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U.S. CHAMBER OF COMMERCE

Statement of the U.S. Chamber of Commerce

**ON: Uncharted Territory: What are the Consequences of President Obama's
Unprecedented "Recess" Appointments?**

TO: The House Committee on Oversight and Government Reform

DATE: February 1, 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 Issa, Ranking Member Cummings, and members of the Committee:

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.

On January 4 of this year, notwithstanding the fact that the Senate was in session on January 3 and again on January 6, President Obama invoked his recess appointment power under the United States Constitution to install Richard Cordray as the first director of the CFPB. The same day, the President also recess appointed Sharon Block, Terence F. Flynn, and Richard Griffin to fill vacant seats on the National Labor Relations Board.

This was an unprecedented exercise of the recess appointment power. There is a strong argument that these actions violate the Constitution and that, as a result, the appointments are invalid.

My testimony will address the adverse consequences that will result from a judicial finding of unconstitutionality. Invalidation of the appointment of the CFPB Director would have very significant adverse consequences, because it would lead to the invalidation of virtually all of the Bureau’s actions since January 4, resulting in:

- serious gaps in consumer protection;

- a complete lack of certainty regarding the rules that businesses should follow; and
- infliction of substantial additional costs on business.

Finally, the burden imposed by the current uncertainty, and the very real possibility of the wholesale invalidation of the Bureau's actions, is magnified considerably by the huge challenges that the Bureau faces in exercising its power to protect consumers without gratuitously harming economic growth.

I. CONSEQUENCES OF A COURT DECISION HOLDING THE RECESS APPOINTMENT OF THE CFPB DIRECTOR UNCONSTITUTIONAL .

Very significant adverse consequences will follow from a judicial determination that the appointment of the Bureau's director violated the Constitution. Actions taken by the Bureau to protect consumers will be invalidated; and expenditures made by businesses to comply with now-invalid rules or enforcement results will have been wasted, because legally-valid standards adopted in the future could require different actions.

Most importantly, ***even regulatory acts that would have been lawful and enforceable if the President had not acted will instead be invalid because of the President's decision to make the recess appointment.***

To begin with, there can be no doubt that if the courts find that the President's appointment violated the Constitution, every act taken by the Director will be subject to invalidation on this basis. That has been the consequence of the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*,¹ which held that the Labor Board lacked the power to act when it consisted of only two members. As the dissenting Justices observed, the effect of the Court's ruling was to invalidate more than 500 decisions.²

Of course, there may be some acts that are not susceptible to challenge in court because they do not affect private parties. But any act that affects a private party can

¹ 130 S.Ct. 2635 (2010).

² 130 S.Ct. at 2645; *see also* *NLRB v. Talmadge Park*, 608 F.3d 913 (2d Cir. 2010) applying *New Process Steel* in refusing to enforce decision).

be set aside, and it seems likely that litigation will be brought in all, or virtually all, such circumstances.³

The starting point in understanding the consequences of an unconstitutional recess appointment—in terms of the scope of actions that will be invalidated—is the fact that the Secretary of the Treasury was empowered to—and was—exercising a substantial part of the Bureau’s authority prior to the appointment of the Director. As the Committee is aware, Section 1066(a) of the Dodd-Frank Act states, “The Secretary is authorized to perform the functions of the Bureau under this subtitle until the Director of the Bureau is confirmed by the Senate in accordance with section 1011.”

The Inspectors General of the Federal Reserve and Department of the Treasury have explained that this provision permitted the Treasury Secretary to exercise the subset of the Bureau’s authority referred to in subtitle F of title X of the statute.⁴ That included:

“the authority to

- prescribe rules, issue orders, and produce guidance related to the federal consumer financial laws that were, prior to the designated transfer date, within the authority of the Board, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the National Credit Union Administration;
- conduct examinations (for federal consumer financial law purposes) of banks, savings associations, and credit unions with total assets in excess of \$10 billion, and any affiliates thereof;
- prescribe rules, issue guidelines, and conduct a study or issue a report (with certain limitations) under the enumerated consumer laws that were previously within the authority of the Federal Trade Commission (FTC) prior to the designated transfer date;

³ Numerous other precedents demonstrate the availability of such relief. *See, e.g., Ryder v. United States*, 515 U.S. 177, 182-83 (1995); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 & n.6 (D.C. Cir. 1993); *Olympic Federal Savings and Loan Association v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183 (D.D.C. 1990).

