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WHO'S WATCHING THE WATCHMEN? OVERSIGHT OF THE CONSUMER FINANCIAL PROTECTION BUREAU

HEARING

BEFORE THE

SUBCOMMITTEE ON TARP, FINANCIAL SERVICES AND BAILOUTS OF PUBLIC AND PRIVATE PROGRAMS

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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WHO'S WATCHING THE WATCHMEN? OVERSIGHT OF THE CONSUMER FINANCIAL PROTECTION BUREAU

TUESDAY, MAY 24, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TARP, FINANCIAL SERVICES AND
BAILOUTS OF PUBLIC AND PRIVATE PROGRAMS,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 1:16 p.m., in room 2247, Rayburn House Office Building, Hon. Patrick T. McHenry (chairman of the subcommittee) presiding.

Present: Representatives McHenry, Guinta, Buerkle, Amash, Gowdy, Issa (Ex Officio), Quigley, Maloney, Yarmuth, Speier, Cooper, and Cummings (Ex Officio).

Staff present: Robert Borden, general counsel; Katelyn E. Christ, research analyst; Benjamin Stroud Cole, policy advisor and investigative analyst; Drew Colliatie, staff assistant; John Cuaderes, deputy staff director; Adam P. Fromm, director of Member services and committee operations; Linda Good, chief clerk; Tyler Grimm and Ryan M. Hambleton, professional staff members; Peter Haller, senior counsel; Christopher Hixon, deputy chief counsel, oversight; Hudson T. Hollister, counsel; Jaron Bourke, minority director of administration; Jason Powell and Steven Rangel, minority senior counsels; Brian Quinn and Davida Walsh, minority counsels; Dave Rapallo, minority staff director; and Cecelia Thomas, minority counsel/deputy clerk.

Mr. MCHENRY. The committee will come to order.

The hearing today is Who's Watching the Watchmen? Oversight of the Consumer Financial Protection Bureau.

The committee is now in order. We make it a policy here on the Oversight and Government Reform Committee to read our mission statement.

We exist to secure two fundamental principles. First, Americans have a right to know that the money Washington takes from them is well spent; and, second, Americans deserve an efficient, effective government that works for them.

Our duty on the Oversight and Government Reform Committee is to protect these rights. Our solemn responsibility is to hold government accountable to taxpayers, because taxpayers have a right to know what they get from their government. We will work tirelessly in partnership with citizen watchdogs to deliver the facts to

the American people and bring genuine reform to the Federal bureaucracy.

This is the mission of the Oversight and Government Reform Committee.

I now recognize myself for 4 minutes for an opening statement.

Today's Oversight hearing underscores the role of the U.S. Congress to scrutinize the implementation and enforcement of key provisions of the Dodd-Frank Act. The Consumer Financial Protection Bureau, which is the brainchild of today's first witness, has been hailed by some as a much-needed regulatory authority to limit the risk of financial fraud. Yet others, myself included, are skeptical that the Bureau's creation, structure, and broad discretionary powers are warranted.

Nevertheless, Dodd-Frank is now the law of the land; and in a few short weeks the Bureau will become a powerful instrument in the hands of progressive regulators. Once fully operational, the Bureau will possess virtually unchecked discretion to identify financial products and services that the director determines to be "unfair, deceptive, or abusive."

To fund and execute this mandate, the law has granted the Bureau an unparalleled budgetary authority, free from congressional authorization and an unacceptable degree of autonomy, hidden from congressional oversight.

While we have yet to hit the date of transfer of authority to the Bureau, Congress has a responsibility to assess and the American people have a right to know the designs that Professor Warren has implemented in its creation. What controls are being created to protect the American people from abusive government power? We demand internal controls of companies. What internal controls govern the Bureau? What limits are being set to guard them from administrative overreach? In the absence of the normal checks and balances established by the Constitution, what guarantees do the American people have that the Bureau will behave responsibly, spend wisely, and regulate fairly?

Furthermore, in earlier testimony before the Financial Services Committee here in the House, Professor Warren asserted that the Bureau is "the most constrained and the most accountable agency in government." Yet the lofty promise of restraint and accountability seems to be backed by the highest appeal threshold in regulatory history.

In that same appearance, Professor Warren testified that the Bureau's role in ongoing mortgage settlement negotiations was limited to "advice." Furthermore, one of her staffers then e-mailed the press and defines the role and the quote of advice defined by Miriam Webster.

Since her testimony, however, Congress received evidence that Professor Warren and the Bureau were deeply involved in the negotiations. The emergence of the Bureau's "Settlement Presentation" and the fact that Professor Warren has been in dozens of meetings with Federal and State officials about these settlements raise concerns about the veracity of her earlier testimony.

This hearing, however, is not about a confirmation hearing for Professor Warren or a potential Senate race. This hearing is about the mission, policy, and structure that affect the creation and im-

plementation of the Bureau. It is also the need for critical oversight of an agency which has so vast oversight authority over large portions of the American economy. Simply stated, who is watching the watchmen?

The Constitution creates a government that protects the freedoms of the American people, not one that provides for them. It empowers the people through their elected officials, who are directly accountable to them, not a super-class of administrative elite. Protecting American consumers from abusive institutions and unaccountable authorities is the first priority of this committee and the U.S. Congress. Today, we will examine whether the key provisions of the Dodd-Frank Act serve this purpose.

With that, I yield 4 minutes to the ranking member, Mr. Quigley of Illinois.

[The prepared statement of Hon. Patrick T. McHenry follows:]

Rep. Patrick McHenry, Chairman
Subcommittee on TARP, Financial Services and Bailouts of Public and Private Program

Opening Statement
"Who's Watching the Watchmen? Oversight of the Consumer Protection Bureau."
May 24, 2011

Today's Oversight hearing underscores the role of the United States Congress to scrutinize the implementation and enforcement of key provisions of the Dodd-Frank Act.

The Consumer Financial Protection Bureau, which is the brainchild of today's first witness, has been hailed by some as a much-needed regulatory authority to limit the risk of financial fraud. Yet others, myself included, are skeptical that the bureau's creation, structure and broad discretionary powers are warranted.

Nevertheless, Dodd-Frank is now the law of the land, and in a few short weeks the Bureau will become a powerful instrument in the hands of progressive regulators. Once fully operational, the bureau will possess virtually unchecked discretion to identify financial products and services that the director determines to be "unfair, deceptive, or abusive." To fund and execute this mandate, the law has granted the bureau an unparalleled budgetary authority – free from Congressional authorization – and an unacceptable degree of autonomy – hidden from Congressional oversight.

While we have yet to hit the date for transfer of authority to the Bureau, Congress has a responsibility to assess – and the American people have a right to know – the designs that Professor Warren has implemented in its creation. What controls are being created to protect the American people from abusive government power? We demand internal controls of companies, what internal controls govern the Bureau? What limits are being set to guard them from administrative overreach? In the absence of the normal checks and balances established by the Constitution, what guarantee do the American people have that the bureau will behave responsibly, spend wisely, and regulate fairly?

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This hearing, however, is not a confirmation hearing for Professor Warren. This hearing is about the mission, policy, and structure that affect the creation and implementation of the bureau. It is also about the need for critical oversight of an agency which has so vast oversight authority over large portions of the American economy. Simply stated, who's watching the watchmen?

The Constitution creates a government that protects the freedoms of the American people, not one that provides them. It empowers the people – through their elected officials who are directly accountable to them – not a super-class of administrative elites. Protecting American consumers from abusive institutions and unaccountable authorities is first priority of this committee, and of the United States Congress.

Today we will examine whether the key provisions of the Dodd-Frank Act serve this purpose.

With that, I yield to the Ranking Member for an opening statement.

###

Mr. QUIGLEY. Thank you, Mr. Chairman.

Like any government agency, this new agency needs vigilant oversight from Congress and this committee, but we should not obstruct it from carrying out the intent of the Dodd-Frank Act.

Millions of Americans are still suffering the consequences of the housing and financial crisis. This crisis was caused in large part by weak or nonexistent regulation. These regulatory failures allowed dangerous consumer financial products and toxic financial instruments to infiltrate the marketplace.

Before Dodd-Frank, consumer financial protection responsibilities were scattered across seven different agencies. Unscrupulous lenders were able to take advantage of consumers by selling them faulty, fraudulent, and deceptive financial products. This reckless lending poisoned the financial system and directly contributed to the mortgage meltdown.

While today we may have the benefit of hindsight, some sounded the alarm well in advance of the crisis. In 2007, before the onset of the crisis, Professor Elizabeth Warren recognized that there was a serious problem. "Nearly every product sold in America has passed basic safety regulations well in advance of reaching store shelves," she observed. "But credit products, by comparison, are regulated by a tattered patchwork of State and Federal laws that have failed to adapt to changing markets."

This new agency was explicitly designed to address these regulatory shortcomings. Just like the Consumer Products Safety Commission protects consumers against exploding toasters, the new agency will protect consumers against faulty mortgages. One of the CFPB'S strengths is its accountability. The CFPB has a capped budget, its action are subject to a veto by the Financial Stability Oversight Council, and it must follow stricter rulemaking procedures than most other agencies.

Another strength is the CFPB's focus on the "shadow financial services sector" which has been the most responsible for victimizing consumers. These unregulated lenders will, for the first time, be held to the same standards as banks and credit unions.

Our number one priority on this committee must be ensuring that we never have a repeat of the financial crisis and that the CFPB is a strong step in the right direction. The CFPB has won early praise, even from financial industry groups that were initially hesitant to support it. Both the ICBA and the ABA have praised the Bureau for its transparent and accessible rulemaking process.

On that point I ask unanimous consent that the May 19, 2011, article from the American Banker entitled "New CFPB Mortgage Disclosures Win Praise for Content and Process" be submitted for the record.

Mr. MCHENRY. Without objection.

[The information referred to follows:]

New CFPB Mortgage Disclosures Win Praise for Content and Process

American Banker | Thursday, May 19, 2011

By Kate Davidson

WASHINGTON - The Consumer Financial Protection Bureau's prototypes for a single mortgage disclosure form won praise from industry groups Wednesday for their streamlined format, as well as the unorthodox way they are being developed.

Under the Dodd-Frank Act, the CFPB does not have to issue a final version of the form until July 2012. But the bureau has already invited industry representatives, bankers and consumer advocates to weigh in on the model forms, which will be tested on focus groups and revised throughout the summer before the formal rulemaking process even begins.

"I think what was probably the most refreshing was just the fact that you had a room of bankers there ... folks who use this every single day and have to explain it to customers every single day," Ron Haynie, the president and CEO of ICBA Mortgage, said about a meeting with CFPB officials this week. "And the folks at the CFPB were asking questions - does this work? They want the feedback, and bankers are not a shy bunch."

Haynie and other industry observers said the two prototypes released Wednesday are a good first step toward merging the disclosure forms required under the Truth in Lending Act and Real Estate Settlement Procedures Act.

"Our bankers felt that this was clearer, more to the point, and was a substantial improvement" over existing disclosure forms, said Bob Davis, executive vice president of government relations for the American Bankers Association, who also met with CFPB officials and several bankers on Tuesday. "So they welcomed seeing this."

Each form has a slightly different design (see them here and here), but both would break down the mortgage offer to highlight key terms, such as interest rate and monthly payment, and would caution borrowers about certain terms, such as increasing loan amounts or balloon payments.

Both also include a section to help consumers compare the offer with other loans, and lays out projected payments over the life of the loan. They break down expected closing costs, and use check boxes to indicate whether a loan requires an escrow account or mortgage insurance.

Although it was still early, the reviews for both forms were positive.

Stephen Ornstein, a partner at SNR Denton, said the forms are and easy to understand. The section for projected payments and "cautions" is particularly helpful.

"As jaded a compliance attorney as I am, I think they're terrific," Ornstein said. "Particularly the first one."

Norma Garcia, a senior attorney with the Consumers Union, agreed.

"They both do a great job of laying out the essential information. However, I think disclosure 1 is easier to navigate," Garcia said. "It's visually easier to break the essential information into parts that make it easy for a consumer to digest."

Industry representatives were also pleased.

"It seems like they're trying to make an effort to have things that are clear to the eye, and also to use language that consumers understand," said Elizabeth Eurgubian, a vice president and regulatory counsel at the Independent Community Bankers of America. "That being said, they're not there yet. But the process has started."

David H. Stevens, the president and CEO of the Mortgage Bankers Association, said in a press release Wednesday that the CFPB staff put a lot of thought into the new forms, and the MBA looks forward to participating in the revision process.

"One of MBA's primary goals will be to make certain that not only do the new forms provide consumers with the information they need in a simple, clean way, but also that they can be implemented into lenders' operations and systems with a minimum of disruption," he said.

Stevens also noted that the industry "expended considerable costs" on Respa changes just 18 months ago.

"We need to make sure that this new form is highly beneficial to consumers who will bear the implementation costs," he added.

The Dodd-Frank Act directed the CFPB to merge the TILA and Respa forms, which are two and three pages long, respectively, and have overlapping information.

The bureau plans to test the prototypes with focus groups before beginning a formal rulemaking process. It will conduct five rounds of evaluation and revision through September 2011 to select a single draft disclosure and then refine it.

"We're just going to keep testing this thing," Elizabeth Warren, the administration's point person in charge of setting up the CFPB, said in a conference call with reporters on Wednesday. "We're going to listen to comments, adjust and retest, until, with lots of help from the public, from industry, we believe we have this right."

Some were optimistic that the CFPB's process will set the standard for how the new agency develops rules in the future.

"This shows the CFPB wants to make regulation work better, because they're rolling these out early, they're showing them to bankers and consumers, they're going to be testing them, and this is doing regulation better," said Edmund Mierzwinski, the consumer program director at the U.S. Public Interest Research

Group. "It's not more government, it's better government. So that's I think the exciting thing."

Reaching out to the public so early in the process is something that no other federal agency, and certainly no banking regulator, has ever done before, said Travis Plunkett, a legislative director at the Consumer Federation of America.

"To me this is a model for what the consumer bureau can become, in terms of reaching out to the public and getting input not just from the usual suspects - and that includes us, by the way - but from borrowers affected by the regulations that they're considering," Plunkett said.

Richard Riese, director of the ABA's Center for Regulatory Compliance, said the bureau has tried to engage both bankers and consumer advocates on how to communicate useful information to consumers about their mortgage transaction. That allows stakeholders to focus first on the quality of the forms, rather than the legalese, Riese said.

"I think this, as Elizabeth Warren has said on numerous occasions ... is an approach that if they think it's producing good results and other people feel that the process was worth engaging in because of those results, then it could be applicable in future standard settings," Riese said.

There may be some risk to the open nature of the process, especially because it doesn't follow normal rulemaking protocols, Riese said.

"But it doesn't mean that they won't get to the normal process down the line to ensure that the legal hurdles have been met," he said. "It's that she is enabling people to see ... more of the sausage-making that goes into how you get to a more formal proposal."

The bureau also plans to conduct additional analysis and research over the summer, and consider underlying regulatory issues and ways to refine closing-stage mortgage forms, a process that will likely extend into the fall and early next year.

CFPB must issue the proposed forms and regulations for formal notice and comment by July 2012.

Mr. QUIGLEY. This transparency is especially important given the CFPB's mandate to increase transparency in the consumer lending market. I am confident Ms. Warren and the CFPB can continue to build on its early successes and both consumers and businesses will be stronger for it. It is critical that the CFPB be implemented as set forth in the Dodd-Frank Act.

Thank you, Mr. Chairman, and I yield back.

Mr. MCHENRY. I thank the ranking member.

Members will have 7 days to submit opening statements and extraneous material for the record.

Pursuant to committee rules, all witnesses will be sworn before they testify. If you will stand and raise your right hand and repeat after me.

[Witnesses sworn.]

Mr. MCHENRY. The record will indicate that the witness answered in the affirmative.

Our first panel, our sole witness on our fist panel is Ms. Elizabeth Warren, who serves as the Assistant to the President and Special Adviser to the Secretary of the Treasury for the Consumer Financial Protection Bureau at the U.S. Department of Treasury.

Ms. Warren, you are well accustomed to testifying before Congress. So we have the system of lights. With 1 minute remaining, you will get the yellow light. You will have 5 minutes to give your opening statement or to summarize your opening statement. We will move forward with questions thereafter.

You are now recognized for 5 minutes.

STATEMENT OF ELIZABETH WARREN, SPECIAL ADVISER TO THE SECRETARY OF THE TREASURY FOR THE CONSUMER FINANCIAL PROTECTION BUREAU, U.S. DEPARTMENT OF THE TREASURY

Ms. WARREN. Thank you—let me hit the button.

Thank you, Chairman McHenry, Ranking Member Quigley, and members of the subcommittee for inviting me today to testify about the work of the Consumer Financial Protection Bureau.

Two-and-a-half years ago, I came to Washington to serve Congress as chair of the TARP Congressional Oversight Panel. I developed a keen appreciation for the important role of oversight, and I respect careful oversight work.

For today's hearing, I have prepared 10 pages of written testimony to document our startup efforts, and that supplements the 34 pages of testimony I provided for the Subcommittee on Financial Institutions and Consumer Credit in March.

In my testimony, I discuss the Consumer Bureau's straightforward mission, to make prices and risks clear and to cut down on the fine print so customers can make straight-up comparisons among financial products, so they can compare two or three or four credit cards or three or four mortgages before they actually sign on the dotted line. That is what Congress created the consumer agency to do, and that is what we are already doing.

Last week, after months of consultation with borrowers and lenders and their representatives, we started testing a prototype of the mortgage shopping sheet. Eventually, the result of this process will be a simple, streamlined mortgage disclosure to replace the longer,

more complicated, and more burdensome forms that are now required by law.

Now, in this process we have taken another step, something pretty much unprecedented in the regulatory world. We have invited everyone in the door early, before the cake is baked. We are months away from formal rulemaking, but we believe that by opening up our process and getting help from the people who are affected by these rules we will be more likely to produce something that works right.

We have posted early versions of the form on our Web site, www.consumerfinance.gov—come and see us there—and we have asked people to let us know what they think. So far, a lot of people have been willing to help. Within hours after our posting of the new forms, we had more than 20,000 visits to our Web site.

The reaction to the forms has been almost unanimously favorable. The article that Congressman Quigley referred to in the American Banker was headlined "New CFPB Mortgage Disclosures Win Praise for Content and Process." You know, a lot of very different people have been supportive throughout this process. The Consumer Federation of America and the American Enterprise Institute, U.S. PIRG and the Financial Services Roundtable have all been supportive.

The draft forms are not perfect. We are only at the beginning. But the process really matters. It is an example of how a new Federal agency can shed some of the old bureaucratic attitudes and develop ideas and approaches that serve both consumers and businesses.

Mr. Chairman, the title of this hearing is Who Watches the Watchmen. The answer can be found in a single word—everyone. At the consumer agency, we aren't just talking about transparency and openness, we are living it right now. We are building an agency that involves American families, small banks, credit unions, and other financial services providers in our work from the ground up.

Recently, there have been many overblown claims about the nature of the consumer agency's powers. Critics claim that the CFPB is "the most powerful regulatory agency that has ever been put together" and that it is "the most powerful agency ever created."

The consumer agency isn't even the strongest of the banking regulators, much less the most powerful agency ever created. Those kinds of claims disregard the significant limits on the Consumer Bureau's authorities, the long debates over these issues more than a year ago, and the very meaningful oversight that Congress imposes on the Bureau's functioning. Those claims also ignore the intensity with which large and powerful interests watch everything we do and make certain that their views are carefully considered.

Most importantly, those claims ignore what we are doing, building an agency in plain sight with help from good people across this country.

Together, we can create a fairer system that works for families and works for the community banks, for the credit unions, and for the other financial institutions that want to serve those families honestly and openly.

Thank you for inviting me here today, and I look forward to your questions.

[The prepared statement of Ms. Warren follows:]

Testimony of Elizabeth Warren
Special Advisor to the Secretary of the Treasury for the Consumer Financial Protection Bureau
Before the Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs
Committee on Oversight and Government Reform
United States House of Representatives
Tuesday, May 24, 2011

Introduction

Thank you Chairman McHenry, Ranking Member Quigley, and members of the Subcommittee for inviting me to testify about the work of the Consumer Financial Protection Bureau (CFPB). I appreciate the opportunity to report to Congress about the structure and management of the consumer bureau.

Two and a half years ago, I began my work in Washington as Chair of the Congressional Oversight Panel (COP). The COP produced detailed monthly reports for Congress about the Department of the Treasury's administration of the Troubled Asset Relief Program. I came to Capitol Hill on many occasions to testify on behalf of the COP about our oversight efforts. Based on that experience working on behalf of Congress, I became a firm believer in the importance of oversight.

Two months ago, I testified before the House Financial Services Subcommittee on Financial Institutions and Consumer Credit. At that appearance, I provided 34 pages of detailed written testimony on the following topics to shed as much light as possible on the efforts underway to establish the CFPB:

- The CFPB's mission
  - Background
  - Goals for the Bureau
  - Implementing the CFPB's goals
- The CFPB's priorities
  - Mortgages
  - Credit cards
  - Financial education
  - Consumer complaints
  - Supervision, enforcement, and fair lending
  - Information technology
- Accountability and transparency
  - Oversight of the CFPB
  - Budget
  - Organizational structure and hiring

  - CFPB headquarters
  - Public disclosure of my schedule
  - Availability to Members of Congress

- Public Engagement
  - Industry
  - Consumer advocates and faith leaders
  - Military families
  - Attorneys general

It is the hope of those of us working at the consumer bureau that the testimony I provided then and in today's hearing will provide you with the information you are looking for to oversee our efforts.

The Crisis of 2008: What Went Wrong

Last year, the Dodd-Frank Wall Street Reform and Consumer Protection Act established the CFPB, in part, to increase accountability in government by consolidating consumer financial protection authorities that had existed across seven different federal agencies into one. Consumer financial protection had not been the primary focus of any Federal agency, and no agency had effective tools to set the rules for and oversee the whole market. The result was a system without effective rules or consistent enforcement. We have seen the results, both in the 2008 financial crisis and in its aftermath.

