Thus, any rules that threaten the safety and soundness of some financial institutions, but do not arise to the level of posing a systemic risk, would not appear to qualify.

Third, two-thirds of the FSOC must agree to a veto, meaning that even a unanimous vote of the five prudential regulators—the Federal Reserve, FDIC, OCC, NCUA, and the Federal Housing Finance Agency—would not suffice. Yet these are the entities responsible for ensuring the safety and soundness of the U.S. financial system. Finally, it should be remembered that the CFPB's Director is one of the FSOC's ten members, rendering it even harder to obtain the necessary two-thirds majority when the CFPB's own rules are at issue. In fact, assuming that the CFPB Director will always vote against overturning one of his or her own rules, only two of the nine remaining FSOC members need agree for the rule to come into force.

This FSOC process also is no substitute for the necessary regulatory coordination between the CFPB and other Federal and State regulators in order to avoid conflicting rules and guidance.

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The only possible conclusion is that the CFPB's current structure places more unreviewable power in the hands of a single unelected official than any other federal regulatory law. And the unprecedented combination of the CFPB's unaccountable structure with its vast and unclear powers creates a significant foreseeable risk that, at some point in the future, it will act in a way that does serious harm to the American economy—including the very consumers it is meant to protect. When that time comes, it will be too late for Congress to make the necessary legislative corrections. The time to act is now.

I will now turn to the specific legislative measures that have been proposed to reform the CFPB's structure.

III. LEGISLATIVE PROPOSALS

1. H.R. 1121—"Responsible Consumer Financial Protection Regulations Act of 2011"

H.R. 1121 would provide for the CFPB to be led by a five-member, bipartisan commission rather than a single director. Under the legislation, the President would, with the advice and consent of the Senate, appoint commissioners to staggered five-year terms. The President would select a Chair from among the Commission's members to serve as the CFPB's principal executive officer. Significantly, under this proposal, no more than three of the five commissioners could be affiliated with any one political party. This proposal thus follows the same approach as the House-passed version of the Dodd-Frank legislation. For four main reasons, we strongly support this reform as necessary to address the significant flaws in the CFPB's current leadership structure.

A. H.R. 1121 would conform the CFPB's structure to that of other independent agencies.

Far from singling out the CFPB for special treatment, H.R. 1121 would conform its structure to the long-established template used for numerous other independent federal agencies, including those responsible for consumer protection. Both the FTC and the SEC are headed by five-member commissions, led by a chairperson, whose members serve for staggered fixed terms, and no more than three of whom may belong to the same political party. The FTC's consumer-protection model is particularly instructive. The FTC's Bureau of Consumer Protection has a mission very similar to that of the CFPB, focusing its efforts on preventing unfair and deceptive marketing. But the final decision on whether to act rests with the FTC's bipartisan commission, not with the Bureau of Consumer Protection.

Indeed, a commission structure has been the standard model for independent federal agencies since the creation of the Interstate Commerce Commission in 1887. Today, almost all agencies follow that model, although some have three commissioners rather than five. In addition to the FTC, SEC, CFTC, NCUA, and the FCC, examples include the Consumer Product Safety Commission, the Equal Employment Opportunity Commission, the National Transportation Safety Board, the Nuclear Regulatory Commission ("NRC"), the Federal Energy Regulatory Commission ("FERC"), and the U.S. International Trade Commission. Congress has almost uniformly rejected periodic efforts to replace certain of these commissions—such as the NRC and FERC—with a single administrator.

Moreover, the decision to place a single director in charge of the CFPB—far from being essential to the original conception of this agency—actually was made quite late in the legislative process. Professor Warren first introduced the concept of a single federal regulator of consumer finance in a 2007 article for the journal "Democracy." She identified the model for her proposed "Financial Product Safety Commission" as the Consumer Product Safety Commission ("CPSC"), which as I have already noted is just the type of multi-member, bipartisan decision-making body that H.R. 1121 would create. That structure has already demonstrated its effectiveness in the consumer-protection context: in the words of Professor Warren, "[t]he evidence clearly shows that CPSC is a cost-effective agency."

The President's June 30, 2009 draft legislation proposing the creation of the Consumer Financial Protection Agency likewise would have adopted this commission model, as would the original version of financial reform legislation reported by the House Energy and Commerce Committee in 2009. And although the House-passed bill provided for a single director to serve for 30 months from the date of the bill's enactment, a five-member commission would have come into existence at the end of that period. It was not until the Senate-passed bill that the commission model was dispensed with entirely in favor of a single, tenure-protected director serving for a fixed five-year term, and that modification was adopted in the final compromise legislation.