⁴ Letter to The Honorable Spencer Bachus, Chairman, Committee on Financial Services, and The Honorable Judy Biggert, Chairman, Committee on Financial Services, Subcommittee on Insurance, Housing and Community Opportunity at 5-7 (Jan. 10, 2011) (“January 10 Letter”).

- conduct all consumer protection functions relating to the Real Estate Settlement Procedures Act of 1974, the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, and the Interstate Land Sales Full Disclosure Act that were previously within the authority of the Secretary of the Department of Housing and Urban Development prior to the designated transfer date;
- enforce all orders, resolutions, determinations, agreements, and rulings that have been issued, made, prescribed, or allowed to become effective prior to the designated transfer date by any transferor agency or by a court of competent jurisdiction, in the performance of consumer financial protection functions that are transferred to the Bureau, with respect to a bank, savings association, or credit union with total assets in excess of \$10 billion, and any affiliates thereof; and
- replace the Board, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Department of Housing and Urban Development in any lawsuit or proceeding that was commenced by or against one of the transferor agencies prior to the designated transfer date, with respect to a consumer financial protection function transferred to the Bureau.”

January 10 Letter, at 5-6. The IGs are clear that the Secretary’s authority did not include the Bureau’s “newly—established federal consumer financial regulatory authorities.” *Id.* at 6; *see also id.* at 7 n.4.

Prior to the President’s January 4 action, actions taken in the Bureau’s name referenced the Treasury Secretary’s authority and, presumably, were approved by the Secretary or his designee exercising this authority.⁵ Their legality accordingly did not turn on the presence or absence of a Director.

Now, by contrast, all of the Bureau’s actions will be taken on the Director’s authority. If that authority is held illegal, all of those actions—those that previously could have been taken under the Treasury Secretary’s Section 1066(a) authority, as well as those that could not—will be invalid.

⁵ *E.g.*, 76 Fed. Reg. 45168 n.1 (2011); 76 Fed. Reg. 44226, 44229 n.27 (2011).

Thus, regulations issued under statutory authority that predated Dodd-Frank, which could have been promulgated lawfully under Section 1066(a), will now be invalid because they were approved by the Director. That conclusion applies to the remittance rule that the Bureau is scheduled to publish in the Federal Register on February 7, and that is to become effective on that date.

Another example is the proposed rule issued by the Federal Register last April under the Truth in Lending Act, required by the Dodd-Frank Act, that would require creditors to determine a consumer's ability to repay a mortgage before making the loan and would establish minimum mortgage underwriting standards.⁶ That rulemaking responsibility has now been transferred to the Bureau, and—because of the President's action—if and when the Bureau issues a rule, that rule will be subject to invalidation on grounds of the Director's lack of authority. The same is true of every single rulemaking that the Bureau undertakes pursuant to statutory authority that pre-dated the Dodd-Frank Act.⁷

In addition, of course, any actions taken pursuant to the Bureau's new authority will be subject to automatic invalidation by the courts. That includes any rules issued pursuant to authority conferred by the Dodd-Frank Act and any enforcement or supervisory actions taken with respect to non-bank entities.

This will produce a number of very substantial adverse consequences.

First, serious gaps in consumer protection. Everything that the Bureau does from January 4 forward will be invalidated—punishments imposed on fraudsters will be overturned; new regulations designed to protect consumers will be null and void. Actions that could have been accomplished lawfully—by the Bureau alone or the Bureau working in tandem with the FTC and other agencies—will be sent back to square one. In the meantime, to the extent those actions were necessary to shield consumers from harm, consumers will be left unprotected.

Second, businesses that have expended valuable resources complying with rules adopted by the Bureau or with principles announced by the Bureau in enforcement actions will face a complete lack of certainty regarding the rules applicable to their behavior. Should they comply with the rules that applied prior to the Bureau's action? Should they comply with the Bureau's standards notwithstanding their invalidation?

⁶ 76 Fed. Reg. 27390 (2011).

⁷ The Bureau has indicated its intention to issue a number of rules pursuant to these statutory authorities. See Fall 2011 Regulatory Agenda, available at http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET-_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3170.

Third, any change in the standards due to invalidation of the Bureau’s actions will impose new costs on business—and mean that the funds expended to comply with the Bureau’s rules or enforcement standards were effectively wasted. Given our economic situation, subjecting business to the potential waste of these significant resources, resources that could have been used to create new jobs, is simply intolerable.