In April, after two years of bipartisan investigation, the U.S. Senate Permanent Subcommittee on Investigations released a 635-page report on the key causes of the financial crisis. The report highlighted several causes of the crisis, including high-risk mortgage lending, inflated credit ratings, structured products sold by investment banks, and repeated failures of regulatory agencies to provide adequate oversight of the financial services industry. Senator Carl Levin, who chaired the committee, said that the report "catalogues conflicts of interest, heedless risk-taking, and failures of federal oversight that helped to push the country into the deepest recession since the Great Depression."[1] Senator Tom Coburn, the committee's ranking member, said that "Blame for this mess lies everywhere from federal regulators who cast a blind eye, Wall Street bankers who let greed run wild, and members of Congress who failed to provide oversight."[2]

The conclusions of the Senate Permanent Subcommittee on Investigations have been echoed elsewhere. During the recent hearing on the CFPB before the House Subcommittee on Financial Institutions and Consumer Credit, Chairman Shelley Moore Capito similarly observed, "I think

[1] Press conference, Wall Street And The Financial Crisis: Anatomy of a Financial Collapse (April 13, 2011) (video online at http://www.youtube.com/watch?v=lmlhvkEcb7Y).
[2] U.S. Senate Permanent Subcommittee on Investigations, *Senate Investigations Subcommittee Releases Levin-Coburn Report On the Financial Crisis* (April 13, 2011) (online at http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MajorityNews&ContentRecord_id=51BF2C79-5056-8059-76A0-6674916E133D).

we could all agree that there were lapses in oversight and inherent problems within the regulatory structure."[3]

Last month, the Chief Executive Officer of one of our nation's largest financial institutions made a similar point. He wrote to his company's shareholders that, "Indeed, had there been stronger standards in the mortgage markets, one huge cause of the recent crisis might have been avoided.... As recently as five years ago, most Americans would have called the U.S. mortgage market one of the best in the world – boy, was that wrong! What happened to our system did not work well for any market participant – lender or borrower – and a careful rewriting of rules would benefit all."[4]

The conclusion is bipartisan and shared by both those in government and those in private industry: Failures of our regulatory system were an important contributor to the country's worst financial disaster since the Great Depression.

Congressional Response: A New Consumer Bureau

To address a root cause of the financial crisis of 2008, Congress established the CFPB: 1) to ensure that consumers have timely and understandable information to make responsible decisions about financial transactions; 2) to protect consumers from unfair, deceptive, or abusive acts or practices, and from discrimination; 3) to reduce outdated, unnecessary, or overly burdensome regulations; 4) to promote fair competition by enforcing the Federal consumer financial laws consistently; and 5) to advance markets for consumer financial products and services that operate transparently and efficiently to facilitate access and innovation.

As Congress recognized in creating the CFPB, every market needs rules. Antitrust rules, for example, ensure that companies don't conspire to fix prices or to squeeze out competitors and lock down a whole market. Those regulations ensure that every business – small, large, established, or start-up – has a chance to compete and to innovate. The rules also guarantee that customers have choices. The ability of customers to choose means that competition works at its best: The best businesses – those that produce goods and services that customers want most at the most affordable price – can flourish while those whose products aren't as good or whose prices are too high do not.

A fair, efficient, and transparent market presupposes that consumers are able to compare the costs and benefits of different products effectively and to use that information to choose the product that is best for them. In the world of consumer financial services today, that is a questionable premise. Fine print and overly long agreements make it difficult for consumers to

[3] Subcommittee on Financial Institutions and Consumer Credit, Statement by Chairman Shelley Moore Capito (March 16, 2011) (video online at http://www.c-span.org/Events/Warren-Defends-Consumer-Financial-Protection-Bureau/10737420228-1/).

[4] Letter from Jamie Dimon, to JPMorgan Chase shareholders (April 4, 2011) (online at http://files.shareholder.com/downloads/ONE/1225684322x0x458384/6832cb35-0cdb-47fe-8ae4-1183aeceb7fa/2010_JPMC_AR_letter_.pdf). Dimon also noted that, "we fully acknowledge that there were many good reasons that led to the creation of the CFPB and believe that if the CFPB does its job well, the agency will benefit American consumers and the system."

understand and compare products, and that obstacle to sound markets is not removed by disclosures that are too complicated or that do not focus on the key information consumers need. The principal role of consumer protection regulation in credit markets is to make it easy for consumers to see what they are getting and to make it easy for customers to compare one product with another, so that markets can function effectively.

At the consumer bureau, we believe in markets – markets that make prices and risks clear and that give consumers the basic information they need to determine who is offering the best deals. Our primary goal is to make markets for consumer financial products and services work in a fair, efficient, and transparent manner. That means ensuring that consumers have access to information to help them understand the terms of the deal. Fair and transparent markets encourage personal responsibility and smart decision-making. When consumers are presented with a clearer choice between two financial products and they can easily know the costs, benefits, and risks of those products, they will be better able to make decisions that work for themselves and for their families.

Consumers expect to be held responsible for the financial decisions they make. If they don't keep up with their debt payments, they expect to face the consequences. Personal responsibility is critical. But consumers want to know the costs up-front and don't want to be blindsided by hidden fees, interest rate changes, or payment shocks. Informed decision-making allows consumers to drive the financial marketplace so that providers offer products that meet consumer needs and preferences.

Getting Started: Markets that Work

At the CFPB, we believe that a simple and straightforward presentation of key credit terms is the best way to level the playing field between borrowers and lenders and to foster honest competition. Our goal is shorter, clearer forms for the most common credit products, the kind that consumers can read in a few minutes with high levels of understanding. The CFPB is working to give consumers the transparency they deserve to make the choices that work for themselves and their families, while easing unnecessary regulatory burdens for their lenders.

In my first week on the job, the Treasury Department sponsored a symposium that brought together lenders and consumer advocates to discuss how to simplify federal mortgage disclosures. Consumer groups explained that many consumers didn't use current disclosures to assess costs or to compare alternatives because the forms are complicated and hard to use. The forms came under even more intense criticism from those who have to fill them out. Mortgage originators, particularly community banks and credit unions that work closely with their customers, described paperwork that was costly to complete, even as it produced little value for borrowers. Now, after months of consultation with borrower and lender representatives, we have developed prototype short mortgage shopping sheets that will be tested with actual consumers and, eventually, result in a simple, streamlined mortgage disclosure that will replace the two existing, complicated forms.

The new consumer bureau is making the early form drafts publicly available, long in advance of the formal process of notice-and-comment for official rule-making. We are seeking feedback early and often from consumers, lenders, brokers, and others now, and we will continue to do so as we refine the forms. We have posted draft forms online, while they are still in the design phase, and we have asked the public to weigh in. We will share the input we receive with our testers and designers, factoring it into our design process. We hope that these expanded procedures will permit us to engage a broader constituency, helping us deliver on the promise of this agency embodied in the Dodd-Frank Act.

A significant part of our mission will also be to help level the playing field for smaller lenders, such as community banks and credit unions. We recognize that the regulatory pressures on banks have increased substantially over time. While regulatory costs may be manageable on a per-account basis for the largest financial institutions, for smaller businesses, all the complicated rules, extensive paperwork, and expensive compliance reviews can be daunting. If we continue on our current regulatory trajectory, traditional banks and credit unions will be put at a further disadvantage that could push many out of business.

American consumers are best served by a strong and diversified financial services industry. Many community banks and credit unions embrace relationship lending, and they often work in partnership with the families they serve. Some smaller institutions provide a banking presence in otherwise-underserved communities, both in our cities and in rural areas. If community banks and credit unions continue to face competitive pressures triggered by a complex regulatory system, then those institutions will not be as able to serve American families. In that case, not only do the banks lose, but families lose as well.

The CFPB is committed to working with smaller institutions to reduce regulatory costs. We have already begun that work, and we are pleased to report to Congress that the spirit of openness and cooperation expressed by community banks and credit unions has been extraordinary. The mortgage disclosure integration project is one area in which we are seeking to reduce regulatory burdens, and we expect that it will serve as an excellent test case as we design our ongoing processes for how the consumer bureau and smaller institutions can work together to increase the ability of these institutions to spend less time on regulations and more time serving America's families.

Structure and Management: Organizing the CFPB

Under Section 1066 of the Dodd-Frank Act, the Secretary of the Treasury is authorized to perform certain functions of the CFPB. On September 17, 2010, the Secretary appointed me to be his Special Advisor for this role. The President is in the process of considering candidates to nominate as the Bureau's first Director.

One of our main tasks since last September has been to develop an organizational design that will provide the infrastructure the Bureau will need to meet its responsibilities in the months and years ahead. Late last year, the CFPB began providing its draft organizational chart to Members of Congress and the media. In early February, we posted the chart to our newly launched CFPB

website. In developing the CFPB's organizational structure, we have asked for comments and critiques from individuals in the private sector, community groups, and academia, as well as from Members of Congress.

Our primary goals in designing the CFPB organizational chart have been: 1) to engage the American public; 2) to ensure that the Federal consumer financial laws will be administered by the Bureau consistently, efficiently, and effectively; 3) to help create a level playing field for community banks and credit unions to compete with large banks and non-depository financial companies; 4) to make the CFPB a data-driven agency by making research and market analysis core to all of its work; 5) to advance financial education opportunities for all Americans; 6) to continue an open and candid dialogue with Members of Congress; and 7) to create accountability within the CFPB.

The CFPB team currently consists of more than 200 members and includes the following senior managers:

- Steve Antonakes, the former Commissioner of Banks in Massachusetts, serves as Assistant Director for Large Bank Supervision for institutions such as banks and thrifts.
- Leonard Chanin, the former Deputy Director of the Federal Reserve Board's Division of Consumer and Community Affairs, serves as Assistant Director for Regulations.
- Richard Cordray, the former Attorney General of Ohio, serves as Assistant Director for Enforcement.
- Raj Date, who worked in consumer finance and banking for more than a decade and was a Managing Director at Deutsche Bank Securities, serves as Associate Director of Research, Markets, and Regulations.
- Patrice Ficklin, who has practiced law at the law firm Relman, Dane & Colfax and has provided fair lending, fair housing, and other consumer law advice regarding mortgage products, pricing, and servicing while working at Fannie Mae, serves as Assistant Director for Fair Lending.
- David Forrest, who spent 16 years helping develop the Motley Fool, a multimedia financial-services company that promotes investor education, serves as Chief Technology Officer.
- Meredith Fuchs, who worked in the U.S. House of Representatives as Chief Investigative Counsel of the Committee on Energy and Commerce, serves as Principal Deputy General Counsel.
- Roberto Gonzalez, who served in the Office of White House Counsel, serves as Deputy General Counsel.

- Michael Gordon, who was Counselor to the General Counsel in the Treasury Department, serves as Deputy General Counsel.

- David Gragan, formerly Chief Procurement Officer for the District of Columbia, serves as Assistant Director of Procurement.

- Gail Hillebrand, who joined Consumers Union in 1985 and was a Senior Attorney there, serves as Associate Director of Consumer Education and Engagement.

- Len Kennedy, former General Counsel of Sprint Nextel and long-time regulatory attorney, serves as CFPB's General Counsel.

- Zixta Martinez, an expert on housing policy who last worked at Freddie Mac, serves as Assistant Director of Community Affairs to work with consumer, civil rights, and other organizations.

- Patricia McCoy, a scholar on the housing market and chaired professor at the University of Connecticut who has served as Director of its Insurance Law Center, serves as Assistant Director for Mortgage and Home Equity Markets.

- Holly Petraeus, a top financial educator for military families, leads the Bureau's Office of Servicemember Affairs as Assistant Director.

- David Silberman, who built a successful affinity credit card business and then served as a banking consultant, serves as Assistant Director for Card Markets.

- Dennis Slagter, formerly Director of Human Resources at the Millennium Challenge Corporation and Director of Strategic Initiatives for the Assistant Secretary of the Army (Manpower and Reserve Affairs), serves as Assistant Director for Human Capital.

- Corey Stone, formerly a Chairman of the Board of a community bank and CEO of an alternative credit reporting business, serves as Assistant Director for Credit Information Markets.

- Peggy Twohig, formerly Associate Director of the Division of Financial Practices at the Federal Trade Commission, serves as Assistant Director for Non-Bank Supervision.

- Elizabeth Vale, who started her professional career with 16 years in community banking and eventually served as a managing director at Morgan Stanley, serves as Assistant Director for Community Banks and Credit Unions.

- Catherine West, a former President of the credit card business at Capital One, serves as Chief Operating Officer of the CFPB.

As this list shows, the leadership of the CFPB is diverse, with people coming from a variety of backgrounds – public and private, banking and non-banking, large institutions and small institutions. The expertise and diversity represented by our leadership team is extraordinary. There is no single point of view that dominates this group, other than a shared vision to make consumer financial markets work better for all Americans.

Public Engagement: Reaching Out in Many Directions

The CFPB is currently a construction site and, like most construction sites, it should be in plain view for anyone who is interested. That is why we launched our website in early February, more than five months ahead of the time the agency would assume many of its powers. We posted our draft organizational chart when we launched, and we have posted additional information about our budget and our progress in standing up the new agency over the time since. We have also consulted with various organizations dedicated to transparency in government to explore how we might add more information to our website or provide other useful data to the public.

We are committed to letting everyone know how we are working for the American people. One way we have sought to accomplish that is through the public release of my calendar. We began to post my calendar to the Treasury website proactively on November 24, 2010, even before we launched our website. We have now posted my calendar online each month and will continue to do so as a commitment to our openness.

The posted schedule gives everyone an opportunity to see who we are meeting with and what perspectives we are hearing. Our hope is that by releasing my schedule, the public will see that the agency is listening to a variety of viewpoints about how the consumer bureau should be shaped and where its efforts should be focused. The calendars show that we have now spoken directly with dozens of executives from large banks and banking trade associations. We have also spoken with leaders of community banks, credit unions, and other small financial services providers from all 50 states. We have met with dozens of consumer advocates, both in Washington and around the country. We have met with servicemembers on visits to military bases. We have spoken with state attorneys general and bank supervisors from across the country, and we have had multiple meetings with other federal regulators. We have also met with entrepreneurs, innovators, retailers, leaders of non-profit organizations, and a wide variety of others both in and outside of the financial services industry.

In addition, since September, I have had more than 90 one-on-one conversations with Members of Congress. We have been in close touch with many who supported the creation of the CFPB and many who opposed it. My presence here today reflects our commitment to working closely with you and your colleagues.

Oversight: Significant Limits on the CFPB

In recent weeks, there have been many overblown claims about the nature of the CFPB's power. Critics have claimed that the CFPB is "the most powerful regulatory agency that's ever been put

together," that it is "the most powerful agency ever created," and that it "doesn't have to explain what it does to anybody." These claims disregard the limits on the consumer bureau's authorities and the very meaningful oversight that Congress imposed over its functioning – oversight that is consistent with that which exists over other independent agencies.

I have been told that if you say anything in Washington often enough, it is eventually treated as fact – regardless of whether it is true or false. While making baseless claims might be shrewd tactics for those who want to undermine the Bureau's work, they are flatly wrong. The CFPB's jurisdiction is fundamentally limited to consumer financial products and services. Even within the world of consumer finance, huge sectors, including investments and insurance, are explicitly excluded from its jurisdiction, left instead to other state and federal regulators. The scope of the CFPB's authority is carefully limited.

False claims about CFPB's power also ignore the structural oversight and accountability that limit the reach of the CFPB. Like all other agencies in the federal government, the CFPB is subject to the requirements and limitations of the Administrative Procedure Act. We are one of only three agencies anywhere in government (and the only banking regulator) that is required to conduct SBREFA panels, a process to gather input directly from small businesses about the potential impact of proposed rules. And we are also specifically required to consider the benefits and costs of any proposed rules to consumers and providers. The CFPB's activities are subject to judicial review, ensuring that the CFPB operates within the constraints set by Congress and the U.S. Constitution.

In addition to being subject to judicial review, the Bureau is the only bank regulator whose rules can be overruled by a council made up of other federal agencies. In an unprecedented restriction unlike that on the authority of any other Federal financial regulator, Congress determined that a two-thirds majority of the banking regulators and other members of the Financial Stability Oversight Council can veto any rule issued by the consumer bureau if the council determines that it would put the safety and soundness of the banking system or the stability of the financial system at risk. And, of course, like with any federal agency, Congress can always overturn the Bureau's rules if the legislature disagrees with our judgments.

The CFPB is also the only bank regulator that is expressly limited in its ability to determine its own funding levels. If the Office of the Comptroller of the Currency believes it needs more funds to hire more examiners, it can raise more through assessments on the industry. But the consumer agency's independent funding is statutorily capped at a portion of the Federal Reserve System's operating expenses. If the CFPB concludes that it needs additional funding, it must persuade Congress to provide that funding.

Other forms of oversight exist as well:

1) The CFPB must submit annual financial reports to Congress.

2) The CFPB must report to Congress twice each year to justify its budget from the previous year.

3) The Director of the CFPB must testify before and report to Congress twice each year regarding the CFPB's activities.

4) The GAO must conduct an audit each year of the consumer bureau's expenditures and submit a report to Congress.

5) The CFPB must submit its financial operating plans and forecasts and quarterly financial reports to the Office of Management and Budget.

6) The Inspector General of the Federal Reserve Board (and the Inspector General of the Treasury Department, during this interim period) have been charged with reviewing the CFPB's activities to inform Congress and the public about the consumer bureau's work.

The formal restraints over the agency are substantial, but informal restraints are significant as well. The financial services industry has substantial resources to ensure that its views about the CFPB and its work are well known and fully considered.

Recent proposals to alter the CFPB's structure – including those that the House Financial Services Committee recently passed – overlook the many constraints already in place. The work facing the new bureau is very challenging; additional restrictions would undermine the consumer bureau before it even begins its work of protecting American families.

Proposals to change the consumer bureau have been put forward in the name of accountability. But accountability is ultimately about being responsible for getting a job done on behalf of American families. Those families know that they are held accountable every day. They have to pay their credit card bills and student loans. They see money disappear from their checking accounts when they make a mistake. And, as millions of families have witnessed first-hand in the past few years, when they default on mortgages they cannot afford, they lose their homes. American families expect to pay what they owe, but they also want to make sure that the rules are fair and followed. They want an agency that will be accountable for getting that basic job done, and, so long as it has the tools, the CFPB will be that agency.

Conclusion

Chairman McHenry, Ranking Member Quigley, and members of the Subcommittee, thank you again for inviting me to testify today about the CFPB.

I understand – and greatly appreciate – the important role of oversight. Oversight is a deeply important feature of our democracy that provides for checks and balances and helps prevent overreach, violations of law, and misguided expenditure of public funds. Oversight of the CFPB – during its stand-up and beyond – will build greater confidence in the consumer bureau by the public. That is why I welcome the opportunity to discuss our efforts and to update you on our progress.

Mr. MCHENRY. Thank you Ms. Warren. Thank you for your testimony.

I recognize myself for 5 minutes.

Ms. Warren, if the President makes you the CFPB's first director through recess appointment, would you accept it? Yes or no would be fine.

Ms. WARREN. Congressman, it is——

Mr. MCHENRY. Yes or no would be fine.

Ms. WARREN. It is up to the President of the United States under Dodd-Frank to make the nomination. It would not be appropriate, I think, for anyone to be speculating about that.

Mr. MCHENRY. As Assistant to the President for Consumer Financial Protection, you are advising the President about the nomination for this Bureau, are you not?

Ms. WARREN. Congressman, I have tried to help the President in any way I can on the nomination process.

Mr. MCHENRY. Have you recommended anyone?

Ms. WARREN. Congressman, I have tried to help the President.

Mr. MCHENRY. I understand. That is fine. If you don't want to answer, that is fine.

Ms. WARREN. I have been doing this for a month.

Mr. MCHENRY. I understand. You don't want to answer, and that is fine.

I would call up—if you look at the screen, we have a PowerPoint presentation.

Now, when I last asked you questions, which was before the March 16th House Financial Services Committee hearing, I asked about your role in the mortgage settlement issue and the CFPB's role there. You said, "We have been asked for advice, and wherever we can be helpful we are not only glad to be helpful, we are proud to be helpful."

Slide one, as you see, this document is dated February 14th, a month before you answered that question and gave that answer. Apparently, it is authored by the CFPB. Are you familiar with this document?

Ms. WARREN. Congressman, I believe, although obviously——

Mr. MCHENRY. Are you familiar with it? Yes or no.

Ms. WARREN. Congressman, I haven't seen the rest of the pages, but I assume what this document is is a document that was initially prepared for internal discussions with the Secretary of the Treasury.

Mr. MCHENRY. Right. At the bottom left corner, if I might point out, it says "draft confidential for AG Miller." Are you familiar with that?

Ms. WARREN. Thank you very much. Yes, Congressman, I am.

Mr. MCHENRY. Second slide. This slide, the second slide, indicates that the CFPB is pushing for significant policy change.

The third slide. This quote indicates that the CFPB is leading the charge to persuade other regulators to demand punitive penalties.

Fourth slide. If you look at the fourth slide, it is apparent that the CFPB is pushing a policy proposal called the Principal Reduction Mandate. Is that something that the CFPB has been pushing?

Ms. WARREN. Congressman, if you want to ask about our participation——

Mr. MCHENRY. I am going to get to that. I am asking a question. If you could respond to my question, I would certainly appreciate that.

Ms. WARREN. Congressman, we have given our advice when we have been asked for advice, and we have done so proudly and enthusiastically.

Mr. MCHENRY. So if you are so proud and enthusiastic about your advocacy and advice, why didn't you express that before the committee when I asked you your involvement in the settlement issue?

Ms. WARREN. Congressman, I thought the quote you quoted said exactly that, and I believe it said that I was proud to give that advice and I thought there was some word enthusiasm.

Mr. MCHENRY. Let me give you the fuller quote here. "When the Treasury came to me and said we would like your advice, I was glad to."

Ms. WARREN. Glad to.

Mr. MCHENRY. Right. Okay, AG Miller——

Ms. WARREN. Was there more? I just lost it.

Mr. MCHENRY. Who is Attorney General Miller?

Ms. WARREN. I believe Attorney General Miller is the Attorney General for the State of Iowa.

Mr. MCHENRY. Okay. That is different than advice to the Treasury Secretary, which is part of your job title, and advice to the President, is it not?

Ms. WARREN. I am sorry, is what different? Is the Attorney General different from the Secretary of the Treasury?

Mr. MCHENRY. You said you are providing advice to the Treasury Secretary in your sworn testimony.

Ms. WARREN. That is right, yes.

Mr. MCHENRY. What is apparent is you are providing advice to the Attorney General of Iowa in their suit against mortgage servicers, is that correct?

Ms. WARREN. Congressman, the Secretary of the Treasury asked for advice, and we gave advice. We also gave advice—at his instruction, we gave advice to other Federal agencies, and we gave advice where asked. I think we tried to make that clear.

Mr. MCHENRY. In terms of mortgage settlement talks, would you disclose the meetings that you have had about those mortgage settlement talks?

Ms. WARREN. Congressman, I believe that my calendar is an open book, that we have been posting my calendar since last October, last November. I actually can't remember.

Mr. MCHENRY. So your calendar would entail when you have discussions about the mortgage settlements?

Ms. WARREN. I can say my calendar is an open book. We make it part of the public record.

Mr. MCHENRY. I understand. Reclaiming my time, so it has gone beyond your advice to Treasury. You are also providing advice to other governmental agencies?

Ms. WARREN. Congressman——

Mr. MCHENRY. I understand. You can use the word "Congressman" a number of times, Ms. Warren, but I am simply asking a very simple question, who you are providing advice to?