As this history makes clear, there is nothing about the single director structure that is inherent to the idea of an effective consumer financial protection agency. In fact, that structure was substituted very late in the legislative process. The history of the CFPB concept, as well as the approach taken with respect to other independent regulators, demonstrates that a multi-member commission actually is the proven, logical approach to regulating consumer financial products—just as it is for the broad consumer protection oversight provided by the FTC.

B. H.R. 1121 would ensure better, impartial decision-making.

The Chamber believes that technical expertise, exercised in a non-partisan fashion, should guide the Bureau's regulatory agenda. This view counsels strongly in favor of a multi-member commission structure, particularly given the legal difficulty, technical complexity, and economic importance of the Bureau's consumer protection mandate. As the historical practice suggests, collaborative deliberation among individuals with diverse views, expertise, and backgrounds is more likely than decision-making by a single individual to result in sound choices regarding issues of this nature. The discussion and compromise inherent to the multi-member commission model encourage intellectual rigor, impartiality, and moderation. And the need to accommodate multiple viewpoints affords an important check against a regulatory agenda driven by possibly idiosyncratic or ill-considered policy views.

While a single director may often be able to act more quickly than a commission, faster decision-making does not necessarily mean better decision-making. This is especially true in light of the inability of either the President or Congress to exercise oversight through the appropriations process.

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

Finally, there is no indication that the FTC's multi-member model has prevented that agency from acting rapidly when necessary. To the contrary, the FTC is recognized as a very responsive and effective regulator.

C. H.R. 1121 would minimize risk of regulatory capture.

In a coauthored 2008 law review article, *Making Credit Safer*, Professor Warren observed that a major challenge in establishing a unified federal regulator of consumer credit products is "minimizing the risk of capture."[1] The Chamber agrees that capture—by any interest group—is an evil to be avoided, and believes that a multi-member commission is the best way to address this risk.

As Professor Rachel E. Barkow of NYU Law School recently noted, "having only one person at the apex can . . . mean that the agency is more easily captured."[2] The reason is simple and obvious: it is much easier for an interest on one side or the other of an issue to capture one person than five people—particularly if those five have diverse viewpoints and political leanings. A multi-member commission further protects against the threat of capture by embedding an early warning system into the fabric of the agency's governance. A dissent against questionable agency action, which by definition cannot occur when a single director is in charge, can alert Congress and the public that the agency is off course and merits closer scrutiny.

D. H.R. 1121 would ensure continuity and stability.

Enactment of H.R. 1121 would also facilitate continuity and stability in the Bureau's regulatory approach. Agency heads gain experience and effectiveness as they accumulate years on the job and develop familiarity with the regulated industry and the agency's personnel and practices. This process of acculturation and education is particularly important in the context of the Bureau, which has a vast regulatory mandate—including authority over many parts of the economy outside the financial services sector.

New directors are unlikely to have deep familiarity with all aspects of the regulatory environment. Yet, as the Bureau is currently structured, all of the accumulated knowledge gained by the Director during the course of his or her tenure will be lost upon departure. The result will almost inevitably be discontinuity and an extended period of agency drift while the new appointee settles in and gets up to speed on the issues. Moreover, if a vacancy coincides with a different party assuming the Presidency, the departure of the incumbent director will likely lead to significant substantive policy shifts. In particular, there is a risk that a new Administration unenthusiastic about the agency's mission could undermine its effectiveness through a single appointment.

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[1] Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. 1, 99 n.325 (2008).

[2] *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 38 (2010).

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

Some have raised the concern that a commission structure will lead to gridlock if stalled confirmations render the CFPB unable to act. But H.R. 1121 is drafted to alleviate any such concern. It makes clear that "[n]o vacancy in the members of the Commission shall impair the right of the remaining members of the Commission to exercise all the powers of the Commission." It further provides that one member would serve as an initial quorum until more than two members have been appointed, and that thereafter two members shall constitute a quorum any time the commission's membership drops to three or two members (although, in the latter case, the quorum will only last for six months). Moreover, the bill would provide that each member of the CFPB Commission may continue to serve for up to one year after the expiration of his or her term of office, or until a successor has been appointed. Thus, H.R. 1121 ensures that vacancies will not impair the ability of the CFPB Commission to function effectively.

