Statement of the U.S. Chamber of Commerce

ON: "Legislative Proposals to Reform the Consumer Financial Protection Bureau"

TO: The House Subcommittee on Financial Institutions and Consumer Credit

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The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing 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.

My name is Jess Sharp and I am managing director for the Center for Capital Markets Competitiveness at the U.S. Chamber of Commerce. Thank you for the opportunity to testify before the Subcommittee today on behalf of the hundreds of thousands of businesses that the Chamber represents.

The Chamber firmly 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. Legitimate businesses, as well as consumers, benefit from a marketplace free of fraud and other deceptive and predatory practices.

But consumer protection, like every other government function, must be carried out in a fair, transparent manner consistent with the principles embodied in the Constitution. And consumer protection goals can be achieved only if an agency's organizational structure promotes rather than frustrates a consistent, effective approach to regulatory and enforcement issues.

The Consumer Financial Protection Bureau fails these basic tests. The CFPB's structure differs fundamentally from every other federal agency that regulates private individuals and businesses. It lacks the accountability and checks and balances that are at the core of our democracy, as well as the mechanisms long recognized as essential for effective regulation.

The CFPB's structural problems are not simply fodder for a debate among constitutional scholars. The Bureau's structural isolation is creating, and will continue to create, adverse consequences for the business community and its customers.

Structural reforms, such as those specified in the bills now before the Subcommittee, are urgently needed to align the Bureau's structure with long-settled basic concepts reflected in every other federal regulatory agency and eliminate the significant adverse consequences being visited upon consumers, businesses, Congress, and the American people. The CFPB can only further its important consumer protection goals if the Bureau's structure is changed to incorporate the controls and oversight that apply to other federal regulatory agencies.

NEED FOR ACCOUNTABILITY AND CHECKS AND BALANCES

Our federal government rests on two fundamental principles: accountability to the people—either directly through elections or indirectly through accountability to the people's elected representatives—and checks and balances—sharing of authority and oversight of those exercising authority in order to prevent abuse of that authority.

Moreover, rulemaking and enforcement, in order to be effective and consistent with a sound economy, must be well-considered, evidence-based, and carefully calibrated. Agencies, even those established with the best of intentions, can over time abandon sound regulatory principles if structural protections against politicization and regulatory "tunnel-vision" are not put in place.

Aware of this inherent risk, Congress has historically subjected all federal agencies, including independent regulators, to a system of checks and balances that ensures their accountability and fidelity to law. The need for these traditional constraints is particularly acute in an area as fundamental to the health of the American economy as consumer finance. Americans can ill-afford government action that imposes unjustified regulatory costs on lending institutions and, perhaps even more importantly, prevents businesses from obtaining the credit to expand and to create the new jobs that our economy so desperately needs.

THE CFPB'S UNIQUE CURRENT STRUCTURE AND EXTREMELY BROAD AUTHORITY

The CFPB's structure is unprecedented:

- Independent regulatory agencies typically are headed by a multi-member bipartisan commission whose members serve for fixed terms. That is the structure of the Federal Trade Commission, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal Communications Commission, and numerous other agencies.

  The Bureau, by contrast, is headed by a single director with tenure protection and a five-year fixed term. Although located formally within the Federal Reserve, the Bureau is completely insulated from the Federal Reserve's supervision and control.

  In addition, because the Bureau's Director serves for a fixed term and can be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office" (Dodd-Frank, Section 1011(c)(3)), and because the Bureau's rulemaking process is insulated from review by the Office of Management and Budget, the President cannot exercise any control over the Bureau's decisions. This is especially problematic because the Director's five-year term necessarily will exceed the term of the President who appointed him, and could in many cases extend into the term of a new President with very

different policy views, but there is nothing at all that the President can do to affect the actions of the CFPB.

- The Bureau also is exempt from the congressional budget process. It is funded by a transfer of money from the Federal Reserve to be spent as the Director decides in his sole discretion—these decisions are not subject to reversal or alteration in any way by the Congress, the Office of Management and Budget, or the President—subject only to a statutory cap. That cap, which is indexed for inflation, is approximately $597 million for FY 2013 and $608 million for FY 2014. (By comparison, the Federal Trade Commission is *seeking* an appropriation of approximately $300 million in FY 2014, a *decline* of more than $10 million from its FY 2013 request.)

There is no other government official who serves for a fixed term, exercises sole authority over an agency, and has sole power to spend hundreds of millions of dollars outside the congressional appropriation process. To be sure, some regulators—for example, the Office of the Comptroller of the Currency and the Federal Housing Finance Agency—have single directors. And members of the commissions heading independent regulatory agencies generally serve for fixed terms. And a very few agencies are funded outside the appropriations process. But there is no other entity in the federal government that combines all of these features.