Ms. WARREN. Congressman, there was a question on this from Chairman Bachus——

Mr. MCHENRY. I know. I am asking you a question.

Ms. WARREN. What I want to do——

Mr. MCHENRY. A question different from that, Ms. Warren. If you will answer my question, are you giving advice to any governmental agency outside of the Treasury and the President? Yes or no?

Ms. WARREN. Congressman, let me read the letter that I sent almost 2 months ago.

Mr. MCHENRY. My time has expired. I am asking you a yes or no question.

Ms. WARREN. We have provided advice to Federal and State officials regarding a potential settlement—servicing settlement. In doing so, we have been an active participant in interagency discussions, sharing our analysis and recommendations in support of a resolution that would hold accountable any servicers that violated the law.

We sent this letter nearly 2 months ago. We have not heard from back from you or from anyone else so far as I know in the House of Representatives or in Congress. This is a statement. We have given advice when asked.

Mr. MCHENRY. I appreciate your statement.

I have one final question. Have you been in meetings with the Department of Justice regarding the mortgage settlement issue? Yes or no.

Ms. WARREN. Yes, we have given advice to the Department of Justice, when asked, as we say here. We have provided advice to Federal and State officials.

Mr. MCHENRY. Thank you for your testimony.

I now recognize Mr. Quigley for 5 minutes.

Mr. QUIGLEY. Thank you, Mr. Chairman.

Professor, it is obviously serious when someone accuses anyone of lying to Congress, but let's just walk back through this.

First, as was mentioned, the definition of advice somehow will magically appear. If not, Random House defines it as an opinion or recommendation offered as a guide to action. So, Professor, you were asked to provide advice by another agency involved in these negotiations, is that correct?

Ms. WARREN. Yes, Congressman, it is.

Mr. QUIGLEY. Did you provide advice in response?

Ms. WARREN. Yes, Congressman, we did.

Mr. QUIGLEY. Okay. Did you provide options for how the Federal Government might proceed in those negotiations?

Ms. WARREN. Congressman, that is what we have tried to do, is give advice, as we said here, shared our analysis and recommendation. That is what we are trying to do.

Mr. QUIGLEY. Did you ever talk directly with the private parties to those negotiations?

Ms. WARREN. Congressman, it is not our job to negotiate on behalf of the Federal agencies. That undertaking is led by the De-

partment of Justice at the Federal level. What we have done is tried to be helpful to those regulators who are trying to hold those who broke the law accountable for their actions.

Mr. QUIGLEY. If the Department of Justice ends up taking your advice, that would give some qualities or reference to how good your advice was, correct?

Ms. WARREN. Congressman, what they ultimately decide I am sure will be a mix of many things. I hope we have given good advice.

Let me say this as clearly as I can, Congressman: This is our job, and we are trying to do our job, and that is to be helpful to other agencies, to work with other agencies in trying to hold those who break the law accountable for their misdeeds.

Mr. QUIGLEY. Well, unfortunately, many of these entities that you will be regulating as a new agency are mortgage servicing companies that have already admitted to breaking the law, that they have illegally foreclosed on U.S. service members and their families, for example, that they have charged inflated fees and they have perpetrated fraud on the courts. You are aware of those admissions as well, correct?

Ms. WARREN. Yes, Congressman. I am aware now that the Office of the Controller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the Federal Reserve Bank have all found serious, widespread deficiencies. They have found violations of local law, of State law, and of Federal law that have damaged families, that have damaged mortgage markets, and that have damaged the entire economy.

Mr. QUIGLEY. Sort of a David and Goliath discussion, but it flips on its side to an extent. You are being accused of being an all-powerful, monolithic-type Goliath, but the reality your budget is probably going to be about 1 percent of what these agencies have been charging just in credit card penalties and overdraft penalties. So I guess the question is, how are you going to keep up with them?

Ms. WARREN. Congressman, I think that is a tough question, but I believe that the Consumer Financial Protection Agency is well-crafted so that we are going to be able to make a significant difference, that we are going to be an effective cop on the beat. We will have responsibilities in the rule-writing area, doing research, and, as our new mortgage project shows, doing what we can to make sure that our rules are streamlined and efficient and effective.

We will have responsibilities in supervision and in enforcement. In fact, about half of our budget will go to supervision and enforcement. We will have responsibilities in consumer complaints, to hear from Americans around the country when they have problems with credit providers; and we will have responsibility for financial education.

We have a lot to do. But the good part is I think those things work together, work in concert. We have a real opportunity here to make prices clear, to make risks clear, to give families the opportunity to compare one product with two or three others. And when that happens, markets can start to work. They can start to work on behalf of American families.

Mr. QUIGLEY. In the end, all we have is our good name. Is there anything else you would like to say about allegations that have been made?

Ms. WARREN. You know, Congressman, all I can say is it is a deep honor to be here to try to set up an agency that is designed to be a voice for American families. They have been shut out of this process for far too long.

This most recent crisis was the consequence of a substantial——

Mr. MCHENRY. The gentleman's time has expired. You can finish your thoughts, and then we will move to the next question.

Ms. WARREN. Thank you. I appreciate that, Mr. Chairman.

I will just say this most recent crisis started one lousy mortgage at a time. If we had had a Consumer Financial Protection Bureau in place, we could have avoided a lot of the pain that we have gone through in the last 2½ years.

Thank you, Mr. Chairman.

Mr. MCHENRY. I thank the ranking member.

With that, Ms. Buerkle of New York is recognized for 5 minutes.

Ms. BUERKLE. Thank you, Mr. Chairman. Thank you for calling this hearing, and thank you to Ms. Warren for being here today. Thank you.

Ms. WARREN. Thank you.

Ms. BUERKLE. The Dodd-Frank bill that passed last year included sweeping reforms in the regulation and the oversight of the financial industry. And while it made many changes, it completely ignored—and you just alluded to this in your last comment—it completely ignored reforming Fannie Mae and Freddie Mac, whose poor big business practices led to massive losses and taxpayer bailouts. Instead of addressing the problems created by political appointees, Dodd-Frank sought to increase the level of government regulation with the creation of a new regulatory body, the Consumer Financial Protection Bureau.

The thing that concerns me about this new regulatory body is that the House does not get to approve the director; and, even worse, it appears that the administration is going to install political appointees using a recess appointment process. This takes it away from the Senate and the House and an opportunity to question and to do what they should be doing as elected representatives.

My question to you today has to do with the salaries of the folks who are going to work in this consumer finance Bureau. A quick look at your Web site lists job openings that you are seeking to fill in D.C. and three other cities: Chicago, New York, and San Francisco. After a close look at these openings, I found that the starting salaries with the CFPB are, in most cases, 60 to 90 percent higher than the GS equivalent listed on the Federal Government's Web site.

So my first question to you is, given the absolute fiscal constraints that this Nation faces, the deficit and the debt that this country is trying to grapple with in trying to get this country back on a fiscal sanity course, how do you justify that kind of a disparity in salaries between a government worker versus the folks who are going to be hired by your regulatory agency?

Ms. WARREN. You know, Congresswoman, I really appreciate your question and your concerns in this area.

You know, when you talk about the structure—the new structure for the Consumer Financial Protection Bureau, I know you are aware that this new Bureau was designed to pick up consumer laws and consumer responsibilities that have been scattered among seven different agencies, none of those agencies focusing on consumer practices and consumer products.

This is important in the context of the most recent financial crisis, the reason so many people across this country are unemployed, so many millions of families are losing their home and others have lost their savings, and that is the question of what kind of regulatory structure do we want, including what kind of pay structure. And I think you are right to raise this.

Dodd-Frank was very careful and thoughtful in its point, and that was to say, in effect, the Office of the Controller of the Currency, the principal banking regulator in the country, is paid at one level——

Ms. BUERKLE. Excuse me, if I could interrupt, as you know, we only have 5 minutes here.

Ms. WARREN. Yes, ma'am.

Ms. BUERKLE. Let me just give you an example. There is 10 positions, and it is the consumer response policy and procedure analyst. The starting salary range for that position is $72,000 in your regulatory body. The top salary range is $149,000. Now the GS equivalent of that is a GS–9. In the Federal Government, a GS–9 starts at $41,000 and the top salary is $54,000.

My question to you is, why are these folks getting paid such an exorbitant amount more than someone in the Federal Government system? And you are not answering my question. You are going around.

Ms. WARREN. I am sorry, Congresswoman. I am trying to give it the context about we are following the law set up in Dodd-Frank. The five banking regulators that exist today, the Federal Reserve Bank, the Office of the Controller of the Currency, the Office of Thrift Supervision, the FDIC, those banking regulators are paid on a different pay scale; and the reason they are paid on a different pay scale in part is because they are bank regulators and the competition for those jobs includes people who are in the financial services industry. We will never be able to pay like the financial services industry pays. But this was Congress' judgment——

Ms. BUERKLE. Excuse me, this is a government agency. This is not the private sector. And we, the Congress, we, the government, needs to be accountable to the American people why someone can come into this government agency and make starting salaries $72,000 with a range of $149,000.

Mr. MCHENRY. The gentlelady's time has expired. You can finish the thought.

Ms. BUERKLE. It just seems like I think that this regulatory body has some questions to answer regarding the huge disparity in the Federal jobs versus the job salaries that you are offering.

I yield back. Thank you, Mr. Chairman.

Mr. MCHENRY. I thank the Member.

I now recognize the full committee ranking member, Mr. Cummings of Maryland, for 5 minutes.

Mr. CUMMINGS. Can you start my time? I already have 21 seconds.

Mr. MCHENRY. No, it was the previous time. I will give you the full time. We will start over right now. Hold on 1 second. We will pause.

Mr. CUMMINGS. Like a basketball game. All right.

Ms. Warren, first of all, let me say this: I don't care what happens in this hearing today. I don't care what is said. I am begging you, I am begging you to keep the fire. I have constituents who have lost so much and they don't even know how they lost it. And we need you. We really desperately need your passion, your concern, and thank you for synchronizing your conscience with your conduct. And I just want you to know that.

Now, you know, one of the things that is so significant, one of the things that you are doing for us and part of your mission, is to protect consumers from unfair, deceptive, or abusive acts or practices and from discrimination. Every single Member of Congress has people, whether they know it or not, who have suffered and have lost. And, like I said, some of them don't even know what they lost and how they lost it. They still don't know.

Professor Warren, Ranking Member Quigley said something that I agree with. He said your situation is like David and Goliath. Let me ask you about the consumer resources compared to the fees generated by banks you are supposed to regulate.

According to the firm R.K. Hammer, consumers paid more than $20 billion—that is our constituents—in credit card penalty fees in 2009. The same year, consumers paid more than $38 billion in overdraft fees, our constituents. So that is about $59 billion in 1 year, and that is just some of the fees they generated.

Professor Warren, your budget at the consumer Bureau will be capped at about $600 million, is that right?

Ms. WARREN. Yes, sir, it is.

Mr. CUMMINGS. Let me get this straight. Let me show you a chart.

If my math is correct, the Consumer Bureau's budget is only about 1 percent—where is my chart? Get my chart up.

The Consumer Budget Bureau's budget is only about 1 percent of the amount banks generate just from late fees and overdraft fees. I have to ask you, how in the world will you be able to compete against this Goliath when you are so mismatched?

Ms. WARREN. You know, Congressman, it is a good and fair question, but I want to say this: I think in the creation of the Consumer Financial Protection Bureau, Congress made some very smart moves. And one of the key ones is that we have the capacity at the consumer agency to drive toward making the price clear, making the risk clear, making it easy, not 111 pages of documentation and fine print, but making it easy for families to compare one product to another.

I ultimately believe that the real partners for this agency will be families all over this country, who, if they have clear and simple information in front of them, if they can really make apples-to-apples comparisons, will be able to turn this market around so that

those providers, those community banks, those credit unions, those providers who in good faith are willing to get out there and compete in the marketplace, they are willing to offer the most value at the lowest price, or they are willing to offer good customer service that draws people in, that those will be the providers who will flourish in consumer credit, ultimately serving families. So I believe we can do this, sir.

Mr. CUMMINGS. On Radio One, Cathy Hughes has a slogan; and she says, information is power, information is powerful when you use it. So I think that summarizes pretty much what you are saying. Give them the information and let them run with it and make decisions based on sound information.

Now, some people are saying that you are the Goliath. Incredible. They say you are going to overrun the industry with overbearing regulations and a complete lack of accountability. But isn't it true that your rulemaking power can be vetoed by the Financial Stability Oversight Council? Vetoed, is that right?

Ms. WARREN. Yes, Congressman, it is.

Mr. CUMMINGS. Does any other bank regulator have that kind of requirement?

Ms. WARREN. No, Congressman, they do not.

Mr. CUMMINGS. You are not looking too much like a Goliath to me so far. And to issue regulations, you have to make particularized findings and consult with other banking regulators, is that right?

Ms. WARREN. Yes, sir, it is.

Mr. CUMMINGS. I understand that the banks want to protect their fees just like the oil companies in the Gulf want to protect their profits. But, as I said this morning—we had a hearing this morning on oil—we cannot go back to the era of inadequate protection for the American people.

So I want to thank you for everything you are doing. I want to thank your staff for everything they are doing. Again, there are people in my district who applaud what you are doing. And may God bless you. Stay on the battlefield.

Ms. WARREN. Thank you, sir.

Mr. MCHENRY. The gentleman's time has expired.

I now recognize Mr. Guinta of New Hampshire for 5 minutes.

Mr. GUINTA. Thank you very much, Mr. Chairman.

Thank you, Ms. Warren, for being here today.

I wish this wouldn't have to be described as a battlefield. Rather than that, I would like to see a more productive manner in which we could solve the Nation's problems.

I do have some questions, though, about the formation of this entity and the need for its existence and how it plans to operate; and I am sure you could appreciate that some Members of Congress do have questions, given the unique nature of this entity.

The first question I want to ask is, can you quickly describe how unique this is in comparison to other bank regulator organizations in terms of who you have overseeing you?

Ms. WARREN. Well, like the OCC, we have a single director. Unlike the OCC, any rule that comes out of the Consumer Financial Protection Bureau can be overruled by a group of other regulators.

I am trying to think. Like the OCC, we have rulemaking authority; we are subject to the Administrative Procedures Act. Unlike the OCC, we are also subject to—I think the acronym is SBREFA—the small business panels, that we have to bring in panels to be able to go through the impact on small businesses. We are required to do cost-benefit analyses. We are required to consult with the other banking regulators before we issue rules.

I think it is fair to say that our charter is written very much in mind with the notion that we are there to be cooperative with the other banking regulators, at least to work with them. We are—I am trying to think. We have a research function that is somewhat different from the other regulators.

Mr. GUINTA. Can you tell me why there is a necessity for a 5-year fixed term, when I don't believe anyone else in history has had that period of time as an appointment?

Ms. WARREN. Congressman, I think many terms are 5-year fixed terms. It is my understanding that the head of the Office of the Controller of the Currency finished his 5-year term last August.

Mr. GUINTA. But I think those entities, I think, are at the discretion of Congress. There is an oversight process through appropriations. You are excluded from that.

Ms. WARREN. No, Congressman. I am sorry, but that is not the rule with the Office of the Controller of the Currency. There is no banking regulator who is subject to the political process or to appropriations. All banking regulators are funded independently; and, indeed, all of the other banking regulators, not the consumer agency but all of the other banking regulators, are able to set their own funding levels.

So, for example, if the Office of the Controller of the Currency decides they need more money to run exams or they need more money to engage in their other activities, they up the assessment on banks and simply raise more money. There is no oversight from Congress in that process.

Mr. GUINTA. So do you have an idea of what your budget is going to be?

Ms. WARREN. The cap on our budget is set at just under $600 million. The actual budget I actually have brought with me, because I knew that you wanted to do oversight on this. Our estimates for fiscal year 2011 are $143 million, and our estimate for fiscal year 2012 is $329 million. So at least as best we can project in the next 2 years we will be substantially under the caps that are set by Congress in the Dodd-Frank Act.

Mr. GUINTA. Of the seven separate agencies that you are going to assume authority over, do you plan on hiring from those agencies?

Ms. WARREN. Congressman, we have already begun the process of hiring some people. I believe it is the case from each of—I think it is the case from each of the Federal agencies. We have certainly been in talks with all seven agencies. We have been very——

Mr. MCHENRY. The gentleman's time has expired. Please finish your thoughts.

Ms. WARREN. We have been very lucky to have detailees from each of those Federal agencies come and help us in the stand-up process, and then we have gone through an interview process—I

would be glad to describe it in more detail, but I understand I am past time.

Mr. GUINTA. I would just state to the chairman the reason I am asking that question is earlier the witness had stated that if this entity had existed we wouldn't have the financial meltdown that we had. So I wonder why we would hire people from those other agencies who were doing this oversight in the first place.

Mr. MCHENRY. Thank you.

I now recognize Mrs. Maloney of New York for 5 minutes.

Mrs. MALONEY. Thank you. Thank you very much.

I truly believe the title of this hearing today and really the GOP efforts in general should be: Let's pretend the financial crisis never happened. Let's forget that 15 million families lost household wealth in America, that our financial community was brought to its knees and had to be bailed out by the American taxpayer.

And in response to this crisis, with overwhelming support from the American people, we created the CFPB, and it is carefully constructed, urgently needed, and should be allowed to go into operation as planned by the bill that was signed into law by President Obama.

Now, the CFPB fills a gaping hole in our regulatory framework. This is a body that will focus completely and totally on consumer financial protection. Too often, consumer protection was a second thought, a third thought, or not even thought about at all, so you came out with abusive and anti-competitive practices and credit cards, subprime loans that had a degree of probability of throwing American families out on the street and hurting our financial system. So this was put in place to help our overall economy and to help consumers; and all of the efforts so far have been to dismantle, disrupt, delay, and not allow the agency to go into effect.

There was an astonishing abuse of power, of confirmation power in the Senate. Forty-four Senators signed a letter that said we will not allow this agency to go into effect or for you to confirm a director unless you pass bills that will destroy it, that will make it meaningless, that will make it ineffective. That is not what the confirmation process is supposed to be. It is literally holding the entire government hostage to their demands on dismantling this program.

I would say that there is a lot of unfounded concern about lack of oversight on this agency. I would argue that the oversight and balance of power over this agency is greater than any other agency in the entire Federal Government, with audits and requirements and the unprecedented ability of another agency, the Financial Stability Oversight Council, to overrule the decisions made by the CFPB. I don't believe any other government agency has that ability to overrule another agency.

Would you comment on that, Dr. Warren?

Ms. WARREN. Yes, Congresswoman.

So far as I know, there is no agency anywhere in the Federal Government whose rulings, once arrived at through the full process, through hearings, through fact-finding, all the way through, could actually be overruled by a group of other agencies. It is unprecedented.

Mrs. MALONEY. So how many other banking regulators can be overruled? Can banking regulators be overruled with, say, a faulty mortgage product? Can they be overruled?

Ms. WARREN. No, Congresswoman. Right now, there is no banking regulator who can be overruled.

Mrs. MALONEY. And could you go through and outline some of the oversight and, really, constraints? No other agency has their budget capped, I don't believe.

Ms. WARREN. I appreciate your bringing up the question of budget, because I think it is so important here, Congresswoman.

As Congress has known since the middle of the 1800's when they made the decision in the establishment of the first bank regulator to make the funding for that regulator outside the appropriations and political process, we knew that we wanted banking regulators that, at a minimum, were not glancing over their shoulders as they walked in, now, walked into trillion dollar financial institutions to try to do supervision or enforcement. They are not glancing over their shoulders wondering if something they do or something they say will create problems and increase lobbying efforts against the agency next time around in the political process.

This agency—and, as a result, all of the banking regulators are set up so they determine their own funding. It is not just that they are out of the political process. They decide the number of dollars that they get.

The consumer agency is capped. If we need more money for supervision and enforcement, our only option is to come to Congress. But we are capped, and there is only a certain amount of money that comes to this agency to carry out its functions before we would be forced to go into the political process.

Mrs. MALONEY. I want to thank you for your testimony and your hard work.

My time has expired, but I would say those who want to gut this agency want to leave consumers prey to unscrupulous mortgage efforts and credit card abuses. So I believe this agency is important, and we should allow it to go forward and be implemented.

Mr. MCHENRY. Mr. Gowdy of South Carolina is recognized for 5 minutes.

Mr. GOWDY. Thank you, Mr. Chairman.

Thank you, Ms. Warren.

The first question I was going to ask you is directly from a constituent of mine in South Carolina who is in the business of providing financial services. What steps will you take to ensure that complaints received by the Bureau are legitimate ones and not merely post-contractual gripes against a company when the consumer decides they don't want to live with the terms?

Ms. WARREN. Congressman, I am glad you asked about the complaint system. It is one of the most significant features I think of the new consumer agency. And what we are planning to do with it is, instead of having sort of a general complaint line, we are really trying to develop more effective complaint resolution in the consumer agency on a product-by-product basis.

So, for example, we will be starting with credit cards. And what we are hoping to do is we are working on setting up a hotline and a form online for people who have had problems with their credit

card issuers and they believe perhaps that there have been violations of law and want to get in touch with the new consumer agency.

Mr. GOWDY. Will the complaints be made public? Because I think you will agree with me that unfounded, unsubstantiated complaints have a deleterious effect on the accused.

Ms. WARREN. So what we will be doing—and I really want to give a shout-out here to five of the largest credit card companies in the country who are working with us right now on a way that, as soon as we receive a complaint, that complaint can go directly to the credit card company. They can help us understand whether the complaint has merit. They have the opportunity to try to resolve it with the customer, keeping us in the loop.

Mr. GOWDY. Is that just for credit card companies or is it for all financial service providers?

Ms. WARREN. Here is what I want to make clear. As we build this——

Mr. GOWDY. I only have 5 minutes. I am not trying to cut you off.

Ms. WARREN. Fair enough, sir. I am just trying to give you a picture of what we are doing.

Mr. GOWDY. Are the complaints public? Let's try that with a yes or no answer.

Ms. WARREN. Congressman, I have tried to describe the process for one product. We are trying to get this product right, and we have had a lot of cooperation from the credit card companies.

Mr. GOWDY. I am probably not asking my question very artfully. Are the complaints public, yes or no?

Ms. WARREN. Congressman, there is no single answer for all products in the same way. We are working——

Mr. GOWDY. Are any of the complaints public?

Ms. WARREN. Congressman, we don't have any complaints yet. What we are trying to do is build a system to deal with complaints.

Mr. GOWDY. So you do have the discretion to keep the complaints non-public if you like?

Ms. WARREN. What we are trying to do is work with the industry to find a complaint system that works for American families and works for those who are providing them services. We are in the middle of that process. This is part of stand-up. And we are glad, Congressman, to hear from you, to hear from your constituents, and to hear from everyone else about this process. We are an open door on this subject.