2. H.R. 1315—"Consumer Financial Protection Safety and Soundness Improvement Act of 2011"

H.R. 1315 would reduce the vote necessary to overrule CFPB regulations from a two-thirds supermajority of the FSOC's voting membership to a simple majority, and would exclude the CFPB Director from participating in that vote. Thus, the number of members necessary to overturn a rule would be reduced from seven to five. The bill also would lower the substantive standard necessary for the FSOC to overrule CFPB regulations to a finding that the rule is "inconsistent with the safe and sound operations of United States financial institutions." And it would require, not just authorize, the FSOC to act when that standard is met.

The Chamber supports H.R. 1315 because it would enhance the FSOC's ability to serve as a critical check on unsound CFPB rulemaking that threatens the safety and soundness of any segment of our financial system. Even if Congress replaces the current single-director structure with a multi-member Commission, the need remains for the agencies charged with prudential regulation to have an effective mechanism for ensuring that the Bureau's rules do not threaten the health of U.S. financial institutions. Moreover, the bill's requirement for the FSOC's members to take action any time the Bureau's regulations are inconsistent with safety and soundness would ensure intervention when it is warranted.

Some have raised the objection that effective regulation of consumer finance is necessarily incompatible with safety and soundness regulation and that, as a result, the FSOC would routinely overturn CFPB rules if H.R. 1315 is enacted. That simply is not true. CFPB regulations that help consumers make better borrowing decisions by promoting useful and cost-effective disclosures will bolster, not undermine, the health of financial institutions, and therefore will face little risk of an FSOC veto. Likewise, the agencies charged with prudential regulation should have no objection to regulations that address in an effective and targeted manner the actual deception and exploitation of consumers by unscrupulous lenders. Even if such wrongful activities provide a short-term boost to bank profitability, they are necessarily inconsistent with any proper understanding of safety and soundness. .

Nonetheless, the danger that the Bureau will act on the assumption that its mandate is at odds with that of the prudential regulators is precisely why a robust FSOC review process is so necessary. There is no reason to think that the prudential regulators will not, in the context of FSOC deliberations, defer to the CFPB in determining what is best for the consumers of financial products. But if every prudential regulator opposes a proposed regulation on safety and soundness grounds, that regulation should not stand, and a majority requirement based on a vote of nine of the FSOC's members would ensure that result.

Some also have voiced doubts about the constitutionality of the FSOC review mechanism, citing the Supreme Court's decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S.Ct. 3138 (2010). Any such concern is baseless. The Court held in *Free Enterprise Fund* that a "multilevel protection from removal"—entailing a restriction on the President's ability to remove a principal officer, who was in turn restricted in his ability to remove an inferior officer—was "contrary to Article II's vesting of the executive power in the President." 130 S.Ct. at 3147. The case has nothing to do with the situation here, where the President has the direct authority to remove the CFPB Director. The President also has the direct authority to remove each of the FSOC's members, all of whom thus are subject to a constitutionally adequate level of control in exercising their review authority over CFPB rules. The constitutional objection is a red-herring, and this Subcommittee should not permit it to distract from the important policy issues that are at stake.

Finally, I would point out that H.R. 1315 does not address the Dodd-Frank Act's failure to allow the FSOC to intervene when the Bureau takes **enforcement** action that threatens safety and soundness. Professor Warren has already explained that the Bureau will not be adopting a "rules-based approach" to regulation. That means a heavier reliance on enforcement, and enforcement actions meant to establish broad guidance can impinge on safety and soundness, just as regulations can. The Chamber urges the Committee to consider modifying the bill to address this loophole.

3. H.R. 1667—"The Bureau of Consumer Financial Protection Transfer Clarification Act"

H.R. 1667 would delay the transfer of consumer protection functions to the CFPB until the confirmation of a Director. The Chamber agrees that consumer protection functions should remain with their existing agencies until the leadership of the CFPB (in the form of the first member of a multi-member Commission) has been confirmed. Section 1066(a) of the Dodd-Frank Act authorizes the Secretary of the Treasury to perform the CFPB's functions until the appointment of a Director. The Inspectors General of the Treasury and the Federal Reserve System have expressed the view that this provision authorizes the Secretary to exercise those consumer protection functions transferred to the CFPB on the designated transfer date. We believe that the existing agencies are the more appropriate repositories for these significant powers until the CFPB has Senate-confirmed leadership.

IV. CONCLUSION

Well-regulated, transparent, efficient capital markets are the lifeblood of the American economy. Both businesses and consumers will benefit from the right reforms, which include ensuring regulators are structured to function effectively and are required to work well together. The CFPB is no exception to this. We urge Congress to work on a bi-partisan basis to ensure we have transparent, accountable, and effective regulators.

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