II. SIGNIFICANT CHALLENGES FACING THE BUREAU.

Although the focus of today’s hearing is the uncertainty and other harm as a result of the President’s recess appointments, I would be remiss if I failed to bring to the Committee’s attention to the uncertainty for businesses that has been created by the CFPB already, independent of the recess appointment, and the very significant challenges that the Bureau faces in carrying out its mission.

There is a “right way” for the Bureau to go about its work—establishing rules for business that are clear, consistent, and innovation-friendly, and under which the choices for consumers and small businesses are transparent and robust; and a “wrong way” for the Bureau to conduct itself that could lead to duplicative or even contradictory layers of regulation for already struggling businesses, and a contraction in the availability of credit, for both consumers and small businesses. Following are some key challenges that the Bureau is confronting.

- *Simplifying Disclosure*

One of the most widely-recognized problems in consumer protection today is the confusing, overlapping, and often inconsistent disclosure obligations imposed by various federal and state laws. Rather than giving consumers the information they need to make informed decisions, the current regulatory regime more often hides the most important information in a forest of forms and jargon. These rules also may make it difficult for businesses to include in their agreements the provisions necessary to spell out intelligibly both parties’ obligations. The Chamber supports the Bureau’s efforts to improve disclosure and seek industry input. Of course, disclosure obligations cannot and should not be used as a means to prevent inclusion within a contract of the necessary and appropriate provisions defining the terms of a transaction, including alternative dispute resolution provisions that are permitted under applicable state and federal laws—provisions that repeatedly have been shown to reduce cost and increase consumers’ ability to obtain fair resolution of their complaints.

The Bureau has been engaged in informal processes to identify potential approaches to changing current disclosure obligations in the mortgage and credit card contexts. Informal consultations prior to initiating a rulemaking are often useful in setting the stage for the legally-required rulemaking process, but it is important to recognize that they cannot substitute for that process, which provides important procedural protections for all interested parties. For example, the Bureau has not made public the comments received in the course of its informal outreach, but all comments received in a rulemaking process are publicly available, and the Bureau will be obligated to provide reasons for its decision, including a response to issues raised by the comments.

Moreover, there is always a risk—given the very substantial discretionary authority that a regulator exercises over regulated companies—that individual companies asked to engage in informal discussions will feel pressured to accede to the regulator’s proposals, for fear of being identified publicly as “anti-consumer” or subjected to more intensive regulatory scrutiny. In reforming disclosure standards, therefore, the Bureau should, and must, conduct a rulemaking proceeding that exposes its proposals to broad and searching public comment and consideration, as well as unbiased evaluation by the Bureau itself, and that is not designed merely to ratify quickly the results of its informal processes.

In addition, as discussed below, the Bureau has special obligations to identify and address potential impacts on small business, but—as far as the Chamber is aware—it has not done so in connection with its informal discussions regarding changes in disclosure. That is a significant omission, because small businesses are the least likely to be able to devote resources to monitoring and participating in agencies’ informal deliberations. The Bureau should initiate these processes in connection with its informal consultation, and not wait until the formal rulemaking process begins.

- *Avoiding Substitution of Uncertainty for Currently-Clear “Rules of the Road”*

The business community is eager to comply with Federal consumer financial protection laws, but the transfer of so much existing authority to a new regulator can lead to new, and very different, interpretations of long-established standards. In addition, the CFPB has the authority to define new terms such as “abusive” for which there is no established body of law. The combined effect is substantial uncertainty about how new and shifting standards will affect legitimate transactions engaged in by companies seeking to comply fully with the law. The CFPB can help by making it clear that existing standards remain in place, including sub-regulatory guidance and opinion letters, until new standards are promulgated to replace them. New terms, like “abusive” should not be used in an enforcement context until the CFPB has clearly

defined what the term means. Companies want to comply with the law, but the CFPB must be clear about expectations rather than engaging in “gotcha” enforcement during this transition period.

- *Preserving Credit Availability and Choice for Consumers and Small Businesses*

Products and services that are marketed through the use of fraud and other deceptive practices are worthy targets for the CFPB, and their elimination benefits both consumers and legitimate competitors in the marketplace. However, the CFPB must be careful not to use that broad authority to ban legitimate products or services, or features of legitimate products, simply because it does not understand or favor them.

Consumers and small businesses rely on consumer credit products and services, and one of the key strengths of our credit markets is the abundance, and diversity, of legitimate products and services that fit needs of all kinds. Recognizing the importance of consumer choice, Congress specifically prohibited the Bureau from requiring businesses to offer products with characteristics specified by the Bureau—for example, so called “plain vanilla” products. Thus, while the Bureau can and should ensure that consumers have the facts they need to make informed decisions, it should not make those decisions for consumers by requiring the offering of some financial products and prohibiting the offering of others. The credit market will remain vibrant only if informed consumers are free to make those decisions for themselves.