Mr. GOWDY. Well, thank you. I will encourage them to participate.

I want to ask you about some of the definitions. I saw a definition for abusive: "Materially interferes with the ability of a consumer to understand a term of condition of a consumer financial product or service." That suggests to me that some interferences are immaterial. Is that what you meant by that?

Ms. WARREN. Congressman, I believe the language you are quoting is out of the Dodd-Frank Act, and it is Congress' intention. I believe, if I am not mistaken—I don't have a copy of it with me here.

Mr. GOWDY. Will you not be the one enforcing that? Will you set regulations that define these terms?

Ms. WARREN. Congressman, this is the guidance that Congress has given.

Mr. GOWDY. I am asking you. Are some interferences immaterial?

Ms. WARREN. Congressman, we will go through the process of interpreting the language that Congress has given us.

Mr. GOWDY. I don't mean for that to be a trick question. Are some interferences immaterial? Because the word "material" modifies "interference."

Ms. WARREN. Congressman, I want to be clear about this. It is statutory language that you are asking. There is a process in place for the Consumer Bureau. You don't want me standing here shooting from the hip about how I might want to interpret individual language.

Mr. GOWDY. Let me ask you about the second one. It also defines it as an unreasonable advantage or taking unreasonable advantage of a consumer's lack of understanding. Are there some instances where taking advantage of a consumer's lack of understanding are reasonable?

Ms. WARREN. Congressman, this is the language that Congress has adopted in the Dodd-Frank Act. Ultimately, it will fall to this Bureau through a lengthy process to interpret this on a case-by-case basis. I believe it would be irresponsible for me to stand here and pop off about how I would interpret particular words.

Mr. GOWDY. Do you believe there is a duty to educate or a duty to learn on behalf of the consumer?

Ms. WARREN. I believe that consumers want to learn. I think they want to know——

Mr. GOWDY. Well, that is a different question. I didn't ask whether or not they wanted to. Do you believe that there is a duty to do it? Since the law itself says consumer's inability to protect his own interest, do you agree there is a duty to educate yourself?

Ms. WARREN. Congressman, we have, as part of our responsibility under the Consumer Financial Protection Bureau laws, undertaken consumer financial education, and I embrace this. I think it is exactly where this agency should be.

Mr. GOWDY. Is that a yes? Is that a yes?

Ms. WARREN. We are going to help consumers by giving them products where prices are clear, where risks are clear, where they can make comparisons.

Mr. GOWDY. Is there a duty to educate yourself, yes or no?

Ms. WARREN. I believe that an empowered consumer is a consumer who can not only protect himself or herself but one who can change the market.

Mr. GOWDY. Mr. Chairman, I give up.

Mr. MCHENRY. Thank you.

We have two votes on the House floor. We have two additional Members and not enough time for them to ask questions. We're going to recess until the second vote is cast. We'll come back over here as quickly as possible and we'll have our final Members ask their questions.

And the committee's in recess until we return.

Mr. GOWDY. Mr. Chairman, procedurally, let's make sure Ms. Warren is still available.

Mr. MCHENRY. That was never the pledge. We have two additional Members with questions, and originally this hearing was at 2. Are you not able to stay for these?

Ms. WARREN. Congressman, when you asked to change the time four times in the last 12 hours, including waking people up at home last night to change the time again——

Mr. MCHENRY. Ms. Warren, let me be direct with you. I never made a single phone call about this. So be very clear about what you're saying.

We have two additional Members. We have 8 minutes remaining on the floor to vote. If you won't stay around for the questions, then we're going to stay around, and we're going to finish this out. I never heard that you had to leave at 2:15, which is the time——

Ms. WARREN. Then, Congressman, you might want to have a conversation with your staff. When they asked us to move the hearing, we said the only way we could do this is if I could leave here at 2:15 for a meeting that would be at 2:30, and your staff agreed.

Mr. MCHENRY. All right. Then we're going for questions now. Mr. Yarmuth, you're recognized for 5 minutes.

Mr. YARMUTH. Thank you, Mr. Chairman.

And I want to say for the record that I apologize to the witness, Dr. Warren, for the rude and disrespectful behavior of the chair. The snarky comments about a Senate race and the questioning of your veracity when there's documented evidence that you are being totally truthful indicates to me that this hearing is all about impugning you, because people are afraid of you and your ability to communicate in very clear terms the threats to our consumers, the threats to our constituents, and possibly very, very effective ways to combat them.

So I think in one respect, I congratulate you for instilling such fear in the committee on the majority side and in some aspects or segments of the business community, because they understand how effective you are in getting the message out to the American people that there are better ways to do things.

That being said, one of the major questions that's being asked here is whether there's a need for your agency or the agency that you conceived, in light of the fact that there are seven related agencies, all of whom who have some authority in this area.

These seven agencies have been around for some time. During the time that those seven agencies have been around, have financial products, the disclosure statements and so forth, gotten easier to understand? Has the type gotten bigger? Have they shrunk? Or, in fact, have they gotten much more incomprehensible?

Ms. WARREN. Congressman, during the time these agencies have been around I believe that financial products have become more complicated and much more heavily laden with fine print that effectively make it impossible for consumers to compare risks and costs.

Mr. YARMUTH. In respect to the question that Ms. Buerkle asked regarding the comparative salaries, would you be willing to speculate on what the average salary is of the people who are writing financial agreements, mortgages, and credit card agreements for

the major corporations, compared to what the Consumer Financial Protection Bureau would be paying?

Ms. WARREN. Congressman, I couldn't begin to speculate on the difference between the salaries of the government officials who will be hired into the new consumer agency to try to oversee this market and the salaries of those who are writing the financial products, particularly for the Wall Street companies. I suspect though, sir, there is a large differential.

Mr. YARMUTH. I suspect you're right. And I'm going to yield back the balance of my time in a second so that we can get out of here.

But I just want to say that the question of accountability——

Mr. MCHENRY. If the gentleman will yield, I will say that Mr. Issa went to vote. He's coming back to ask his question. Mr. Walsh went to vote. He's coming back to ask his question. So we'll give you 20 additional seconds for my interruption. Go right ahead.

Mr. YARMUTH. Thank you. That's quite all right.

But the title of the hearing involves accountability of your agency. I'd just like you to spend a few seconds talking about what accountability there has been in terms of the credit card companies, mortgage writers, and so forth over the last decade or so. Because it seems to me that that's where the real accountability issue has been, that the consumers have no way to hold those companies accountable for the products that they offer.

Ms. WARREN. Congressman, we have seen very little accountability among the largest financial services providers and among the largely unregulated financial services providers, both before the crash of 2008 and after the crash of 2008.

And I just want to point out that has been really hard on American families. It's been hard on them directly when they've gotten their feet tangled in credit card agreements and payday loans that were deceptive. It's been hard on them when they thought they were doing sensible things on mortgages, only to learn that they were going to lose their homes.

But it's also been hard on others in the economy, people who did nothing to get involved with financial services but who lost their jobs. People who see the companies, the small businesses they're working for, their markets have dried up. And it has also been hard on community banks, on credit unions who work so hard day in and day out to work with their customers, to be the relationship lenders, to be there over the long haul, and who are getting crushed in a financial turnaround that was not their fault. The problems have gone everywhere. The problem of lack of accountability is one that is squarely on the industry, and this consumer agency is going to do its best to help turn that around.

Mr. YARMUTH. I congratulate on your work and thank you for your service.

Mr. CUMMINGS. Will the gentleman yield?

Mr. YARMUTH. I will yield to the gentleman.

Mr. CUMMINGS. Mr. Chairman, my understanding is that your staff made an agreement with Professor Warren. The agreement was that she would available to this committee for 1 hour. And pursuant to that agreement, if she accompanied your late-breaking request made by your staff at 9 p.m. last night that she appear at an earlier time than previously scheduled, you would allow her to

leave 1 hour after that, at 2:15 p.m., in keeping with the agreement. It is 2:15 now. She kept her side of the bargain, and now it's time for you to keep yours.

Mr. Chairman, out of respect for Professor Warren's schedule and the flexibility she showed to accommodate your request, you should now dismiss this witness and get on with the remainder of the hearing. I mean, in fairness. I mean, we were here.

Mr. MCHENRY. I certainly appreciate it. And in reaction to, as the ranking member, the original agreement was that we would have a 2 p.m. Hearing in order to accommodate votes which we expected to be at 1:30. Knowing that the Professor is very busy, we don't want to keep witnesses here while we adjourn to go—recess to go vote. And so we changed the time in anticipation of the vote we're about to have. So rather than gavel in and have opening statements and go to vote and come back 30 minutes later and have an hour of questions, rather than do that, we tried to work with the witness.

In exchanging of e-mails, your staffer, your Government Affairs staffer talked to Mr. Haller on the committee staff, and he asked for confirmation on this. He called you up, the Government Relations head, did not respond to your e-mail, called you up and said, I'll do my best to get you out of there, but we need to accommodate people's questions. And so that's where we are today.

Mr. Cummings, I understand, and I certainly appreciate your questions.

Mr. CUMMINGS. I just want to make it clear. I know you sound like you've already decided, but just this one real quick thing. Peter Haller, according to my staff, changed the time on us a few times. And they bent over backward, moved things around and agreed to 1:15 to 2:15. She needed to get out of here by 2:15. That has been constant, and Peter McHenry and his staff knew this.

Mr. MCHENRY. Peter Haller, you said. Because there is no Peter McHenry.

Mr. CUMMINGS. Yeah. I just want to make it clear. I know you're going to do what you're going to do, but out of respect for Ms. Warren, I mean, she's got her own limitations. She's trying to protect our constituents, yours and mine, big time.

Mr. MCHENRY. And I would respond to the ranking member. I would respond to the ranking member that the date of this hearing was chosen by Ms. Warren. We worked with her and her staff diligently and gave them a number of options. They came back with different options. We accommodated those options in context for a hearing room. We're here to have the former chairman's unveiling of a picture in the main committee room. So that's an accommodation, number one.

Number two, we accommodated her schedule. That's why it's on this date.

Furthermore, I'm skipping this vote, as are you, to have this debate, rather than simply allow for a few additional minutes.

Mr. CUMMINGS. I'm going to get my vote in. But the only thing I'm saying is that, at the rate we're going, it looks like she'll be here—what—until about 20 of at least.

Mr. MCHENRY. Well, actually, I anticipate that the two Members will have 5 minutes apiece. And, as the gentleman knows, I kept folks to the 5-minute timeframe today.

So with that, I'm not trying to cause you problems, Ms. Warren, but we're trying to accommodate folks. And if you wanted to stick around, we're going to have two more Members with questions, and then we'll see you off.

Ms. WARREN. Congressman, you are causing problems. We had an agreement for a later hearing. Your staff asked us to move around so that we had to change everything on my schedule to try to accommodate your time.

Mr. MCHENRY. And I certainly appreciate that.

Ms. WARREN. But the agreement was that I would be out of here at 2:15 because there are other things now scheduled at 2:30.

Mr. MCHENRY. That was a request. But we moved the hearing so that you could actually get the questions in.

Ms. WARREN. Congressman, you told us one thing.

Mr. MCHENRY. I did not tell you anything.

Mr. CUMMINGS. We have no one here to ask questions, Mr. Chairman. We have no one here to ask questions.

Ms. WARREN. I have other obligations I committed to based on the representations of your staff and our effort to try to accommodate you and rearrange our schedule to accommodate you.

Mr. MCHENRY. Look, Ms. Warren, it was a simple request. Your staff had a request. My staff said we're trying to accommodate you. We're going to get you out of here in 10 minutes if you just——

Ms. WARREN. Congressman, we had an agreement.

Mr. MCHENRY. You had no agreement.

Ms. WARREN. We had an agreement for the time this hearing would occur.

Mr. MCHENRY. You're making this up, Ms. Warren. This is not the case. This is not the case.

Mr. CUMMINGS. Mr. Chairman, you just did something that—I'm trying to be cordial here, but you just accused the lady of lying.

Mr. MCHENRY. She's accusing me of making an agreement that I never made.

Mr. CUMMINGS. I think you need to clear this up with your staff. They have moved this thing around 50 million times, and she's got to go to another hearing.

Ms. WARREN. Not to another hearing, to another meeting.

Congressman, I would be glad to answer questions for the record. We can do that on—if you'll just send us questions for the record, we're glad to answer them, and they'll be a matter of the public record.

Mr. MCHENRY. I certainly appreciate that. And I have tried to accommodate you. I just want to be very clear and make sure that this is on the record. There was no agreement about departure time. And I want to just make sure to the ranking member that I didn't make those representations. I've confirmed with my staff before this thing started. The reason why we moved the times is so that she wouldn't have to wait during a vote in the middle of the hearing.

So, with that, I understand your frustration. But just ask you to see my side of this thing as well, because we thought we had you for more time. I thought I had you for more time.

Mr. CUMMINGS. Most respectfully——

Mr. MCHENRY. So, with that—if the gentleman will simmer. You know, I would just say——

Mr. CUMMINGS. No, I'm cool. I just want to make sure she's treated fairly. I mean——

Mr. MCHENRY. I understand. We've had more debate than actually the questions remaining.

So, with that, you know, Ms. Warren, I appreciate your service to our government. I do. And, you know, I was just trying to get on the record a few of these things that we have seen counter to my questions of you back in March of this year. And it is informative and instructive for this committee on the construct of this enormous Bureau that you're constructing. And so that's why Congress wants to have this oversight.

I thank you for your testimony. I'll dismiss you now. And I'll ask the two Members that are not being given the opportunity to ask questions to submit theirs for the record, and I'd ask you to turn around those questions as quickly as you possibly could.

Ms. WARREN. Thank you, Congressman.

Mr. CUMMINGS. Mr. Chairman, thank you very much.

Mr. MCHENRY. And we're going to recess for votes and come back for the second panel.

[Recess.]

Mr. MCHENRY. The committee will come back to order.

We'll now recognize the second panel. We have Mr. Todd Zywicki, a foundation professor of law at George Mason University. Dr. David S. Evans is the chairman of the Global Economics Group and lecturer at the University of Chicago Law School. Mr. Adam J. Levitin is associate professor of law at Georgetown University Law Center. Mr. Andrew Pincus is a partner at Mayer Brown Rowe and Maw LLP.

And, with that, as is pursuant to committee rules, all witnesses are sworn before they testify. If you'll stand and raise your right hands.

[Witnesses sworn.]

Mr. MCHENRY. The record will reflect that all witnesses answered in the affirmative.

In order to facilitate discussion, if you can—your written statement will be admissible to the record, and you can just simply summarize, a simple 5 minutes. And at 1 minute you'll get the yellow light, which sort of helps you round up. And we'd love to hear your testimony.

Mr. Zywicki, we'll start with you, sir.

STATEMENTS OF TODD ZYWICKI, FOUNDATION PROFESSOR OF LAW, GEORGE MASON UNIVERSITY; DAVID S. EVANS, CHAIRMAN, GLOBAL ECONOMICS GROUP, LECTURER, UNIVERSITY OF CHICAGO LAW SCHOOL; ADAM J. LEVITIN, ASSOCIATE PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER; AND ANDREW PINCUS, PARTNER, MAYER BROWN ROWE & MAW LLP

STATEMENT OF TODD ZYWICKI

Mr. ZYWICKI. Thank you, Mr. Chairman. It's a pleasure to be here today.

I want to say at the outset that I was in favor and remain strongly in favor of regulatory reform dealing with consumer financial protection and that sort of thing. I think that we've been much in need of regulatory reform, streamlining coherence, and that sort of thing. And to this day I remain disappointed that I think with the CFPB we've squandered a golden opportunity to create new, useful safeguards for consumers that would promote competition, consumer choice, and consumer protection simultaneously.

Instead, what I think is we've created a monster of an agency that is going to reduce access to credit, increase the cost of credit, and, ironically, have the unintended consequence of probably exposing more consumers to fraud and abuse when it comes to lending products.

The Truth in Lending Act was three pages long. Now it's grown to thousands and thousands of pages. We've seen duplicative regulatory enactments over time; and, in particular, years of class action litigation, heavy-handed regulation legislation have larded up the current system with a lot of counterproductive regulation; and, unfortunately, this isn't going to change that.

This Bureau is simultaneously the most powerful and unaccountable bureaucracy that I've ever been aware of. It is an independent agency within another independent agency inside the Federal Reserve. It may be the most powerful that's ever been considered by most to be constitutional.

It has the power to reach every single credit card, payday loan, mortgage in America. It has the potential to impact small businesses that use consumer credit and personal credit in their operations. Yet an agency with this kind of power is presided over by one person, with no effective external oversight, a completely unreviewed and unreviewable budget, and really no checks on them except for this loose check by the FSOC.

Now, history tells us what happens when we give bureaucrats this much unaccountable power to regulate massive swaths of the economy. This super regulator is like something that we haven't seen since the Nixon administration; and there's a good reason why we haven't seen this since the Nixon administration, is we know what happens when we give this sort of unaccountable power to bureaucrats to make decisions for consumers as to what kind of products they're allowed to have and what the terms of those products are going to be.

It is, as I mentioned, a one-person commission. I think it seems obvious that this should be a commission, rather than a one person sort of thing.

I also agree with the proposal to reduce the two-thirds super majority oversight to a simple majority rule for oversight.

Failing that, or perhaps in addition to that, I think that this should be formally required to undergo some sort of external review by OIRA or someone else, rather than what I take to be the really toothless cost-benefit analysis that's included here.

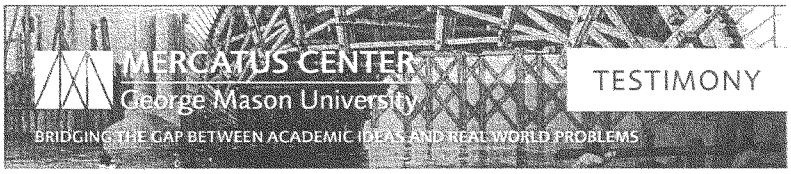
And we saw—and the reason we haven't seen this since the Nixon administration is we saw what happened when we give this kind of unaccountable power to bureaucrats. We saw a generation of economic stagnation, stifled innovation, declining American competitiveness, and the like. And it's completely predictable this is what happens to bureaucracies when they lack the feedback and the accountability from outside. You get tunnel vision, mission creep, and you get the pet hobbyhorses of whoever the person is who happens to be running the organization is the one who sets the priorities.

And what we learned from that experience and the harm to the American economy is that we need accountability, oversight, and transparency in our processes.

Why does that matter? Because overregulation by this body could inflict huge harm on the American economy. It will raise costs and reduce access to credit. I'm not familiar with any theory that says that increasing the costs of a business could possibly cause prices to go down. And it will increase the costs and reduce access to credit. And what we've learned over time is that you simply cannot wish away the need for credit. That if somebody needs $500 to repair their transmission to get to work on Monday, they need $500 to repair their transmission to get to work on Monday.

What should be done? I lay out in my statement which is the model here is the Federal Trade Commission, a multi-member commission with internal checks and balances. One reason that independent agencies typically are not subject to OIRA review is precisely because they are commissions that have an internal deliberative process. This agency will not be subject to any budget oversight. It is not a multi-member commission. It is not subject to external review by OIRA or anybody else, and I think that this needs to be fundamentally reviewed.

[The prepared statement of Mr. Zywicki follows:]



WHO'S WATCHING THE WATCHMEN?
OVERSIGHT OF THE CONSUMER FINANCIAL PROTECTION BUREAU
MAY 24, 2011

Todd Zywicki
George Mason University Foundation Professor of Law
Mercatus Center Senior Scholar

United States House of Representatives
Committee on Oversight and Government Relations
Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs

It is my pleasure to testify this afternoon on the question of "Who's Watching the Watchmen? Oversight of the Consumer Financial Protection Bureau." This is a crucially important question to ask at a crucially important time in our economic recovery. Economic recovery remains fragile, housing markets are still in flux, and consumer credit markets are still recovering from the credit crisis and the imposition of regulations that have increased the cost and reduced the availability of credit to consumers and small businesses, from credit cards to bank overdraft protection. In addition, the Durbin Amendment to the Dodd-Frank financial reform legislation will take effect this summer, imposing confiscatory and punitive price controls on debit card interchange fees and shifting those costs onto American banking consumers. It is estimated that when the dust settles, these new banking fees will mark the end of free checking for low-income Americans and drive some one million of them out of the mainstream banking system and into the hands of check cashers, pawn shops, and fee-laden prepaid cards.[1]

This constant interference with the ability of lenders to price their risk accurately has resulted in higher interest rates, billions of dollars slashed from consumer credit lines, and record popularity for payday lenders and pawn shops.[2]

But these impositions are just the tip of the iceberg of the possible damage that poorly conceived regulation can do to consumer credit, small business credit, and the overall American economy. Just weeks from now the Consumer Financial Protection Bureau (CFPB) will enter its operative phase. If not subject to effective congressional oversight, the massive, vaguely defined powers and expansive reach of the new consumer credit "super regulator" could prove an economy killer, producing still-higher credit costs for consumers, and accelerating regulatory pressures that drive consumers out of the mainstream financial system and into the alternative, high-cost financial sector. Moreover, because millions of small,

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[1] David S. Evans, Robert E. Litan, and Richard Schmalensee, *Economic Analysis of the Effects of the Federal Reserve Board's Proposed Deb it Card Interchange Fee Regulations on Consumers and Small Businesses* (Feb. 22, 2011).

[2] *See* Todd J. Zywicki, *Why Aren't Banks Lending? Because Bureaucrats and Politicians Won't Let Them*, WASHINGTON TIMES, page B1 (June 10, 2010).

independent businesses rely wholly or partly on personal and consumer credit to start and build their businesses, heavy-handed, misguided regulation could strangle job creation and economic dynamism.[3]

Indeed, based on standard economic analysis and the history of consumer credit regulation in America, an entirely foreseeable consequence of an unchecked CFPB will be—ironically—to produce higher levels of fraud and abuse of American consumers. This is because oppressive and misguided regulation stifles competition, reduces consumer choice, and drives consumers from the mainstream banking system into non-traditional lending products.

At this point, there seems to be a general consensus that the overall impact of the CFPB will be to increase the cost of, and reduce access to, consumer and small-business credit, and to increase the regulatory burden on financial institutions. Even supporters of the CFPB and its continued insulation from responsible oversight generally acknowledge that this will be the overall impact of the body as a purely descriptive matter—they simply believe that higher cost and reduced credit access to mainstream credit is a good thing in light of the experience of the past decade.

I disagree—economics and history teach that reducing *access* to credit does not reduce consumer *need* for credit. Washington bureaucrats cannot wish away the need of American families for credit. If you need $500 to repair your transmission to get to work on Monday, you need that $500 —regardless of whether you have a bank account or credit card. If you need $300 to pay your rent or electric bill, then you need that money regardless of whether you have it saved up or not. And if you can't get a credit card because a paternalistic Washington bureaucrat doesn't think you deserve one, then you are simply going to go to a payday lender. And if payday loans are regulated out of existence, you are going to turn to a pawn shop. History teaches the unfortunate lesson that if all else fails, illegal loan sharks stand ready to meet your needs.