Some have pointed to the OCC, the Federal Reserve, and the FDIC as precedents for the Bureau's structure, but the significant contrast between those entities and the Bureau in fact shows how radically the Bureau's structure deviates from established practice. The OCC is part of the Treasury Department, and the Comptroller serves at the pleasure of the President. He is thus politically accountable in a way that the Director of the Bureau simply is not. And while banking regulators such as the Federal Reserve and the Federal Deposit Insurance Corporation are outside the budget process, they have bipartisan, multi-member leadership, and thus are subject to the protection provided by collective decision making, a protection that simply is not present when a single director makes the decisions.

The combination of these features—producing a single Director with essentially complete independence with respect to substantive decision making as well as budgeting and spending—renders the Bureau virtually immune from the checks and balances that normally guide and constrain agency action.

Moreover, the regulatory and enforcement authority exercised by the Director is extraordinarily broad. The Bureau's reach is not limited to banks and other financial service businesses. It has the power to regulate a number of products and

services that are common sources of financing for Main Street businesses and in some cases to regulate the service providers to those companies. And it has a very broad standard to enforce—the prevention of "unfair, deceptive, or abusive acts or practices" in the market for consumer financial products. While unfair and deceptive practices have been proscribed for years with decades of case law to guide compliance and enforcement, the new "abusive" standard gives the opportunity to try to expand its power much more broadly.

While it is true that a two-thirds majority of the ten-member Financial Stability Oversight Council will be able to overturn CFPB regulations in certain circumstances, there are a number of reasons why that review is unlikely to meaningfully constrain the Bureau's authority. First, the FSOC veto applies only to rules, not enforcement actions, and the CFPB has made it clear it prefers to operate outside the rulemaking process. 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. 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, National Credit Union Administration, and Federal Housing Finance Agency—would not suffice. Yet these are the entities responsible for ensuring the safety and soundness of the U.S. banking system. Finally, it should be remembered that the Bureau's Director is one of the FSOC's ten members, rendering it even harder to obtain the necessary two-thirds majority when the Bureau's own rules are at issue.

In sum, the Bureau's current structure places more unreviewable power in the hands of a single unelected official than any other federal regulatory law.

CONSEQUENCES OF THE DIRECTOR'S BROAD, UNREVIEWABLE AUTHORITY

Now that the Bureau has become fully operational, the adverse consequences of this unprecedented structure are no longer theoretical—they are all too real, reflected in a variety of actions taken by the CFPB. For example:

- <u>Lack of Transparency</u>

  Defenders of the Bureau's current structure frequently argue that the Bureau is subject to "unprecedented" oversight, pointing to appearances of Bureau personnel at congressional hearings, the Bureau's semi-annual report, and the Bureau's budget justification, among other things. But the number of hearing

appearances and reports is irrelevant if little or no information is conveyed in the testimony and documents. That unfortunately is the case with the CFPB:

- One example is the Bureau's response to the recent inquiries about its credit card data collection program. As the Subcommittee is well aware, the CFPB's testimony in this area has been confusing and even contradictory. Sometimes the program is justified as a research and regulatory tool, and other times it is characterized as a supervisory tool. The distinction is important because different transparency and other standards apply depending on the authority used, but either way, the law requires much more transparency than we've seen from the Bureau.

  To this day, despite multiple congressional appearances, the Bureau has never publicly explained the legal justification for the collection; identified the information being collected, the number of companies targeted, and the reasons for singling out particular companies for this burden (and whether similarly-situated companies are being treated similarly); discussed the reasons why the collection is necessary; responded to concerns about the security of the data; or addressed whether it plans to collect similar data regarding other types of consumer financial products or services. And the Bureau certainly has not explained why it believes that the benefits of collecting the data outweigh the costs being imposed on the affected companies.

- The Bureau's discussion of its budget and expenditures has been similarly opaque. Thus, the budget information released by the Bureau has been cursory—for example, just three pages for FY 2013 (the remainder of the "Budget Justification" document consists of a discussion of the CFPB's purpose and performance plan).[1] Agencies subject to the appropriations process typically provide much more detailed information to the public and an even greater level of detail to the relevant congressional appropriations subcommittees. Moreover, even the information in these "justifications" is not binding on the CFPB. The FY 2014 Budget Justification includes a new item for FY 2013—$95 million for improvements to the Bureau's Washington headquarters building. Here is the complete description for this large expenditure:

[1] *See* CFPB, *Budget Justification FY 2013*, available at http://files.consumerfinance.gov/f/2012/02/-budget-justification.pdf.