To take just one example, attempting to regulate interest rates or the availability of particular products or services through the use of the “abusive” authority would clearly violate Congress’s intent—and would harm consumers and small businesses. The diversity of our credit markets is an economic strength, not a liability, and an attempt to regulate away useful consumer options where there is no taint of fraud would injure, not protect, the public.

- *Focusing Enforcement Activity on Fraudsters*

The Bureau has considerable discretion in determining how to exercise its enforcement authority. The Bureau should focus first on instances of clear, unadulterated fraud. Not only does fraud harm consumers, but – as you have repeatedly pointed out – it harms legitimate businesses that may lose customers to fraudsters and, possibly, have their reputations tarnished because the marketplace

finds it difficult to distinguish between their products and services and those tainted by fraud.

There is always a temptation to use enforcement powers “innovatively,” especially powers that are as broad as the Bureau’s. Enforcement actions typically command larger headlines, and – especially when enforcement targets are subject to regulation as well – those named as respondents feel considerable pressure to settle rather than incur the regulator’s enmity by contesting the charges. And once one company “knuckles under” in an enforcement action, other regulated businesses feel even more pressure to “fall in line.” Enforcement therefore can be an easy way to impose very significant regulatory changes while avoiding public comment, cost/benefit analysis, small business panels, and judicial review.

The Bureau must resist this temptation. There is more than enough real, undisputed fraud – especially in these tough economic times – to engage the Bureau’s enforcement resources. And in light of the very significant adverse consequences that would result from regulatory overreach – in terms of contraction of credit and, therefore, loss of jobs – the Bureau’s decision-making with respect to extensions of settled principles must be based on the broad record that is produced through a public rulemaking.

- *Reducing Regulatory Burden through Consolidation and Coordination*

Those who advocated creation of the CFPB argued that the new agency would consolidate regulatory and enforcement functions spread across numerous Federal agencies and statutes. By bringing together disparate elements under one roof, they asserted, the CFPB would increase the Federal government’s focus on consumer financial protection, and also reduce duplication and increase the efficiency of the government’s work in this area. In fact, however, very substantial overlap still exists between the CFPB, Federal agencies, and state regulators and state Attorneys General – overlap that can lead to duplicative or even conflicting approaches.

For example, the Act requires the Bureau to issue rules regarding coordination with State enforcement efforts and authorizes the Bureau to provide guidance to coordinate enforcement with State AGs and other regulators (Section 1042(c)). But the interim rules that the Bureau has issued simply require state officials to inform the Bureau of their actions; they provide no mechanism for promoting consistent, nationwide interpretations of the statutory and regulatory requirements.

The Chamber filed comments in response to the interim rule urging that the rules be revised to require the Bureau to take action when it determines that a state

official has proposed an interpretation of federal law not consistent with the Bureau's view. Such an approach is essential to avoid the fragmentation of our national credit market as a result of the application by different State AGs of inconsistent legal standards. The Chamber also recommends that the Bureau consider establishing an office or otherwise designating staff within the Bureau that will have authority and responsibility for monitoring and coordinating the activities of State AGs.

The Act also requires the Bureau to negotiate an agreement with the FTC to coordinate enforcement activities (Section 1024(c)(3)). That agreement has now been released. Although it meets the technical statutory requirement of requiring coordination with respect to contemplated investigations, it does not address the very significant real-world problem that the agencies' overlapping jurisdiction creates: businesses wanting to ensure that their conduct conforms to the law now must obtain guidance from two federal regulators, rather than one (and, in addition, worry about the possible conflicting interpretations of more than 100 state officials).

The Chamber filed comments suggesting that the agencies allocate to the Bureau responsibility for providing informal guidance to companies principally engaged in the financial services business and allocate to the FTC responsibility for providing informal guidance to all other businesses (*i.e.*, companies that are principally engaged in other lines of commerce that are subject to the Bureau's jurisdiction because of peripheral engagement with respect to consumer financial products or services). The agencies could coordinate among themselves to ensure that all informal guidance issued is consistent with the views of both agencies.

The Chamber does applaud the Bureau's decision to seek the public's input regarding regulations that are "outdated, unnecessary, or unduly burdensome..." The Chamber is hopeful that the CFPB will carefully consider the comments it receives, and that this process will yield tangible reductions in regulatory burden.