Even if one believes that increasing the cost and reducing access to credit is a good thing, there should also be agreement that regulators should not try to increase cost and reduce access unduly. But the current organizational structure and lack of responsible oversight of CFPB creates an extreme danger that the agency will overreach, imposing costs on consumers, small businesses, and the economy that will stifle economic growth and drive vulnerable consumers into the arms of less-savory lenders. My testimony today will focus on some structural reforms that might help to minimize those unintended consequences.

At the outset, however, let me add one word—we have seen this movie before and we know how it ends. Beginning with the New Deal, central planners in the United States government created a flotilla of massive, unaccountable bureaucracies dedicated to micro-managing the American economy. And we know what happened: by the 1970s, these unaccountable regulatory behemoths had strangled the life out of the American economy—bringing about stagflation, reduced innovation, and declining American competitiveness--until the deregulation efforts, beginning with the Carter Administration and continuing through the Reagan Administration, restored dynamism to the American economy.

The structure of the CFPB is a throwback to this Nixon-era bureaucracy, from which we learned the following: you cannot give massive discretionary powers to unaccountable Washington bureaucrats, however well-intentioned, and expect they can run the American economy and still preserve innovation, competition, and consumer choice. That idea has been tried and has failed. Since that time, scholars have analyzed that historical experience to distill the general lessons of the pathologies that arise from

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[3] Thomas A. Durkin, *The Impact of the Consumer Financial Protection Agency on Small Business* U.S. Chamber of Commerce, Center for Capital Markets Competitiveness, Sept. 23, 2009, http://www.uschamber.com/reports/impact-consumer-financial-protection-agency-small-business.

unaccountable bureaucrats tasked with a narrow tunnel-vision focus. I hope this body will take steps to avert the pain that will come from relearning those lessons.

I will focus on several different areas of possible reform to mitigate the damage that the CFPB will do to the economy: structural changes, increased accountability, and substantive changes to the agency's mission. At the outset, let me emphasize that I agree with the motivation underlying the creation of the CFPB—to create a more modern, coherent, and integrated consumer-protection regime for the regulation of consumer credit. Unfortunately, the CFPB is not likely to bring about this result.

Reforming the Bureau's Structure

H.R. 1121, passed by the House Financial Services Committee, would replace the single-director model of the CFPB with a multi-member commission. This is the most important reform that should be made to the bureau's structure to make it more consumer-friendly. Ideally, the entire bureau would be liquidated and sent to the dust bin of history, and all of its responsibilities sent to the Federal Trade Commission (FTC), where they belong. Absent that, however, the bureau should be reconstructed along the lines of the FTC as a multi-member commission, or the Board of Governors of the Federal Reserve should be given heightened oversight powers over the bureau.

The bureau's structure itself may be unprecedented in American history: an independent agency within another independent agency. Although headquartered within the Federal Reserve, it is almost completely unaccountable to oversight by the Federal Reserve Board or any other entity except through a cumbersome and limited oversight process by a council of regulators. But even this council can act only if two-thirds agree that a proposed action by the bureau would imperil the safety and soundness of the nation's financial system. Moreover, the bureau is headed by a single chief appointed by the President, rather than a multimember commission, leaving the agency's actions subject to the whims and idiosyncratic views of a single individual.

As an unaccountable bureaucracy with a single head, the bureau will be susceptible to bureaucracy's worst pathologies: a tunnel-vision focus on the agency's regulatory mission, undue risk aversion and agency overreach.[4]

Although a more effective consumer protection system is needed, consumer-protection goals often can conflict with other goals, such as promoting competition, lower prices and expanded choice for consumers; and ensuring safety and soundness of the banking system. Failing to account for the potential negative impact of overzealous regulation enacted in the name of consumer protection can result in greater harm to consumers in terms of higher prices, reduced choice, and lower quality services.

For example, the law gives the bureau new authority to regulate mortgage brokers, some of whom undoubtedly contributed to the onset of the financial crisis. Although stricter regulations of mortgage brokers theoretically could reduce fraud (although there is no evidence that this is the case), brokers also provide a salutary competitive check on traditional bank lenders. Research by economists Morris Kleiner and Richard Todd finds that overly restrictive regulation that reduces the number of mortgage brokers in a given market results in higher prices and lower quality for consumers—including a higher level of

[4] These bureaucratic tendencies have been well-documented by scholars over the past generation. For discussion *see* MAXWELL L. STEARNS AND TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009), especially discussion in chapter 6.

foreclosures.[5] An effective consumer-protection regulator must be able to balance consumer protection against other benefits to consumers and the economy of greater competition, lower prices, and enhanced safety and soundness. The current CFPB is not structured to weigh those broader trade-offs.

A better model is the Federal Trade Commission, the primary consumer-protection regulator for most of the American economy. At the FTC (where I was director of the Office of Policy Planning from 2003-04), the mission of the Bureau of Consumer Protection is virtually identical to that of the CFPB, focusing particularly on unfair and deceptive marketing. But the final decision on whether to act rests not with the director, but with the five-member bipartisan commission to which the bureau reports. Moreover, by combining under its roof the Bureau of Competition and the Bureau of Economics, the FTC has a broader scope to weigh the consumer protection bureau's narrow focus on consumer protection against the larger impacts on competition and economic efficiency (and vice versa).

Yet no one—least of all those who have worked at the FTC in recent decades—contends that this broader focus, greater accountability and internal checks and balances weaken the FTC's effectiveness as a consumer protection watchdog. Instead, FTC officials uniformly recognize that consumers benefit from lower prices and greater choice as well as consumer protection. I don't know a single FTC veteran who believes consumers would be better off if the director of the Bureau of Consumer Protection were unleashed to litigate and regulate without accountability to the commissioners. Yet that's precisely how the CFPB is structured. More generally, there is simply no good reason why this one agency, of all the similarly empowered agencies in Washington, should not be governed by a commission.

Increased External Accountability

The bureau should also have increased external accountability to Congress and/or the White House.

First, it is obvious that a bureaucracy with this huge budget and power should be subject to annual appropriations review and other traditional tools of oversight. There is simply nothing inherent in the functions of this bureau that should shield it from the same degree of transparency and democratic oversight as any other independent agency, such as the FTC or cabinet departments. I won't belabor this point as there is no serious argument against this regular degree of oversight.

Second, H.R. 1315, passed by the Financial Services Committee, would enable the Financial Stability Oversight Council to reverse decisions of the CFPB through a simple majority vote rather than the two-thirds majority needed under the current version of the law. This would provide a useful restraint on the bureau's inevitable tendency toward tunnel vision and mission overreach by providing some modicum of balance in the name of safety and soundness.

Third, the acts of the CFPB should be made subject to Office of Information and Regulatory Affairs (OIRA) or other external review for cost-benefit feasibility.[6] Independent agencies, including the Federal Reserve, traditionally have been exempted from OIRA review of their regulations. But that's because the internal deliberation process of a multi-member commission provides a collegial, deliberative process that ensures that all views are heard and all competing policies weighed. An agency headed by a single person, however, lacks these internal checks and balances. As a result, it is crucial that the decisions of

[5] Morris M. Kleiner & Richard M. Todd, "Mortgage Broker Regulations That Matter: Analyzing Earnings, Employment, and Outcomes for Consumers," in *Studies of Labor Market Intermediation*, David H. Autor, ed., University of Chicago Press, Nov. 2009.

[6] *See* John Morrall, Richard Williams, and Todd Zywicki, *The Next Hot Ticket in Financial Reform*, Reuters (Oct. 8, 2010), http://blogs.reuters.com/great-debate/2010/10/08/the-next-hot-ticket-in-financial-reform/.

the agency be reviewed by OIRA or some external analysts to ensure that the benefits of those regulations exceed the costs imposed.

Restrictions on Substantive Powers

The substantive powers of the CFPB should also be more sharply constrained than the broad and vaguely defined powers that are granted under its 400-page charter by the Dodd-Frank Act. Two areas are of particular concern. First, the bureau is empowered to regulate and punish not only "unfair" and "deceptive" lending practices, but also "abusive" loans and loan terms. This broad, vague, and retroactive standard will likely harm precisely those consumers it is intended to protect, and could dramatically raise the cost of lending by creating unpredictable retroactive liability. Second, the standard for preemption of contrary state laws should be returned to its prior level.

The CFPB has the power to regulate and punish not only "unfair" and "deceptive" lending practices (the FTC's standard) but also "abusive" loans and loan terms—a legal term that appears to be novel in this context. The contours of this new basis for liability are vague, but most obviously it must mean something different and more than attacking those products that are considered unfair or deceptive. In fact, it seems potentially to hold lenders responsible for a *subjective* standard of understanding and competency by some subcategories of consumers, or with respect to some subcategory of loan products.

For example, this power seemingly could enable the bureau to identify some groups of borrowers based on some crude demographic criteria as being thought too dumb to understand credit products that other consumers can understand and therefore have the option of using. Alternatively, the new super regulator would seem to have power to ban loan terms and products anytime the bureau chief thinks consumers lack the ability to comprehend the full risks of a product. The bureau chief could effectively ban many nontraditional lending products, such as payday lending, if he or she thinks, for example, that consumers using that form of lending are too dumb to appreciate the full cost and risk of those products—even if the consumers fully understand the risks and even though research shows that consumers overwhelmingly are satisfied with their choices and use payday loans because those loans are superior to other available choices.

Congress also should roll back the heightened standard for federal bank regulators to pre-empt state regulatory and enforcement authority over federally chartered banks. The threat addressed by pre-emption is long standing—the effort of populist state legislatures and politically ambitious prosecutors to score political points by attacking out-of-state federally chartered banks and their subsidiaries. But the consequences are heightened by the national character of the modern banking system, which has grown in large part because of the power of federal regulators to pre-empt parochial state laws. Moreover, if the rationale for heightened pre-emption standards is justified, it was because of a fear of inadequate federal enforcement—but that rationale was eliminated by the creation of the new federal bureau itself. Instead, the weakening of pre-emption threatens a nightmare regulatory dystopia: a new federal regulator that reaches down to the level of local payday lenders and small merchants while simultaneously empowering state regulators to attack national banks.

Market-Reinforcing versus Market-Replacing Regulation

There is a better way forward for consumers and the economy. Rather than a return to heavy-handed 1970s-style regulation, we should be moving in the direction of a new regulatory approach that harnesses the power of competition and technology to expand consumer choice and consumer welfare.

Consumer credit can be regulated in two different ways: either through "market-reinforcing" regulation or "market-replacing" regulation. Market-reinforcing regulation builds on the dynamism of the competitive process and consumer empowerment to make it easier for consumers to shop among competing credit products and choose the ones that are right for them. Without question, America's consumer credit regulatory system is ripe for a comprehensive overhaul. As a result of litigation and regulation, the Truth in Lending Act, for example, has evolved from a simple three-page document to a regulatory monster saddled with thousands of pages of regulation.[7] Clearing away this thicket of regulator and lawyer-imposed costs is necessary in order to make disclosure regulation work better for consumers. Defensive, legalistic disclosures designed to protect lenders from class action litigation based on technicalities rather than real harm has proven to be a major burden on the consumer finance system. Instead, the CFPB legislation unleashes class action lawyers and state attorneys general through its elimination of contracts to arbitrate, its heightened standards for preemption, and its coterminous power of state attorneys general to enforce federal law. This combination of new enforcement, with the vague, expansive sources of liability created by Dodd-Frank, are likely to spawn further regulatory confusion and defensive disclosures.

In addition, as noted, the regulatory process is plagued by redundant and oppressive regulation. The proposal for a single integrated mortgage disclosure form is a useful step in the right direction. Similar opportunities for streamlining and rationalizing the regulatory process could be seized—but are unlikely to emerge from this CFPB. Finally, recent decades have demonstrated the clunkiness of the old-style regulatory process. Today, innovations in consumer credit markets quickly outstrip the New Deal regulatory framework that exists. Once regulations are passed, they are too often set in stone; old regulations are almost never repealed. Instead, new regulations are simply piled atop existing regulation in an ever-mounting pile of incompatible and incoherent regulation. Finally, regulation in recent decades has been plagued by mandates regarding what I have referred to as "normative disclosure"—efforts to use disclosure not to help consumers to find the products that suit their needs, but instead to try to use disclosure to shape consumer preferences.[8] For example, a single, simplified mortgage disclosure form would be of substantial value to consumers—provided, of course, that more simplified consumer disclosure *forms* is not merely an effort to try to indirectly force more simplified *products* onto the market or to prefer the flawed idea of "plain vanilla" products to other types of products.

Today, for example, only about half of consumers use credit cards primarily as a credit device—others use it as a transactional device where they pay off their balance at the end of every month. Yet the regulatory framework requires credit card marketing to be focused primarily on the assumption that consumers will use it as a credit device. For the half of consumers who use the card like a debit card, however, this information is largely irrelevant. They care about benefits and other factors and compelled prominent disclosures of terms they don't care about simply makes it more difficult to find the information they do want. Furthermore, once imposed, regulations bear the permanent stamp of the particular issues of the day, which are soon obsolete as markets change.

Instead, CFPB is predicated on the old-style model of market-replacing regulation: the idea that Washington bureaucrats know better than real people what is good for them. Whether concealed under the guise of behavioral economics or "nudges" instead of mandates, the underlying premise is still the same—paternalistic bureaucrats who think they know better as to what credit products consumers should be allowed to buy and the terms under which they should be purchased. Again, we have seen time and

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[7] *See* THOMAS A. DURKIN & GREGORY ELLIEHAUSEN, TRUTH IN LENDING: THEORY, HISTORY, AND A WAY FORWARD (2011).

[8] *See* Todd J. Zywicki, "The Market for Information and Credit Card Regulation," *Banking & Financial Services Policy Report*, Vol. 28, No.1, January 2009, pp. 13-16.

time again in history where this path leads: to higher credit prices, reduced choice, and harm to the very consumers that these regulations purportedly are intended to help.

Conclusion

The new CFPB promises higher costs and reduced access to credit for American consumers. The only question now is how much of an impact will be felt. Congress should take steps to build greater accountability and mission focus into a new consumer-protection regulator. Or consumers will be the losers in the end.

Mr. MCHENRY. Thank you for your testimony, Mr. Zywicki.
And, Dr. Evans, you have 5 minutes.

STATEMENT OF DAVID S. EVANS

Dr. EVANS. Chairman McHenry, Ranking Member Quigley, and members of the subcommittee, thank you very much for asking me to testify on the CFPB.

Shortly after the U.S. Department of the Treasury proposed the CFPA Act, Professor Josh Wright from George Mason and I started studying the legislation and the rationales being put forward for it. Early last year, we published an extensive study on the proposed agency.

Based on our research, I'm quite concerned that the CFPB could make it harder and more expensive for consumers to borrow money and for small businesses, who often rely on credit cards and other lending products. Just because someone puts the words "consumer protection" in the title of an administrative agency doesn't mean that's what it's going to do.

There are two reasons, in my view, to believe that the CFPB could become an anti-lending and borrowing bureau that could harm consumers and small businesses and ultimately reduce economic growth.

The first is that there's an anti-borrowing bias built into the CFPB. Professor Warren co-authored a long article in the University of Pennsylvania Law Review in late 2008 that laid out the rationale for the new agency and its agenda in some detail. She claimed that consumers aren't rational when it comes to borrowing money, that consumers make lots of mistakes, and consumers end, up in the end, borrowing too much.

Professors Barr, Mullainathan, and Shafir wrote an article that proposed very intrusive government regulation for financial services. That included requiring lenders to offer plain vanilla products as the default. Now, while at Treasury, Professor Barr was involved in drafting the CFPA, and Professor Mullainathan was just appointed to Assistant Director for Research at the CFPB.

Professor Wright and I have reviewed the intellectual foundations of the CFPB based on the writings of the people behind its creation. The view that people don't really know what they're doing when they borrow money and that we need to protect consumers from themselves has really become part of the genetic code of the CFPB. Unfortunately, at least in the writings that have provided the foundation for the new agency, there's little recognition of the fact that consumer lending has really improved the lives of millions of people and spurred job growth in this country.

Now, the CFPB has the tools to put the highly interventionist agenda described in these foundational papers into effect, and that's the second reason I'm concerned. This new agency can ban, "abusive lending products." What those are are pretty much left up to the discretion of the head of the CFPB.

The new agency can also steer financial services companies toward offering plain vanilla products designed by the CFPB by either banning products that don't conform to the CFPB view or by making it legally risky and expensive to deviate too far from the products that the CFPB wants. I understand plain vanilla was

excised from the language, but there's still the possibility of, in effect, doing it.

Through prohibitions, disclosure requirements, and fines, the CFPB has the means to place a heavy thumb on consumer lending products that consumers and small businesses would willingly consume and that financial services companies would willingly offer.

There's no dispute that some lenders act very badly and that we need consumer protection. The proponents of the CFPB have made some real contribution, I think, to our understanding of some of the problems and some of the possible solutions, and I have a lot of respect for their passion and their intellect.

But regulation needs to be based on a balanced view of the benefits as well as the costs of lending and borrowing. In fact, most consumers and small businesses are responsible, and most consumers and small businesses don't get into trouble.

Over the last several decades, the fraction of consumer loan debt that banks have had to write off has varied from about 1.5 to 3 percent. Charge-offs for consumer loans rose during the recent very deep recession, but they're now coming back down to that low level. Most lenders provide products that people want and that people benefit from.

There are serious risks to the economy of restricting consumer credit. Let me just focus on one of them.

Between 1992 and 2005, brand new small businesses generated an average of 3 million jobs a year. Access to consumer credit can make or break those entrepreneurs. Many of them use personal credit cards for financing. In fact, the founders of some of our greatest companies, Google, for example, had to max out their credit cards to stay afloat in the early days. Over time, a heavy regulatory thumb on credit availability could therefore pose a significant drag on employment and economic growth.

In closing, I counsel the subcommittee to ensure that the CFPB has leadership that's balanced and that recognizes the great value that lending products provide for consumers and small businesses, as well as the occasional problems. I'd also suggest that Congress keep watch over the CFPB to insure that it doesn't become the anti-lending and borrowing Bureau and harm the very consumers that it was put in power to protect.

Thank you very much.

[The prepared statement of Dr. Evans follows:]

I. Introduction

Thank you Chairman McHenry, Ranking Member Quigley, and Members of the Subcommittee for asking me to testify on the Consumer Financial Protection Bureau. My name is David S. Evans. I'm the Chairman of Global Economics Group. I also teach at the University of Chicago Law School where I am a Lecturer and at the University College London where I am Executive Director of the Jevons Institute for Competition Law and Economics and a Visiting Professor. Despite the law school affiliations I am an economist with a doctorate from the University of Chicago. I represent solely myself at this hearing and I have received no financial support or assistance for this testimony.

I've written widely on the financial services industry over the last 20 years. I'm the co-author of *Paying with Plastic: the Digital Revolution in Buying and Borrowing,* which has become the standard reference work on the credit card industry.[1] In addition to my academic work, I consult with many financial services firms on a wide range of business, legal, and regulatory matters. I also serve as a business advisor to a number of start-up companies some of which are in the financial services industry.[2] I am also one of the founders of PYMNTS.com, a leading online media and marketing business that serves the payments industry which includes credit cards and other lending products.

Together with my co-author Professor Joshua Wright of George Mason Law School, I have conducted extensive research related to the Consumer Financial Protection Bureau. Shortly after the U.S. Department of the Treasury proposed the Consumer Financial Protection Agency Act of 2009 (CFPA), Professor Wright and I began research into the rationales that were being advanced for the CFPA and the likely effects the CFPA would have on the U.S. economy—particularly on consumers, small businesses, and job growth.

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[1] DAVID S. EVANS & RICHARD SCHMALENSEE, PAYING WITH PLASTIC: THE DIGITAL REVOLUTION IN BUYING AND BORROWING (MIT Press 2005).

[2] My curriculum vita is available here and is attached in an annex to this testimony.

We published two articles that focused upon the legislation that was originally proposed.[3] Some of this work received financial support from the American Bankers Association. We have continued to follow the developments and debate surrounding the CFPB. Professor Wright and I have also conducted research related to, and published on, behavioral law and economics. That is a discipline that significantly influenced the intellectual underpinnings of the CFPB, as I will discuss.

Based on the research I have conducted with Professor Wright, I have serious concerns that, without proper oversight, the CFPB could harm consumers and small businesses by making it more difficult and more expensive for them to borrow money. Consumers and small businesses have benefited enormously from the increased availability of credit. We should not lose sight of those benefits because some people overextended themselves in the bubble that led up to the financial crisis and some financial firms engaged in bad practices. I am also worried that the CFPB will depress job growth in this country by making it more difficult for new small businesses, which rely heavily on consumer financial products, to borrow money. Most job growth in this country comes from new small businesses and many of these businesses rely on consumer financial products. As Professor Wright and I show, even a small decrease in the availability of credit to these entrepreneurs could reduce job creation dramatically. We should always worry about risks to job creation—but with an unemployment rate that is still far too high we should be especially concerned now.

My overall concerns related to the CFPB rest on three points.

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[3] David S. Evans & Joshua D. Wright, The Effect of the Consumer Financial Protection Agency Act of 2009 on Consumer Credit, 22(3) Loyola Consumer L. Rev. 277 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1483906 and attached as an annex to this testimony. Also see David S. Evans & Joshua D. Wright, How the Consumer Financial Protection Agency Act of 2009 Would Change the Law and Regulation of Consumer Financial Products, *Bloomberg Law Reports: Risk and Compliance, Vol. 2, No. 10 (October 2009)*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1491117.

- First, the economy has benefited from the expansion of a vibrant lending industry. The ability to borrow more money at lower rates is generally very good for consumers and small businesses.

- Second, the CFPB has a genetic makeup that may make it inherently hostile to companies that want to lend money and to consumers that want to borrow money. The writings of the chief architects of this new entity made that hostility apparent when they laid out the need for a new agency and articulated its guiding principles.

- Third, the CFPB has the tools for making it far more difficult for businesses to lend money and, therefore, for people to borrow. There is a risk that the CFPB could become the anti-lending and borrowing bureau. Just because you put the words "consumer protection" in the title of an administrative agency doesn't mean that's what it will do.

The remainder of my testimony provides the basis for these points in more detail. Although the CFPB covers a wide range of financial services products I focus only on those that extend credit.

II. The Role of Consumer Lending in the US Economy

Most of us borrow money at various points in our lives and do so because we think we need to and have good grounds for doing so. Economists have identified a number of reasons why people benefit from borrowing. The most important reason is that people have very uneven income streams over their lifetimes. Suppose we couldn't borrow. Then we would consume little when we are young, a lot in middle age, and then little again when we are old. That pattern tracks the evolution of earnings for most

people. But, most people want to even out their earnings and consumption. As a result they borrow when they are young if they can. Sometimes that is for significant investments such as an education or a home. Other times it is for smaller things that provide pleasure such as furniture or home entertainment systems.