> "As the headquarters building has not undergone significant renovation since it was constructed in 1976, the CFPB has initiated a capital improvement plan designed to meet workplace and energy-efficiency goals, including upgrades to the building infrastructure; replacement of aging mechanical and electrical systems, which have reached the end of their lifecycle; installation of energy-efficient lighting and structures; and repair of the parking garage decks, sidewalks and public spaces.
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> "The stages prior to actual construction include completing the final design phase; initiating the procurement and selection of a construction firm; determining the phasing of construction and the associated interim moves required; and developing detailed drawings."[2]

Agencies subject to the congressional appropriations process are required to provide appropriations subcommittees with much more information regarding capital expenditures of this sort.[3]

- <u>Failure to Create Clear Rules of the Road that are Essential for Effective Compliance Programs</u>

  Businesses want to comply with applicable government regulations, but they need the government to set clear rules, so that they can be incorporated into compliance programs.

  However, rather than following the notice and comment rulemaking process (except when explicitly required to do so by Congress) the CFPB prefers to set standards through enforcement actions and brief guidance memos, which provide businesses with little ability to implement effective compliance programs.

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[2] CFPB, *The CFPB Strategic Plan, Budget, and Performance Plan and Report* 12-13 (April 2013), available at http://files.consumerfinance.gov/f/strategic-plan-budget-and-performance-plan-and-report.pdf. The FY 2013 estimate also includes another $9 million in expenditures compared to the amount set forth in the original FY 2013 budget justification.

[3] Placing the entire $95 million expenditure in FY 2013 creates the impression that the Bureau's FY 2014 budget contains a significant reduction in expenditures. But with the building project excluded, FY 2014 expenditures are 9% higher than those projected for FY 2013. *Id.*

For example, the Bureau issued a bulletin regarding the relationships between consumer financial services companies subject to supervision by the CFPB and businesses that are service providers to such companies. The guidance stated that when a service provider violates an applicable law or regulation "[d]epending on the circumstances, legal responsibility may lie with the supervised [entity] as well as with the supervised service provider."[4] The Bureau stated that it expected consumer financial services companies "to have an effective process for managing the risks of service provider relationships," but provided only extremely general guidance regarding the elements of such a process (and specified that the required process "should include, but [is] not limited to" the general standards set out in the guidance).[5] This vague language provides no real information to companies wishing to exercise appropriate oversight of service providers and is already leading companies to limit the number of vendors they work with. The Bureau has declined to provide any additional information.

Similarly, the Bureau issued guidance regarding possible unfair, deceptive, or abusive practices in connection with debt collection. The guidance document included descriptions and examples of conduct that the Bureau deemed unfair and deceptive, but provided no guidance regarding the meaning of "abusive" other than simply reciting the statutory definition.[6] How can a company create a compliance program to prevent abusive conduct if the Bureau refuses to provide any guidance regarding the actions that meet that standard? If ever a term required a public notice-and-comment rulemaking process to establish a workable, transparent standard, it is "abusive," but the CFPB expects companies to do for themselves what the Bureau cannot itself do – define the term.

Finally, two separate letters from both Republican and Democrat members of the House Financial Services Committee have raised questions about the CFPB's actions with regard to indirect auto lending and compliance with the Equal Credit Opportunity Act. Members have asked for more information about the CFPB's methodology and the Bureau's apparent choice to create new legal standards that will fundamentally alter the economics of the market

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[4] *CFPB Bulletin 2012-03* (Apr. 13, 2012), available at http://files.consumerfinance.gov/f/-201204_cfpb_bulletin_service-providers.pdf.

[5] *Id.*

[6] *CFPB Bulletin 2013-07* (July 10, 2013), available at http://files.consumerfinance.gov/f/-201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.

through enforcement rather than through notice-and-comment rulemaking. Thus far, the Bureau has done nothing to clarify its approach.

URGENT NEED FOR REFORM

These serious adverse consequences are products of the concentration of unreviewable authority in the single Director. Transparency is essential when the support of others—most importantly Congress through the appropriations process—is needed to allow the exercise of government authority.

Moreover, the long-established model for federal regulatory agencies rests on the inescapable truth that decisions are more likely to be sound if they are the product of collaborative deliberation among individuals with diverse views, expertise, and backgrounds. Through discussion and compromise, the decision making of multi-member agencies tends toward intellectual rigor, impartiality, and moderation. Unsound regulatory determinations—such as decisions to regulate by creating uncertainty—are much more likely when one person makes all of the decisions and has no need even to consult, let alone forge a compromise with, others with whom he shares power that may differing views.

Action by Congress is needed to revise the CFPB's structure and thereby eliminate these adverse consequences:

- *First*, replace the single Director with a five-member bipartisan commission. That is the standard structure for independent federal agencies since the creation of the Interstate Commerce Commission in 1887. Today, almost all independent agencies follow that model, although some have three commissioners rather than five. And it would implement the basic provision regarding CFPB structure in the House-passed version of the Dodd-Frank legislation.

- *Second*, subject the Bureau's spending authority to the congressional appropriations process. The Bureau's lack of transparency in general and particular lack of responsiveness to Congress's inquiries—including the inquiries of members of this Subcommittee—is a direct result of the fact that the Bureau is free to spend more than $600 million dollars without congressional authorization.

CONCLUSION

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