- *Using Examination Authority Effectively*

The Bureau has embarked upon examinations of banks, and announced plans to exercise its examination authority with respect to non-bank institutions. Examination is most effective when it is not an adversarial process—examination is not litigation – and the Chamber hopes that the Bureau will follow that approach in its examinations.

One important challenge that the Bureau will face relates to the protection of the attorney-client privilege in the examination process. Federal law makes clear that provision of privileged information to bank regulators does not waive the privilege.

The Bureau's General Counsel has issued a bulletin explaining why the same standard applies when privileged information is provided to the Bureau. As Director Cordray has recognized, however, it would be best to extend the statutory protection rather than relying simply on the Bureau's analysis.

- *Basing Regulatory Decisions on Credible Empirical Evidence*

Various officials associated with the Bureau have repeatedly stated that the Bureau's decisions will be "data-driven." The Chamber applauds that approach. Too often, government agencies act on the basis of anecdote rather than a well-grounded factual analysis.

But the Chamber is concerned that the Bureau's words may not be reflected in its actions. With some frequency, posts on the Bureau's blog seem to be based on newspaper articles or "studies" that, upon examination, fall far short of any possible standard of credibility. While blog posts are not rules or enforcement actions, the pronouncements of regulators – even informal pronouncements – can have significant impact. The Chamber urges the Bureau to apply to these informal written statements the same rigor that it has said it will espouse for its more official undertakings.

- *Focusing on Rigorous Cost-Benefit Analysis and Assessing Small Business Impact*

Given the broad scope of the Bureau's jurisdiction and rulemaking and enforcement authority, any rules that the Bureau promulgates and enforcement decisions that the Bureau makes will affect a large number of companies that are not engaged principally in the provision of financial services. Many of these are small businesses. In addition, as discussed above, small businesses are very substantial users of consumer credit products and services.

For these reasons, it is critical that the Bureau follow the President's Executive Order 13579, which asks independent agencies to apply the cost-benefit and other provisions of the Executive Order (Number 13563) directed to Executive agency rulemaking, and to strictly adhere to the particular process Congress prescribed for rule writing at the CFPB, which itself requires weighing of costs and benefits. In addition to preparing a full cost benefit analysis, the CFPB must also assess regulations' impact on consumers' access to credit, and must separately carefully assess the economic impact of its actions on small businesses through the procedures specified in the Small Business Regulatory Fairness Act (SBREFA). These businesses often will be situated differently from the financial services businesses likely to be the Bureau's

principal focus, and the CFPB must take steps to protect Main Street businesses against unnecessary, and unnecessarily burdensome, regulation.

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Thank you again for the opportunity to testify before the Committee today. I look forward to answering your questions.

ANDREW J. PINCUS

Andrew Pincus, a partner in the Mayer Brown LLP's Washington, D.C. office, focuses his law practice on briefing and arguing cases in the Supreme Court of the United States and in federal and state appellate courts, as well as on developing legal arguments in trial courts.

Mr. Pincus has argued 23 cases in the Supreme Court, four of them in the 2010 and 2011 Terms, including *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011). For his victory in *Concepcion*, he was named Litigator of the Week by the American Lawyer and Appellate Lawyer of the Week by The National Law Journal. Mr. Pincus has filed briefs in more than 150 cases in the Supreme Court.

Since 2006, he has been co-director of the Yale Law School Supreme Court Clinic, which provides pro bono representation in 10-15 Supreme Court cases each year.

Mr. Pincus served as General Counsel of the United States Department of Commerce from 1997-2000, and as an Assistant to the Solicitor General in the United States Department of Justice from 1984-1988.

He received his J.D. from Columbia University School of Law, where he was Notes & Comments Editor of the *Columbia Law Review* and a James Kent Scholar and Harlan Fiske Stone Scholar. He received his B.A. *cum laude* from Yale University.

Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name: Andrew J. Pincus

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2009. Include the source and amount of each grant or contract.

None.

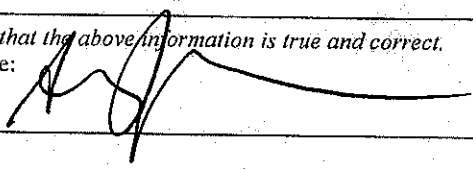
2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

U.S. Chamber of Commerce. I am counsel to the Chamber.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2008, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None.

I certify that the above information is true and correct.

Signature: 

Date:

1/31/2012

Andrew J. Pincus