There are other reasons that people borrow and that is when either their incomes or their need to consume are hit with shocks. A household, for example, may suffer a shock when one of the members loses their job, needs to leave employment temporarily to care for children or elderly parents, becomes disabled, or has a decline in income for some other reason. The household may not be able to meet its commitments without borrowing. In any event, knowing that the shock is temporary, the household may prefer to keep its standard of living constant by paying for the present with by borrowing against income anticipated in the future. Households and people also face random events that increase the need for funds. That could be a child getting married, a funeral, medical expenses, or various other events that are often hard to anticipate and budget for.

The circumstances that I have described are nothing new. Individuals have always had the need to borrow and that gave rise several millennia ago to businesses that provided loans. However, even today many people cannot borrow as much money as they would like to, and believe they need to, at prevailing interest rates. Economists say these individuals are "liquidity constrained." Over the last two centuries, though, and especially since the end of World War II, financial innovations have sharply reduced the extent to which consumers are liquidity constrained. That has benefited consumers enormously by making it possible, and easier, for more people to invest in education, buy homes, purchase consumer durables, and more generally better manage their household finances over their lifetimes. That of course has helped overall economic growth and wellbeing.

It is useful to highlight some of the major financial innovations that made this possible. During the 19th century many merchants started offering consumers the ability to go to a store, purchase their goods and settle up with that merchant at the end of month or to even buy those goods using installment plans. By the early 20th century many businesses that sold durable goods such as sewing machines had introduced financing plans as a way to make it easier for people to have the use of those goods while they were

paying for them over time. In the early part of the last century consumers struggled to finance the purchase of homes; residential mortgages were available for only 5 to 10 year terms, after which the principal balance became due and the borrower usually had to refinance.[4] The development of the 30-year mortgage and later the adjustable rate mortgage enabled consumers to buy homes. Home ownership rates increased especially among socially and economically disadvantaged groups starting in the 1950s. The development of the charge card in 1950 and the credit-card later that decade made credit readily available to increasingly large portions of the population. The development of securitization in the 1980s helped make credit available to a broader portion of the population since it enabled lenders to better diversify their risks. Moreover, over the course of the last century and particularly over the last 20 years lower cost and safer methods of borrowing have displaced higher cost methods, including pawnshops and loan sharks. By the early part of the 21st century all but the poorest segments of society had access to credit and the means to better manage their finances over the lifetimes and during hard times.

This discussion of the expansion of borrowing isn't meant to suggest that there is no dark side. As with any industry, there are problems in lending markets. There are unscrupulous lenders whose activities range from preying on unsuspecting consumers as well as engaging in fraud. Some consumers are also their own worst enemies. They borrow too much and suffer the consequences of going too deeply into debt. Overall, consumers may save too little and that can have implications for the health of the economy. But it is easy to lose perspective by taking the good for granted and focusing on the bad. It is very important that the CFPB has a healthy respect for the valuable role that lending has had in improving the lives of almost every household in America.

Let me turn now to small businesses. New firms account for most of the net job growth in the economy and have been doing so for a long time. As Professor Wright and I report, new small businesses account for about 87 percent of net new jobs in 2005. The growth drivers aren't big businesses because once they get big their growth inevitably slows down. And the growth drivers aren't small businesses that have been around for a

[4] Richard K. Green & Susan M. Wachter, *The American Mortgage in Historical and International Context*, 19 J. ECON. PERSP. 93 (2005).

while. A lot of small businesses just stay small. Jobs come from new firms that start small and become big. There is now extensive documentation on this from studies by academics, the Kauffmann Foundation, and the U.S. Bureau of Labor Statistics.

If you want to start a new business these days, you have very little chance of getting a line of credit from your bank, at least not without putting up your house as collateral. And, most new small businesses are never going to get funding from a venture capitalist. Especially nowadays, new ventures probably won't stand much of a chance of getting funding until they've been around long enough to actually have some revenues. It turns out that a significant source of financing for new small businesses comes from consumer lending. It is much easier for entrepreneurs to put debt on their personal credit cards than to secure funding from other sources. In fact, when you read histories of startups you'll often see that there is a point in time when the entrepreneurs had to max out their credit cards to just stay afloat. Professor Wright and I report that nearly half of firms with fewer than 20 employees use personal credit cards to help finance their businesses; 46.7 percent of businesses with fewer than 500 employees rely on personal credit cards at least occasionally.[5]

It is important to recognize how critical lending is likely to be for job creation. Most new small businesses are liquidity constrained at least in part because lenders have no way of evaluating the likelihood that any particular business will succeed. Since most don't succeed, lenders are hesitant to lend. Many people that would like to start a business can't do so because they can't get financing. Those who do can't get as much financing as they might like. At any point in time there are many new businesses that are able to get over the hurdle of obtaining enough credit only because they have tapped into consumer lending products. To the extent that restrictions in the supply of consumer credit take those sources away, some businesses would not be able to start at all and some of them that would become big businesses—and would generate jobs—would remain someone's dream. As Professor Wright and I documented from data for 2005, job creation would fall by almost 1 percent annually for each 1 percent decrease in the number of new small businesses.

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[5] BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, 110TH CONG., REPORT TO THE CONGRESS ON THE AVAILABILITY OF CREDIT TO SMALL BUSINESSES 30 (2007).

III. The Genetic Makeup of the CFPB

There is a long history in this country of commentators chastising consumers for borrowing. Benjamin Franklin is the author of the famous line that "he who goes a borrowing, goes a sorrowing." As consumer financial products became more widely available during the 19th century, various advice givers cautioned consumers against the evils of borrowing. One popular book published in 1912 deemed credit the "great tempter," the "ally of the devil," and "responsible for half the extravagance of modern life."[6] Early social criticisms of credit even employed sexist undertones, speculating as to the "curious process of reasoning" that led women to purchase goods on installment plans rather than by paying up-front.[7] Though varying in their postulations as to the cause of undesirable consumer borrowing, these commentators shared a common conclusion that consumer credit provided little—or negative—benefit to consumers, and suggested myriad public policies to prevent consumers from borrowing. Consumers and the American economy would have been by far worse off if people had paid much attention to this well-meaning advice.

The creation of the CFPB was inspired by a new wave of critics who tend to focus on the dark side of lending and borrowing. The Consumer Financial Protection Act that was proposed by the U.S. Department of the Treasury in June 2009 has its intellectual origins in a series of papers written by Professor Elizabeth Warren and a subsequent paper co-authored by Professor Michael Barr who, as Deputy Assistant Secretary of the Treasury, was involved in the Administration's proposals.

An influential paper authored by Professors Oren Bar-Gill and Elizabeth Warren was based on the view that "[m]any consumers are uninformed and irrational," that "consumers make systematic mistakes in their choice of credit products" as well as

[6] IRVING BACHELLER, "CHARGE IT," OR KEEPING UP WITH HARRY (1912).
[7] LENDOL CALDER, FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT 181 (Princeton University Press 2001).

whether to use such products at all, and that a central regulator should adopt policies designed to address this ignorance and irrationality.[8] These authors described some financial products as "dangerous," capable of "devastating effects on communities and the economy." They proposed the creation of a single agency that would deal with these issues. Professor Barr and his co-authors detailed key aspects of the regulatory approach the agency should take. Among other things they proposed requiring that lenders offer standardized products designed by the agency regulators. This was the intellectual basis for the "plain-vanilla" provision in the original legislation.

The approach taken by these authors, and the academic authorities they cite, reflects the broad trend of the academic field of "behavioral law and economics." The behaviorist literature—consisting of a variety of economics and psychological studies—generally observes that consumers often make decisions inconsistent with their purported preferences.[9] Behaviorists in turn view these studies as a basis for governmental interventions in the market to prevent consumers from harming themselves. Some interventions represent "soft paternalism," merely "nudging" consumers towards choices preferred by the central authority.[10] Other "hard" paternalist interventions prohibit disfavored products or choices outright. Several of the Bar-Gill and Warren policy proscriptions in their 2008 article constitute these latter prohibitions.[11] Like most behaviorists, Bar-Gill and Warren believe that consumers inappropriately over-value present consumption, underestimate the future costs of repaying various financial products, and believe many consumer lending products in fact harm consumers.[12] The recent appointment of leading behavioral economist Sendhil Mullainathan, Barr's co-author on the academic article mentioned earlier, to serve as Assistant Director for Research for the CFPB confirms that the new agency is committed to the approach to the behaviorist approach to the regulation of consumer credit.[13]

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[8] Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 39 (2008).
[9] For one foundational piece to this approach, *see generally* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).
[10] RICHARD THALER & CASS SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (Yale University Press 2008).
[11] Bar-Gill & Warren, *supra* note 13.
[12] *Id.* at 1395-1404.
[13] Press Release, Treasury Department Announces Senior Leadership Hires for the Consumer Financial Protection Bureau (May 11, 2011), available at http://www.consumerfinance.gov/pressrelease/treasury-department-announces-senior-leadership-hires-for-the-consumer-financial-protection-bureau/.

Although Congress modified various aspects of the Treasury's proposed Consumer Financial Protection Act, the CFPB's genes are to be found in the papers by the authors who proposed it, who shaped the legislation that was adopted, and who have guided its creation over the last several months. Like other critics of borrowing, these authors have heartfelt views that consumers should borrow less and would borrow less if, in effect, consumers only knew better. Professor Warren in particular has been a passionate voice on how borrowing can drag people into bankruptcy and cause other dislocations. Pursuing that vision, however, has the risks helping the few while harming the many who benefit directly from the widespread availability of credit and indirectly from the job creation that consumer credit facilitates.[14]

IV. The Powers of the CFPB to Restrict Credit Availability

Financial services businesses, like other ones, sometimes engage in bad practices and harm consumers. I am in favor of protecting consumers from these by practices through laws and regulations. Financial services products are also often complex and require some knowledge of math and economics. Consumers would benefit from more education about the costs and benefits of alternative products and it may be that the government could help provide more education about these products and how to buy them. The CFPB could use its powers under the Dodd-Frank Act to focus on bad practices by lenders that harm consumers and to pursue consumer education so that people are better equipped to handle their finances. I would have little trepidation it that's what it did.

The CFPB, however, has the power to do much more. The Dodd-Frank Act commends broad powers previously distributed across a plethora of agencies to the

[14] The Federal Reserve Board reports data on the extent to which loans are charged off of banks' books because consumers can't pay. These provide some perspective on the extent to which consumers get into trouble. For most of the last several decades the charge-offs of consumer loans (including credit cards) have range from about 1-3 percent and the charge-offs of residential loans have been below 0.25 percent of the loan amounts. Those figures increased during the Great Recession with residential loan charge-off rates peaking at 2.82 percent and consumer loan charge-off rates peaking at 6.61 percent. As the economy recovers those rates are likely to decline to their historical norms. See http://www.federalreserve.gov/releases/chargeoff/chgallsa.htm

CFPB. Importantly, the Act enables the CFPB to regulate—and ban—"abusive" lending products. While most of the other terms and concepts in Dodd-Frank have some historical basis in consumer protection law, this notion of "abuse" in consumer financial products is not defined and its interpretation will be up to the leadership of the CFPB subject to ultimate review by the courts. In addition, the CFPB has the ability through its rule making procedures ro steer financial services companies towards offering "plain vanilla products" by either banning products that do not conform to the CFPB's view or by making it legally risky and expensive for lenders to deviate too far from the products that the CFPB approves. In addition, it is possible for the CFPB to use disclosure requirements to force companies to standardize products around certain criteria that are the focus of those requirements.

Here is my concern. The CFPB has a genetic bias against consumers borrowing and lenders lending. Through prohibitions, disclosure requirements, and fines, it has the tools to place a regulatory thumb on consumer lending products that consumers, and small businesses, would willingly consume and that financial services companies would willingly offer. While some people might benefit from that approach, history teaches us that heavy-handed credit regulation ultimately makes consumers worse off by reducing the availability of credit to them and increasing the costs of obtaining that credit. Socially and economically disadvantaged groups would be particularly hard hit by regulations that make it more expensive or impossible for financial services companies to adjust their offers according to the riskiness of the loans. Members of these groups would lose access to credit or be forced into much more expensive illegal and even dangerous sources of loans.

I am especially worried that a CFPB that could devise rules based on a cynical view of the value of lending that would depress the availability of consumer credit to new small businesses. As I mentioned earlier, and as Professor Wright and I have discussed in detail in our earlier paper, access to consumer credit can make or break an entrepreneur. Since new small businesses account for most of new jobs a 1 percent reduction in new small businesses would lead to an almost 1 percent reduction in net new jobs annually based on 2005 data. Between 1992 and 2005 startups generated an average

of 3 million jobs a year.[15] Based on those figures for every 1 percent of startups that cannot get off the ground because of lack of access to credit the economy would lose 30,000 jobs. Over time a heavy regulatory thumb on credit availability could pose a significant drag on employment and economic growth.

V. Conclusions

Ultimately, the broad consumer benefits from free consumer lending and the potential steep costs to both individuals and small businesses counsel great caution to the incipient Bureau. In the last thirty years, millions more have been able to purchase homes, finance educations, and start businesses than ever before as Professor Wright and I have documented. Americans may now borrow against future income to even out the systemic ebb and flow of wages and expenses; we may now readily offset calamities and bear unexpected costs in ways prior generations never could. These benefits have often inured to the most disadvantaged and to the smallest of businesses. After all, the independently wealthy have little need for loans. Accordingly, the implementation of the Bureau and Dodd-Frank should keep *all* of its charge in mind: the Bureau should not only seek to prevent deceptive or harmful practices, but that through light and flexible regulations, should ensure that consumer credit products remain available to all American consumers and entrepreneurs.

To make that happen I would counsel the Subcommittee to ensure that the CFPB has a leadership that is balanced and recognizes the great good of lending products as well as their potential problems. I would also suggest that Congress keeps watch over the Consumer Financial Protection Bureau to ensure that it does not become the Anti-Lending and Borrowing Bureau and harm those consumers it was put in power to protect.

[15] Tim Kane, "The Importance of Startups in Job Creation and Destruction," Ewing Marion Kauffmann Foundation, July 2010.

Mr. MCHENRY. Thank you, Dr. Evans.
Mr. Levitin, you're recognized for 5 minutes.

STATEMENT OF ADAM J. LEVITIN

Mr. LEVITIN. Chairman McHenry, Ranking Member Quigley, members of the subcommittee, my name is Adam Levitin. I'm a professor of law at Georgetown University. My research focuses on consumer finance and financial regulation. I'm not here representing any financial interest or to plead the interest of banks or trade groups. Instead, I'm here as an expert on consumer finance and as a scholar whose work is deeply concerned with the financial security of American families.

I'm happy to discuss the CFPB's regulatory structure and how it compares with other Federal bank regulators. I do so in detail in my written testimony.

I'm also happy to address unfounded concerns that the CFPB will crimp the availability of sustainable credit. It's frankly premature to speculate on this, but I would note that the CFPB is required by statute to do a cost-benefit analysis on prohibitions of financial products.

I am also happy to make the case, as I do in my written testimony, that the CFPB is more accountable than any other Federal bank regulator, period.

But I think it's important that we all be honest about what's going on here. This hearing really isn't about improving the CFPB or ensuring that there's sufficient oversight. Those would both be laudable goals. But the CFPB hasn't even gotten up and running yet. And by all accounts the CFPB transition team, led by Professor Warren, is doing an outstanding job. There's simply nothing that suggests that there is an oversight problem that needs to be addressed.

Instead, this hearing is part of an attempt to hobble the CFPB and render it ineffective because there simply aren't the votes to kill it off outright. This is about politics not oversight, unfortunately; and there's no clearer proof of this than the written testimony of Mr. Pincus here on my left on behalf of the Chamber of Commerce.

Mr. Pincus expresses concerns that the CFPB's structure leaves it vulnerable to regulatory capture. Regulatory capture is the phenomenon of a regulatory agency advancing the interest of the industry it regulates rather than the public interest. The typical story of regulatory capture is the oil industry capturing the Minerals Management Service or Wall Street capturing regulators like the OCC or the Fed. As Representative Bachus put it, Washington and the regulators are there to serve the banks.

So this leaves me wondering, who does the Chamber fear will capture the CFPB? Is it the multitude of well-financed consumer groups that have shown themselves to be the terror of Capitol Hill? Is it middle-class citizens? Military families? Seniors? I'm really quite perplexed by it.

And I find it very strange for the Chamber, of all entities, to express concerns about capture. Because regulatory capture is the Chamber's signature mode of operation. Perhaps the Chamber is simply worried that it won't be able to capture the CFPB and that

the CFPB won't be the lapdog of Wall Street but will be a real financial watchdog.

That the Chamber is sounding the alarm about regulatory capture reveals the various CFPB reform proposals for what they really are, naked attempts to gut the CFPB and render it ineffective because there aren't the votes to kill it outright. That's the same reason some members of the subcommittee want to put the CFPB under their regular appropriations process. Because if you don't have the votes to kill off an agency, you can starve it to death via appropriation by playing hostage with the Federal budget.

So let's be frank about what this hearing is about. This is about banks versus families. The issue presented by this hearing is whether Congress cares more about increasing the profits of banks or protecting the financial security of American families. Which is more important, bank or families?

Turning to the so-called reform proposals, one would replace the single CFPB director with a five-person commission. Put differently, the bill proposes paying five people to do one person's job. Where I come from that's called government waste.

What's more, by having five people do one person's job, accountability is diminished and leadership becomes less effective. Policy ends up getting set by horse trading among the commissioners, rather than by exacting analysis of the issue at hand. There's little evidence that a five-person commission provides a meaningful check against agency overreach, and if a single director is good enough for the OCC it's good enough for the CFPB. Put another way, if a single director is good enough for an agency that protects large banks, then it's good enough for an agency that protects American families.

Another so-called reform proposal would lower the threshold for the Financial Stability Oversight Council to veto CFPB rulemakings. It would require a veto if a CFPB rulemaking were inconsistent with bank safety and soundness.

Now, bank safety and soundness is a technical term. It means profitability. Let me repeat that. Bank safety and soundness means bank profitability. It's axiomatic that a bank can only be safe and sound if it is profitable. The consumer protection is often at loggerheads with bank profits.

The only reason to engage in predatory lending, for example, is because it's profitable. It's not done out of spite or malice. What this means is that any CFPB rulemaking that affected bank profitability would therefore be inconsistent with safety and soundness and thus be subject to a veto.

Thus, under this proposal, both the Credit Card Act of 2009 and Title 14 of the Dodd-Frank Act, which reforms the mortgage lending industry, could not be implemented because they would affect bank profitability and thus be inconsistent with bank safety and soundness.

Congress established the CFPB to protect American families, not maximize bank profits. Let's let the CFPB have a chance to do its job.

[The prepared statement of Mr. Levitin follows:]

Mr. Chairman McHenry, Ranking Member Quigley, Members of the Subcommittee:

My name is Adam Levitin, and I am an Associate Professor of Law at the Georgetown University Law Center in Washington, D.C., where I teach courses consumer finance, contracts, and commercial law.

I am here today to urge the Subcommittee to not to smother the new Consumer Financial Protection Bureau (CFPB) before it becomes operational or to roll back parts of the Dodd-Frank Wall Street Reform and Consumer Protection Act. It is important that this Subcommittee continue vigorous oversight of the CFPB and other government agencies. But it is simply premature to start tinkering with the CFPB's oversight structure.

The CFPB has been designed to be more accountable than any other federal bank regulator. It has unprecedented (and possibly unconstitutional) checks on its authority. Until and unless actual problems with the CFPB's operations emerge, there is no reason to adjust its oversight structure. To date, the CFPB implementation team has won nothing but praise from its prospective regulatees.[1] In short, there is no evidence of an oversight problem that needs to be addressed.

I. Why a Consumer Financial Protection Bureau?

In considering the oversight of the CFPB, it is important to recall the reasons for creating a CFPB in the first place.[2] A critical reason for the creation of the CFPB was the recognition that the current system of consumer financial protection does not work. In the current system, 17 separate statutes are enforced by ten federal agencies with other primary and often conflicting missions.[3] A chart at the end of this testimony (Figure 1) illustrates the current crazy quilt structure.

Some of these agencies have the ability to promulgate regulations, some also exercise supervisory authority over financial institutions, and some can only enforce existing regulations. Sometimes authority is over a class of institutions, and sometimes it is over a particular type of product. This situation makes industry-wide rule-making extremely difficult. For example, a rulemaking that would cover all credit cards necessitated coordination between the Federal Reserve Board, the Office of Thrift Supervision, and the National Credit Union Administration. The result has been that consumer protection gets pulled into regulatory turf wars and inaction dominated. Not surprisingly, consumer financial protection has frequently fallen between the cracks—it is an orphan mission.

Only one current agency, the Federal Trade Commission, even has consumer protection as its primary role. The FTC, however, has very limited jurisdiction in financial services—it cannot regulate federally-chartered or insured banks, thrifts, or credit unions. This leaves only bit-players in financial services within the FTC's regulatory ken. The result has been that because consumer protection has been everyone's responsibility, it has been no one's responsibility, and accountability and performance have suffered therewith.

Nowhere can this problem be seen more clearly than in the run up to the financial crisis. Many factors contributed to the crisis, but none more so than an orgy of unsound leverage in the

[1] Kate Davidson, *New CFPB Mortgage Disclosures Win Praise for Content and Process*, AM. BANKER, May 19, 2011.
[2] Adam J. Levitin, *The Consumer Financial Protection Agency*, Pew Financial Reform Project, Briefing Paper, No. 2, 2009.
[3] *Id.*

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home mortgage market. Federal financial regulators had sufficient ability to limit the excesses of mortgage lending. The Federal Reserve Board had the power to restrict some of the most predatory products under the Home Owners Equity Protection Act, and the Office of Comptroller of the Currency and Office of Thrift Supervision had broad ability to rein in the most egregious bank and bank service company activities both in direct lending and in the warehouse lending and securitization that financed non-bank mortgage lenders. None of them acted. Indeed, even this past year, in the midst of the nation's worst foreclosure crisis ever, the Federal Reserve Board proposed a rule-making that would have gutted the Truth in Lending Act right of rescission, the strongest defense homeowners have against foreclosures.[4]

Had the CFPB existed in 2004-2008, it might well have saved this country from the housing bubble and subsequent collapse. Had the CFPB existed in 2004-2008, it might well have regulated the mortgage market to curtail predatory lending practices such as widespread use of payment-option ARMs and other unsustainable financial products and insisting on the very standards that Congress demanded in title XIV of the Dodd-Frank Act, including that mortgage lending be conditioned on the ability to repay, not the ability to refinance.

Congress rightly recognized the severe shortcomings of the current system of consumer financial protection when it enacted Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act and created the Bureau of Consumer Financial Protection. In so doing, it consolidated consumer financial protection into a single agency with a single director who can be held accountable for the agency's performance. Congress also gave the new agency sufficient funding and budgetary independence to ensure that consumer financial protection, like other parts of bank regulation, will not be held hostage to politics because it is too important to financial stability. The new agency has substantial powers to regulate consumer financial products, but it is also subject to even more substantial safeguards that make it more accountable than any other comparable federal agency.

II. THE CFPB IS MORE ACCOUNTABLE THAN ANY OTHER COMPARABLE FEDERAL AGENCY

Some members of Congress and indeed of this Subcommittee have expressed concern about the CFPB's accountability. This concern is misplaced. As detailed below, *the CFPB has more limitations on its power than any other comparable federal agency*.

Administrative Procedures Act Safeguards

First, CFPB is subject to many of the same restrictions as other federal agencies. Thus, the CFPB is subject to the Administrative Procedures Act and must follow notice-and-comment procedures for rulemaking and adjudication.[5] This means that the CFPB will be required to take account of and respond to a range of views and concerns on any regulatory issue on which it undertakes rule-making and that these rule-makings can be challenged in federal court.

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[4] Donna Borak, *Consumer Groups, Lawmakers Press Fed to Withdraw TILA Plan*, AM. BANKER, Jan. 6, 2011.

[5] P.L. 111-203, 124 Stat. 2025, § 1053, July 10, 2010, *codified at* 12 U.S.C. §5563 (making CFPB hearings and adjudications subject to the Administrative Procedures Act, 5 U.S.C. §§ 553-554).

OIRA Small Business Impact Reviews

Similarly, CFPB rulemaking is subject to Office of Information and Regulatory Affairs (OIRA) review for small business impact.[6] Only the Environmental Protection Agency (EPA) and Occupational Safety and Health Administration (OSHA) are subject to similar requirements.

Specific Statutory Limitations on CFPB Rulemaking

The CFPB is specifically limited by statute in its rule-making power. Title X of the Dodd-Frank Act requires that the CFPB make particular findings, including cost-benefit analysis, in order to exercise its authority to restrict or prohibit acts and practices as unfair, deceptive, or abusive.[7] Title X of the Dodd-Frank Act also prohibits the CFPB from imposing usury caps[8] and prohibits the CFPB from regulating non-financial businesses.[9]

The CFPB cannot mandate the offering of any financial product and it cannot force financial institutions to extend credit. At most, then, the CFPB can curtail the offering of certain financial products. But it bears emphasis that it cannot force financial institutions to offer any particular product. This is a critical point because it means that it is virtually impossible for CFPB actions to be a source of systemic risk.

Statutory Budget Cap

The CFPB is subject to a budgetary cap unlike any other federal bank regulator. Some members of Congress have expressed concern over the CFPB's budgetary independence. While most regulatory agencies are funded through the appropriations process, federal bank regulators are budgetarily independent, and these are the proper comparison for the CFPB. Viewed in this framework, the CFPB is actually less independent than other federal bank regulators. If the Office of Comptroller of the Currency or FDIC or OTS wishes to increase its budget, it can simply increase its assessments on banks without so much as a by-your-leave to Congress. Similarly, the Federal Reserve can simply print money. The CFPB, however, is restricted to a capped percentage of the Federal Reserve's operating budget.[10] This means that the CFPB actually has less budgetary independence than any other federal bank regulator.

The budgetary independence of bank regulators and the CFPB represents what prominent conservative legal scholar Richard Epstein has termed "second order rationality," namely steps people take to protect themselves against their own lack of self control. It is tempting for Congress to play politics with bank regulation or consumer protection. The independent funding of the bank regulators and CFPB is designed to be guard against that very possibility. The CFPB's budgetary independence recognizes that federal budgets are complex, negotiated deals that don't allow for proper airing of policy issues. In a federal budget, the CFPB's funding might be held hostage for issues that have nothing to do whatsoever with the CFPB like deficit reduction. One of the insights from the mortgage crisis is that consumer protection is simply too central to economic stability to subject to the politic of the appropriations process.

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[6] P.L. 111-203, 124 Stat. 2112, § 1100G; 5 U.S.C §§ 601-612; Executive Order 12866 of September 30, 1993.
[7] P.L. 111-203, 124 Stat. 2005-06, § 1031, July 10, 2010, *codified at* 12 U.S.C. § 5531
[8] P.L. 111-203, 124 Stat. 2003, § 1027(o), July 10, 2010, *codified at* 12 U.S.C. § 5517(o).
[9] P.L. 111-203, 124 Stat. 1995-98, § 1027(a), July 10, 2010, *codified at* 12 U.S.C. § 5517(a).
[10] P.L. 111-203, 124 Stat. 1975, § 1017(a)(2), July 10, 2010, *codified at* 12 U.S.C. § 5497.

GAO Review

The CFPB's budget is subject to an annual audit by the Government Accounting Office, with the results reported to Congress.[11]

Financial Stability Oversight Council Veto

CFPB rulemaking is subject to a veto by the Financial Stability Oversight Council. This is unique for federal bank regulators.[12] The OCC and OTS's preemption actions, for example, are not subject to review by other federal regulators, even though they were a key element in fostering the excesses in the housing market.[13] The FSOC veto provides an unusually strong check on CFPB rulemaking, not least because no CFPB director would wish to risk a FSOC rebuke.

Congressional Oversight

Finally, the CFPB is subject to oversight by Congress itself. The CFPB Director must make periodic reports to Congress and appear before Congressional committees.[14] This Subcommittee's actions, as well as those of the House Financial Services Committee, show that this oversight is serious, diligent, and exacting. Congressional oversight is perhaps the best guarantor that the CFPB will not abuse the authority delegated to it.

III. RESTRUCTURING THE CFPB FROM A UNITARY DIRECTORSHIP TO A FIVE-PERSON COMMISSION

One proposal for "reforming" the structure of the CFPB is H.R. 1121, the Responsible Consumer Financial Protection Regulations Act of 2011 (the "Bachus Bill"), which would replace the CFPB's unitary director with a five-person commission. While I understand the belief that a five-person commission might result in a more collegial rule-making discourse, there are several strong reasons to eschew such a structure, which will ultimately render the CFPB less effective and less accountable.

In structuring administrative agencies, Congress has variously elected between two models: the Founders' traditional model of a unitary agency director and the Progressive/New Deal era model of five-person commissions. The Founding Fathers' model for executive agencies featured a single principal officer appointed by the President with the advice and consent of the Senate. This model is reflected in the federal cabinet agencies. Thus, the Treasury is governed by a single Secretary, rather than by committee. The traditional unitary director model is also featured in the Office of Comptroller of the Currency, the Office of Thrift Supervision, the Internal Revenue Service, the Social Security Administration, Medicare, and the Environmental Protection Agency. This model enhances accountability and enables streamlined, decisive leadership and decision-making.

An alternative agency model arose during the Progressive era and was warmly embraced by New Deal liberals. That is the five-person commission. Thus, Progressive era agencies like

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[11] P.L. 111-203, 124 Stat. 1976-77, § 1017(a)(5), July 10, 2010, *codified at* 12 U.S.C. § 5497.

[12] The only other federal regulatory agency that I have identified that is subject to an override by another agency is the Public Company Accounting Oversight Board (PCAOB), and as discussed *infra*, the Supreme Court found the PCAOB structure to be unconstitutional.

[13] *See* Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007) (upholding OCC preemption of state attempts to regulate subprime mortgage lenders); Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. ON REG. 143 (2009) (detailing OCC and OTS preemption of state mortgage regulations without substituting equivalent federal regulations).

[14] P.L. 111-203, 124 Stat. 1974, § 1016, July 10, 2010, *codified at* 12 U.S.C. § 5496.

the Federal Trade Commission and the classic New Deal agencies like the Securities and Exchange Commission, Federal Deposit Insurance Corporation, and National Labor Relations Board feature five-person commissions, and the National Credit Union Administration has a three-member board. The multi-member commission model is also featured by the Federal Reserve Board of Governors, the Federal Communications Commission, Federal Election Commission, Equal Employment Opportunity Commission, Federal Mine Safety and Health Review Commission, Commodities Futures Trading Commission, and Consumer Product Safety Commission. For some of these agencies there is a limit of the number of commissioners who may belong to any political party, while other agencies, like the Federal Reserve Board, have geographic appointment requirements.

The scholarly literature on agency design has not achieved any consensus as to the superior form of organization.[15] Instead, it recognizes that there are trade-offs involved. Thus, the five-person commission model encourages more collegial discourse and deal-making, but comes at the expense of accountability and efficiency. Moreover, it often provides little protection for the minority party on the commission; minority commissioners' views are typically disregarded and provide extremely limited protection against abuses by the majority.

In the case of the CFPB there are particularly salient reasons *not* to adopt a multi-member commission structure. For consumer financial protection, we should want a structural bias toward action rather than inaction. We have seen the result of financial regulators asleep at the switch. The price tag was hundreds of billions of dollars in taxpayer-funded bailouts of Wall Street. It is hard to believe that any member of Congress would want to replicate such a situation. Ensuring that the CFPB retain an organization structure than enables efficient, issue-driven decision-making requires maintaining the CFPB's current single director structure.

The CFPB's Unitary Directorship Fosters Efficient Decision-making and Avoids Gridlock and Horse-Trading

A single director is able to exercise decisive leadership in promulgating rules and enforcing them. A single director also does not have to engage with horse-trading with other commission members to wrangle up votes on an issue. This means that each issue will be decided on its own merits, rather than as part of a multi-issue deal involving commissioners' pet projects. Such a streamlined decision-making structure avoids the gridlock that often faces commissions. The five-person commission structure proposed by H.R. 1121, would induce inefficiency in government, as it permit rules to be promulgated only when a quorum (generally 3/5 commissioners) affirmatively votes for the rules.

The quorum requirement is a particular concern because of the frictions in the Senate confirmation process. Numerous administrative and judicial positions remain unfilled today because of the difficulty at achieving confirmation of nominees given the Senate's internal rules that effectively create supermajority requirements not found in the Constitution. The effect has been not only to block many nominations, but also to chill potential nominations. The Senate's confirmation process has become so dysfunctional that a bipartisan group of Senators (including Majority Leader Reid, Minority Leader McConnell, and Senators Schumer, Alexander, Collins,

[15] *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2011). The last time the federal government formally examined the question of agency structure, in 1971 during the Nixon Administration, the President's Advisory Council on Executive Organization (known as the "Ash Council," after its Chairman Roy L. Ash) issued as *Report on Selected Independent Regulatory Agencies*, Feb. 11, 1971, that recommended replacing multi-member commissions with single-executive agencies.

and Lieberman) has introduced legislation, S. 679, which would reduce or streamline the number of executive branch positions requiring Senate confirmation by one-third.

This state of affairs presents the most serious threat to the effectiveness of the modern administrative state—federal agencies have had to operate without directors or chairmen or even quorums because of the increased frictions in the confirmation process. As a result, these agencies are less effective or simply ineffective at ensuring that the law is carried out. Thus, in recent years, the Federal Trade Commission, the Consumer Product Safety Commission, and the National Labor Relations Board have all gone through spells where they have been unable to operate because a quorum did not exist.

Simple math says that five confirmations are more difficult to achieve than a single confirmation (even if multiple appointments sets up opportunities to make political deals on appointments). Put differently, adopting a five-person commission instead of a unitary directorship is likely to hobble the CFPB. While I would hope that is not the motivation for such a proposal, it could well be the consequence.

A Five-Person Commission Would Create Unnecessary Big Government Bloat and Waste

Changing from a unitary directorship to a 5-person commission would also contribute to big government bloat. There is no reason to pay five people top-of-the-executive-branch pay scale salaries and benefits for work that could be done by one person, not to mention the personal staff, office space, and other accommodations for five commissioners. A five-person commission is simply wasteful and should not be pursued, particularly when we are facing a federal budget crisis.

A Five-Person Commission Would Reduce CFPB Accountability

A single CFPB director is clearly accountable to both Congress and the American people. A CFPB Director who oversteps his authority or who fails to do enough to protect consumers cannot deflect blame for his actions. A gang of commissioners, on the other hand, can always avoid responsibility by pointing to the other four people who make up the commission. If Congress wants to maximize CFPB's accountability, responsiveness, efficiency, and effectiveness, the unitary directorship should be retained.

The CFPB's Unitary Directorship Is Necessary as a Counterweight to the OCC

A major reason for the creation of CFPB was to create a counterweight to the strength of the federal bank regulators. The primary mission of federal bank regulators is to ensure the safety-and-soundness of their regulatory charges. ***Safety and soundness means, first and foremost, profitability.*** It is axiomatic that a financial institution that is not profitable cannot be safe and sound. Consumer financial protection, however, is often inconsistent with bank profitability. Financial institutions only engage in unfair, deceptive and abusive acts and practices because they are profitable; they are not done for spite or Sadism. Predatory mortgage lending, for example, exists only because it is profitable.

Federal bank regulators have repeatedly shown that they will favor bank profitability over consumer protection. Thus, a major impetus for the creation of the CFPB was to separate consumer protection regulation from safety-and-soundness regulation so that consumer would not be subordinated to bank profitability.

To do so effectively, however, it is necessary to give the CFPB the same tool-kit as the most powerful of the federal bank regulators, the Office of the Comptroller of the Currency (OCC). The OCC has a unitary director, an independent source of funding, and substantial statutory independence from Treasury. This allows the OCC to act quickly and decisively and without undue quotidian political pressure and without the politicking and horse-trading that goes on with multi-member commissions. The OCC has proven itself to be a capable and aggressive advocate for the interests of national banks, even at the expense of the national interest.

The CFPB is deliberately designed to be a parallel and counterweight to the OCC to allow consumer protection concerns to be given equal weighting to bank profitability (also known as safety-and-soundness) and avoid the problems that result when consumer protection is subordinated to bank profitability. This requires having a unitary directorate, rather than a multi-member commission.

If Subcommittee is convinced, however, that a five-person commission is the proper structure for the CFPB, I would urge the Subcommittee to also adopt a five-person commission structure for the Office of Comptroller of the Currency, which would then be the sole federal financial regulator with a unitary directorship. What is good enough for consumers should be good enough for banks.

I would urge the Subcommittee against adopting a five-person commission model for the CFPB. The CFPB has not yet had a chance to get up and running and there is no reason to think that the unitary directorship is a particular problem; the CFPB should be given a chance to prove itself before it is reconfigured by Congress. Given the multiple safeguards that already exist to ensure that the CFPB does not act arbitrarily and capriciously action, it becomes apparent that changing the CFPB from a unitary directorship to a five-member panel would add little. Instead, switching to a five-member panel would tilt the balance at the agency to gridlock and inaction, would add unnecessary big government bloat, and would reduce accountability.

IV. Financial Stability Oversight Council Review Authority

A second area of proposed "reform" of the CFPB would be to lower the thresholds for the Financial Stability Oversight Council veto. H.R. 1315, the Consumer Financial Protection Safety and Soundness Improvement Act, (the "Duffy Bill"), would amend section 1023 of the Dodd-Frank Act[16] to reduce the thresholds for a Financial Stability Oversight Council veto of CFPB rulemaking. It would do so in two ways.

First, it would reduce the necessary vote from a supermajority of 2/3s of the FSOC members (including the CFPB Director), that is 7 out of 10 votes if all members were present, to a simple majority of FSOC members, not including the CFPB, that is 5 of 9 votes. It would also reduce the necessary finding from the CFPB "regulation or provision would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk" to a less exacting finding merely that the CFPB rulemaking is "inconsistent with the safe and sound operations of United States financial institutions." Finally, by deleting section 1023(c)(5) of the Dodd-Frank Act, the bill would require the FSOC to take a vote if any FSOC member raised an objection to a CFPB rulemaking.

[16] P.L. 111-203, 124 Stat. 1985, § 1023, July 10, 2010, *codified at* 12 U.S.C. § 5513.

The FSOC veto power provides an unnecessary and possibly unconstitutional check on the CFPB and should be eliminated, rather than made more stringent.[17] Irrespective, *the Duffy Bill's proposed finding for an FSOC veto would render virtually every CFPB rulemaking in doubt.* Indeed, under the Duffy Bill's proposed standard—whether the CFPB rulemaking is "inconsistent with the safe and sound operations of United States financial institutions"—it would be impossible for the CFPB to implement several recent pieces of Congressional legislation, including Title XIV of the Dodd-Frank Act, the Mortgage Reform and Anti-Predatory Lending Act.[18]

As noted, above, safety and soundness means, at core, profitability. To the extent that a proposed CFPB regulation would reduce the profitability of a financial institution, it would reduce that institution's safety and soundness. Thus, any CFPB regulation, even if it merely increased compliance costs, would be "inconsistent with the safe and sound operations" of a financial institution.

While bank regulators have argued that consumer protection goes hand in hand with safety and soundness because it is unsafe for a bank to systematically exploit its customers or engage in unfair and deceptive practices, the run up to the financial crisis provides clear evidence that federal bank regulators were unwilling to put the brakes on unfair and deceptive mortgage lending. Similarly, the run up to the Credit CARD Act of 2009 shows that federal regulators were unwilling to act on unfair and deceptive credit card acts and practices until Congress itself started to move. Only then did the Federal Reserve, OTS, and NCUA hustle to amend their UDAP regulations.

To understand just how overbroad the Duffy Bill's proposed rule is, consider, for example, consider if there had been a CFPB in 2005, and it had proposed a rule that would have severely restricted the underwriting of payment-option adjustable-rate mortgages (so-called pick-a-pay mortgages) to borrowers who have demonstrated an ability to repay. Such a rulemaking would have put an end to the "Countrywide special," that was the hallmark of Angelo Mozillo and Countrywide, the nation's largest mortgage lender.

Such a restriction would have significantly curtailed Countrywide's mortgage lending business, and would surely have resulted in the OCC or OTS demanding an FSOC veto. Yet such a move could hardly be called radical. Congress itself passed just such a requirement in section 1411 of the Dodd-Frank Act,[19] and a parallel requirement for credit cards in section 109 of the Credit C.A.R.D. Act of 2009.[20]

Indeed, we actually have an example from 2008 of a bank regulator challenging a proposed consumer financial protection regulation on safety-and-soundness grounds. In August 2008, Comptroller of the Currency John C. Dugan wrote to the Federal Reserve Board to urge it to insert two significant exceptions to the proposed Regulation AA (unfair and deceptive acts and practices) credit card rule that would limit the ability of card issuers to reprice or colloquially

[17] I would urge that if Congress adopts the five-person commission model for the CFPB per the Bachus Bill, it should eliminate the FSOC veto over CFPB actions

[18] P.L. 111-203, 124 Stat. 2137-2212, §§ 1401-1498, July 10, 2010.

[19] P.L. 111-203, 124 Stat. 2142, § 1411, July 10, 2010, *codified at* 15 U.S.C. § 1693c ("no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments.").

[20] P.L. 111-24, 123 Stat. 1743, § 109, May 22, 2009, *codified at* 15 U.S.C. § 1665e ("A card issuer may not open any credit card account for any consumer under an open end consumer credit plan, or increase any credit limit applicable to such account, unless the card issuer considers the ability of the consumer to make the required payments under the terms of such account.").

"rate jack" cardholders.[21] Duggan wrote that the restrictions "raise safety and soundness concerns" because they limited the ability of issuers to re-price their loans if issuers determined that the risk profile of the customer had worsened.[22] If the CFPB had proposed such a rule, the OCC would surely have challenged it before the FSOC as "inconsistent with the safe and sound operations of United States financial institutions." Yet, Congress itself passed an even tougher restriction on credit card repricing less than a year later.[23]

Under the Duffy Bill's standard, several laws passed by Congress in recent years, such as the Credit C.A.R.D. Act and the Mortgage Reform and Anti-Predatory Lending Act would themselves be unenforceable by regulation because the laws themselves might reduce bank safety-and-soundness (i.e., profitability), so any faithful rule-making would have to as well. The effect of the Duffy Bill would be to eviscerate several recent, popular, consumer financial protection statutes.

The Consumer Financial Protection Bureau is a new agency tasked with protecting the financial security of American families, ensuring that they can get the information necessary to make responsible, informed financial choices. Congress created the Bureau to ensure that American families can trust the financial products they use to help them achieve their goals, rather than ensnare them with tricks and traps that lead to financial distress. The Duffy Bill's proposed expansion of the FSOC veto would place bank profits ahead of the well-being of American families, and would put us on a return course to the financial crisis of 2008.

The FSOC Veto Is Possibly Unconstitutional

I would also note that the FSOC veto under section 1023 of the Dodd-Frank Act is already of dubious constitutionality. On June 28, 2010, a fortnight before the enactment of the Dodd-Frank Act, the Supreme Court handed down its judgment in a case captioned *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[24] In this case, the Supreme Court held that it was an unconstitutional violation of the separation of powers to restrict the President in his ability to "remove a [principal] officer of the United States, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States".[25] This ruling raises the question of whether by giving the FSOC veto power over CFPB rulemaking, Congress has impermissibly restricted the power of the President to "take Care that the Laws be faithfully executed" through his appointee as Director of the Bureau of Consumer Financial Protection. It also raises the concern that the CFPB is not truly an independent agency as it would be subject to a veto exercised in part by cabinet agencies.

The existing FSOC veto power is already constitutionally suspect, and proposals such as the Duffy Bill, which would make exercise of the veto authority mandatory and on a hair-trigger basis, would only increase the likelihood that section 1023 of the Dodd-Frank Act offends the Constitution. I would strongly urge the House to request opinion of counsel on the FSOC veto's constitutionality before taking any action in regard to it.

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[21] Letter from Comptroller of the Currency John C. Dugan to Jennifer Johnson, Secretary, Board of Governors of the Federal Reserve System, Re: Docket Number R-1314, August 18, 2008.

[22] *Id.*

[23] P.L. 111-24, 123 Stat. 1736-37, § 101, May 22, 2009, *codified at* 15 U.S.C. § 1666i-1.

[24] 130 S. Ct. 3138 (2010).

[25] *Id.* at 3147.

V. THE ROLE OF THE CFPB IN THE MORTGAGE SERVICING FRAUD INVESTIGATION

Some members of Congress, including from this Committee, have expressed concern over the role of the CFPB in the federal and state investigations into mortgage servicing fraud and settlement discussions.[26] I am not in a position to discuss the specific role of the CFPB in those discussions, but note that the mortgage servicing fraud investigations involves potentially the largest consumer financial fraud in US history.

The specific concerns expressed—namely that the CFPB and Professor Warren did something improper by "doing more than provide advice" but instead by "recommend[ing] the goals and provid[ing] a detailed framework for the structure of the settlement"—are simply baffling, as there is no plausible *legal* impropriety with CFPB involvement. Instead, the only plausible objection to CFPB involvement with the servicing fraud settlement discussions is a *political* objection to having a strong and knowledgeable consumer advocate involved in the settlement talks.

As an initial matter, it is important to note that even if one believes that there is a problem with the CFPB having provided recommendations to other federal agencies regarding the mortgage servicing fraud settlement discussions, this is not a problem that could create on-going oversight concern. As of the CFPB's effective date of July 21, 2011, the CFPB will be the primary government agency for dealing with mortgage servicing, irrespective of whether it has a director.

At most, then the issue deals with CFPB activity prior to July 21, 2011. Prior to the CFPB's effective date, it is beyond peradventure that the CFPB lacks any authority to settle claims on behalf of the US government, and no one has suggested that the CFPB transition team has claimed such authority. So any activity by the CFPB must necessarily fall short of being in any way binding and therefore could not be an affront to Constitutional limits on delegation or create an oversight problem.

Concerns over advising versus recommending express a distinction without a difference. To advise means to make suggestions and proposals. If one retains an expert for advice, one typically expects suggestions and proposals. As it happens, it is hardly evident that the CFPB even provided "a detailed framework for the structure of the settlement." The only public document regarding the settlement produced by the CFPB, a 7-page powerpoint presentation, is hardly a "detailed framework." Instead, it is an analysis of the extent of unjust enrichment of several large banks as a result of mortgage servicing fraud—calculated at *$24 billion*, making this the largest consumer fraud in history—and a barebones analysis of the cost of various levels of mortgage principal reduction. It has nothing to do with the detailed servicing standards proposed by the attorneys general, and does not make any recommendations.

Thus, the issue is solely whether it was improper for members of the CFPB, including political appointees such as Professor Elizabeth Warren, Assistant to the President and Special Advisor to the Treasury Secretary, to be involved in the settlement talks. The clear and undeniable answer to this question is no. There is no Constitutional limit whatsoever on the executive branch's ability to seek advice from individuals who have not been confirmed by the

[26] Letter from Rep. Spencer Bachus & Rep. Shelly Moore Capito to Prof. Elizabeth Warren, dated Mar. 30, 2011, *at* http://financialservices.house.gov/media/pdf/033011warrenltr.pdf; Letter from Rep. Shelley Moore Capito, Rep. Scott Garrett, Rep. Patrick McHenry, & Rep. Randy Neugebauer to Sec. Timothy Geithner, May 6, 2011.

Senate. The executive branch routinely hires experts and consultants for all sorts of matters, and the entire K Street lobbying industry does nothing if not providing advice and suggestions.

Unconfirmed political appointees, as well as common citizens, have provided members of the executive branch with advice from the days of the Founding Fathers to present. Moreover, the President's Constitutional recess appointments power means that the advice and consent of the Senate cannot be relied upon as a check to limit whom the executive branch involves in policy discussions. As long as political appointees do not have a personal conflict of interest at stake and are not engaged in electioneering—and neither has been alleged here—there is no plausible basis for an objection to Professor Warren's involvement in a servicing fraud settlement. Instead, objections to Professor Warren's involvement are nothing more than cover for objections to the substantive positions attributed to Professor Warren.

Indeed, it is worth noting that this is not the usual case of a political appointee providing political advice about a policy decision. *Instead, the question here is whether there is something inappropriate about the country's leading consumer finance law expert advising the Treasury Secretary about mortgage servicing and foreclosures.*

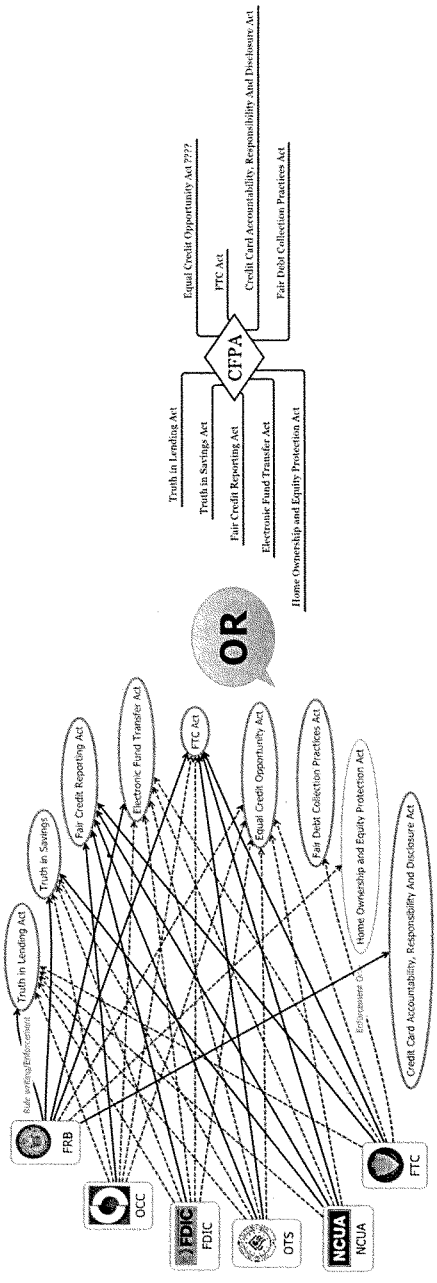
It's hard to think of a more appropriate person to have in the room for servicing fraud settlement discussions. Professor Warren has more expertise about mortgage servicing than virtually any federal employee. No federal bank regulator—OCC, OTS, FDIC, Federal Reserve—has particular expertise in servicing issues, and HUD's expertise is limited to FHA/GNMA regulations. As Chair of the Congressional Oversight Panel, Professor Warren led the production of three substantial and groundbreaking reports on mortgage foreclosures and servicing issues. Moreover, as the CFPB will be picking up responsibility for regulating the entire residential servicing industry going forward, it only makes sense for the head of the CFPB transition team to be involved in the talks.

Unfortunately, following Congressional complaints about the CFPB involvement in the servicing talks, the CFPB was excluded from the talks, and the OCC and Federal Reserve entered into what can charitably be called Potemkin settlements with the major servicers. The result is that rather than resolving the problems in the servicing industry—which are presently the leading source of systemic risk for the US financial system—we have a problem that is continuing to fester, as the attorneys general, HUD, and private litigants continue to pursue the issue. This episode represents nothing less than political interference with bank safety-and-soundness regulation, and I worry that it will rebound to the detriment of the financial system and economy as a whole, much like earlier deregulatory episodes.

CONCLUSION

The Consumer Financial Protection Bureau has not even had an opportunity to begin to exercise its regulatory authority. It is simply premature to consider reforms to its oversight, as it is not yet clear whether any changes to the oversight structure are needed, much less what those changes are. Let's give the CFPB a chance to prove itself and not return to the pre-2008 period when the lack of effective consumer financial protection facilitated the destructive housing bubble and financial collapse from which we have still not recovered.

Figure 1. The Current Consumer Financial Protection Regulatory Structure vs. the Regulatory Structure with the Consumer Financial Protection Bureau.[27]



Mr. MCHENRY. Thank you, Mr. Levitin. Thank you for testifying. Mr. Pincus, you're recognized for 5 minutes.

STATEMENT OF ANDREW PINCUS

Mr. PINCUS. Thank you, Mr. Chairman.

Mr. Chairman, Ranking Member Quigley, and members of the subcommittee, thank you for the opportunity to testify before the subcommittee today on behalf of the Chamber of Commerce and the hundreds of thousands of businesses that the Chamber represents.

Let me, at the outset, correct Mr. Levitin's apparent misperception about what the Chamber's long-held position has been on this issue.

Through the debate over Dodd-Frank, the Chamber made clear that it strongly supported sound consumer protection regulation and enhanced consumer protection at the Federal level. The Chamber businesses, just like consumers, have a strong interest in a marketplace that's free of fraud and free of other deceptive and exploitative practices so legitimate businesses can compete on a level playing field. So businesses, just like consumers, don't like predatory practices that hurt consumers.

At the same time, what is essential is to ensure that regulation does not impose duplicative and unjustified burdens that have two ill effects.

First of all, they unjustifiably divert resources that are essential to fueling economic growth, to complying with rules that are not necessary; and in this context, as Mr. Zywicki has mentioned, they prevent small businesses from obtaining the credit they need to expand and creating the jobs that our economy needs because the well-documented fact is that small business credit is often consumer credit. And misguided regulation of consumer credit that shrinks its availability will shrink the credit that is the lifeblood of small businesses in this country.

So the Chamber actually looks forward to working with the Consumer Financial Protection Bureau once it's up and running to meet these goals and has already had several productive meetings with some of the people that have been designated to take roles at the Bureau.

But the Chamber is concerned that the Bureau's structure will make it impossible to achieve the goals that have been set out for it.

First of all, I think it's important to make clear at the outset, given some of the earlier testimony, that the plain fact is that Dodd-Frank sets up for the Bureau an unprecedented structure that consolidates more power in the director than in the head of any other agency that regulates private individuals and entities. Just want to repeat that again. It concentrates more power in a single person than any other Federal agency head of an agency that regulates private individuals and entities. So let me talk a little bit about why that's so and address some of the comparisons that were put on the table earlier.

First of all, I think we're all familiar with the basic model of the Federal agency. Like the Federal departments, they're headed by a single individual, a Secretary, or the head of the FDA, one indi-

vidual. But there are two important characteristics there. It's one individual who serves at the pleasure of the President. The President has total power to fire that person if he or she disagrees with the President's policy views. And, of course, for all those executive agencies, the appropriations process is there and Congress reviews their appropriations.

Now, we do have independent agencies. The structure for independent agencies virtually uniformly throughout the government is that they are headed by a multi-member, bipartisan commission whose members serve for fixed terms. So there is a built-in compromise there. Yes, it's true the President doesn't have the unfettered power to fire a member of the FTC or the SEC, but neither does one of those people have all the power to run the agency. So you need a majority. And so there's a built in check on the power of any one of those individuals who have protection against the President's discretionary firing.

Second of all, for most all of those agencies there is still the appropriations process oversight to ensure that there is a second check on what they're doing through the people's elected representatives in this House and in the Senate.

The Bureau, of course, is headed by a single director who serves for a fixed term and with respect to whom the President is limited in his ability to fire him, except for cause—him or her—except for cause; and there is no appropriations oversight.

So it is those three things coming together—single person, limitation on the President's power to fire, except for cause, and no appropriations oversight—that makes this different than any other agency.

And I want to address the OCC comparison, because that has been floated earlier again in the hearing. The OCC Comptroller is someone who is subject to firing at the discretion of the President. So, again, critical difference in the checks and balances that exist with respect to that agency and the agency here.

And as I detail in my testimony, the Secretary of the Treasury also exercises some oversight authority over the Comptroller.

Finally, just two quick additional points.

First of all, the question of the FSOC review of regulations and whether that's unique. I served in the executive branch. The OIRA regulatory review process within OMB—I'm sorry, Mr. Chairman. I'm running over a little bit. The OIRA process brings all the executive agencies around the table to reach a compromise about what—a united view about what that executive branch agency regulation should be.

Second of all, I'd be happy to talk more about the regulatory capture point that Mr. Levitin made, but suffice it to say that the banks are not the only special interests in this debate. There are lots of special interests, and the question is how do we create a structure that makes sure that the resulting rules are the public interest and not the product of one special interest or another.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Pincus follows:]

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.

* * * *

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.

Mr. MCHENRY. Thank you, Mr. Pincus. Thank you for your testimony, and I thank all of you for waiting and being here and understanding that the congressional schedule tends to lengthen things.

Mr. Levitin, you mention in your testimony you mention OCC as an apt comparison to the CFPB. In Ms. Warren's testimony, she also mentions that as the appropriate comparison. Why do you believe that to be the case?

Mr. LEVITIN. One of the primary reasons that we separated—that Congress separated consumer finance from bank safety and soundness was that it found that those two did not work well together because safety and soundness always took the foremost position and consumer protection ended up being subordinated.

Mr. MCHENRY. I understand. You're talking about the previous Congress' intent on this law, on the structure of Dodd-Frank and CFPB in particular. What in particular—why is OCC the appropriate comparison?

Mr. LEVITIN. Because OCC is the strongest of the Federal bank regulators; and if we want to have a bank regulator that is able to act efficiently and decisively to protect American families, we want a structure that works like OCC. OCC has been a very effective structure in furthering banks' interests. We want a structure like that that furthers the interest of American families.

Mr. MCHENRY. You speak that these commissions—the commission structure is not ideal. Why?

Mr. LEVITIN. When you have a commission structure—there are two reasons. First of all, just with any commission structure, you end up often having just simply horse trading among the commissioners. Commissioners have their pet issues, as Professor Zywicki pointed out, and as a result of that sometimes commission decisions end up being based on political tradeoffs, rather than what is really the right resolution of the issue.

Mr. MCHENRY. And you're saying this to Congress.

Mr. LEVITIN. I'm saying this to Congress, certainly, because Congress is a different structure, and Congress is meant to be——

Mr. MCHENRY. I'm sorry. Your second point. I didn't mean to interrupt.

Mr. LEVITIN. Oh, no. But I think that's an important distinction. The Congress is a political agency and is meant to do that. We do not want our regulatory agencies operating that way.

Mr. MCHENRY. And your second point?

Mr. LEVITIN. The second point is that when you're dealing with the traditional model of the five-person agency—we don't have this always, but in most cases we have the rule that no more than three members of that five-person commission can be from any one party. The problem is when you apply that partisan division to consumer financial protection it doesn't work, because consumer financial protection issues do not fall on partisan lines.

Mr. MCHENRY. Okay. Thank you.

It is interesting because when you're talking access to credit there is a division there.

Mr. Zywicki, you mentioned in your testimony that the comparison to the FTC is the preferable one. Compare that to the OCC. I'd like to sort of understand the difference here, if there is a difference.

Mr. ZYWICKI. Thank you, Mr. Chairman.

And that's exactly right. The Federal Trade Commission is the obvious analogy here. I worked at the Federal Trade Commission as the Director of the Office of Policy Planning. The Federal Trade Commission for a long time has had authority over some pockets of consumer protection. And what we see is that the FTC is the model of how this should be done, which is that it has an internal deliberative process where they can discuss the policy tradeoffs. Too much consumer protection can be harmful to consumers.

Mr. MCHENRY. Why is that?

Mr. ZYWICKI. We could make the foreclosure rate zero if we just said you couldn't get a mortgage.

Mr. MCHENRY. What would the impact of that be? People would keep their homes. So what would the impact of that be?

Mr. ZYWICKI. People wouldn't be able to buy homes, because they'd have to save up. They'd have to get cash before they could buy a home, for instance.

Mr. MCHENRY. Because people wouldn't lend to them if they could not reclaim their property is what you're saying.

Mr. ZYWICKI. Exactly right. Exactly. And so there is a tradeoff then. There is a tradeoff between two good things, consumer protection and consumer choice, competition and lower prices. If you raise prices, then consumers get less access to credit.

Mr. MCHENRY. Okay. Does the rest of the panel agree, just yes or no, that there are tradeoffs in this, just as Mr. Zywicki outlined. Dr. Evans? Just yes or no.

Dr. EVANS. Yes.

Mr. MCHENRY. Okay. Mr. Levitin.

Mr. LEVITIN. Yes, there are tradeoffs.

Mr. MCHENRY. Okay.

Mr. PINCUS. Yes.

Mr. ZYWICKI. And elaborating on the FTC then, which is that what we see is the FTC through the deliberative five-member process comes up away with doing this. We also see at the FTC that there is an internal check of competition, consumer choice on one side of the agency, consumer protection on the other side of the agency. And when I think about this—and the FTC, nobody has ever said that the FTC is incompetent because they've got an agency—I never saw horse trading with respect to these sorts of things. What I saw was a deliberative process that had internal checks and balances, that weighed all of the considerations here.

And when I think about the CFPB, what I think is that I was at the FTC. I know a lot of people who have worked at the FTC. And if people had said that consumers would be better off if we just took the Consumer Protection Bureau of the FTC and spun it off and just let it sue whoever it wanted to, do any regulations it wanted to, without any consideration about other sorts of things, people would think you had lost your mind. Yet that is the model. That is the model for the Consumer Financial Protection Bureau, would be the FTC Consumer Protection Division standing alone. And that would be a disaster.

Mr. MCHENRY. My time has expired.

Mr. Quigley of Illinois, the ranking member, is recognized for 5 minutes.

Mr. QUIGLEY. Thank you again, Mr. Chairman.

Mr. Levitin, Professor, obviously, a significant part of this new agency's mission is to help level the playing field between the larger lenders and smaller lenders such as credit unions and the small community banks in my district.

You published, I believe, this report in December 2009, in which you made the point, "better regulation of the consumer marketplace would result in both safer and more affordable products." Specifically, you mentioned the issue of incomplete price competition, which makes it very difficult, if not impossible, for consumers to comparison shop for products based on total cost.

Would you explain the concept of incomplete price competition and the effect it has on the consumer finance market?

Mr. LEVITIN. Sure. I want to start by saying that I think that the Consumer Financial Protection Bureau could end up being a major source for relief, could end up really benefiting community banks and credit unions by leveling the competition playing field within the financial services space. That within financial services there are economies of scale that—especially in areas of credit cards and debit cards, there is simply economies of scale that smaller financial institutions cannot match.

Having the Consumer Financial Protection Bureau encourage more transparent products where consumers are able to compare apples to apples, where they don't have to try and guess what is it going to cost me to use this credit card over the course of a year, that they can know if I use this card this will be the cost, if I use this card this will be the cost, and I can make an informed comparison. Just like I go to the grocery store and I can look at unit prices, that I can make an informed comparison like that. Then I can make sure that I choose the right product.

And that lets smaller financial institutions that offer really good products and really good services be able to compete fairly because they don't have to compete with hidden price terms. Their price terms are up front and clear and part of their price terms are that they have excellent service. And often they have to compete with large financial institutions that have an incentive to hide the price terms in small print and make it hard to figure out what is it going to cost to use this product.

Mr. QUIGLEY. You're talking about improving transparency.

Mr. LEVITIN. Very much so, sir.

Mr. QUIGLEY. And exactly, if you were them, how do you do that? What are the steps so the everyday person can find what you're talking about?

Mr. LEVITIN. I think, first and foremost, you focus on disclosure of information. The way we have done consumer protection in the United States since the Truth and Lending Act has focused primarily on disclosure; and you try and improve the disclosure forms, as the CFPB has already started to do with reconciling their Real Estate Settlement Procedures Act and Truth in Lending Act disclosures for mortgages, started doing that with credit cards, trying to boil down, you know, a typical 30-page credit cardholder agreement into hopefully what will end up being a one-page agreement that you and I can look at and read in plain English and that you don't have to be a lawyer to understand.

Mr. QUIGLEY. Is there some other place that you think this makes sense to disclose so it's not just in that? Is there some on-line possibility?

Mr. LEVITIN. That's one of the possibilities. It's not clear exactly what the right answer is. Part of the task before the CFPB is going to be to figure out what is the optimal way to do this. And I expect that the CFPB will consider, among other things, whether having—enabling easier on-line comparisons just the way you might compare used cars on Carmax or something would be an option.

Mr. QUIGLEY. And your best guess on how the market reacts to these requirements?

Mr. LEVITIN. Well, you know, if I were a large financial institution and I made a lot of money by hiding the price terms, I wouldn't like this. I would want to stop this, and I'd want to kill off this agency. But if I were a small financial institution that, you know, where my calling card was excellent customer service and, you know, a straightforward, honest product, I would embrace this wholeheartedly.

Mr. QUIGLEY. I don't fault them for trying to make profits. I just think it's something that the market always should encourage and that's the competitive aspects that transparency allows. So I'd like to think that they'd eventually embrace this and see it as a marketing opportunity, as you said, you know, like a Carmax. Some people are advertising, hey, we make this easy for you to know what you're actually buying when you buy this car. So I'd like to think that they'd embrace it at some point, recognizing the cost and the competitive qualities that it would bring to bear against them in some respects.

Mr. LEVITIN. Transparency is the consumer's best friend.

Mr. QUIGLEY. Thank you, Mr. Chairman. I yield back.

Mr. MCHENRY. I recognize myself for 5 minutes.

Dr. Evans, you mention that your concern is that the CFPB would really put in place an anti-credit policy. Can you explain why that would be? Why would we have an agency with an anti-credit, anti-borrowing, anti-lending policy?

Dr. EVANS. The philosophy of many of the people who are behind the Consumer Financial Protection Bureau is really that there are some fundamental problems in the financial market. There is a belief that consumers really don't know what they're doing, that consumers make a lot of mistakes, and what you really need is you need a nanny, you need a super nanny, in effect, to be telling consumers what they should be doing.

How does that happen? Well, you basically tell financial institutions what kind of products they should design, what kind of products they should offer to consumers. If you look at the writings of a lot of people involved in the agency, there is a tendency on their part to basically believe that borrowing money is not a great thing and that consumers get sucked into borrowing too much.

How do you react to that if you're an agency with those beliefs? You put policies in place that make it more difficult for banks to lend money to consumers, and you put policies in place. And one of the things that has been suggested by some of the backers of the CFPB is basically what's known as sticky opt-out policies, where you basically tell a financial institution that they have to tell con-

sumers that this is the product that we have to give you and make it very difficult for the financial institution to let that consumer take another product. That basically makes it difficult for the financial institution to lend money to that consumer.

If I might just elaborate just a little bit and respond to Professor Levitin's points, I think history tells us that the notion that this regulatory agency is going to lower prices to consumers, that this massive regulatory agency is going to lower prices to consumers, is going to increase competition I think is extraordinarily naive.

And if you look at the facts, we've had the experiment with the CARD Act. What have we seen as a result of the CARD Act? One of the effects of the CARD Act in this marketplace is that prices have gone up to consumers and it has been more difficult for consumers to get credit.

Why is that? Because one of the things that the CARD Act does—and I am not saying the CARD Act doesn't do good things—but one of the things that the CARD Act does is it makes it very, very difficult for financial institutions to price risk.

It is simply not the case that credit is like a car or is like a toaster. The difference is that when a bank extends credit to Mr. Zywicki or Mr. Levitin or to me or to Mr. Pincus, the chances are each one of us has different risk characteristics, and the bank has to figure out a way to price that. The CARD Act and that particular regulation made that more difficult to do, and one of the consequences of that is banks had to basically increase their prices and reduce the availability of credit.

The other example that I've written on recently, of course—and we don't know how this is going to play out—is the Durbin amendment and debit card interchange fees. Based on the work I've done, I think it's pretty clear. I think it's pretty clear from how the market has already operated that that is going to have a very clear effect on the marketplace. It's going increase the price that consumers pay. I simply don't think it's plausible that this regulatory agency is going to result in lower prices for consumers. I just don't think there's a lot of experience in history that's comported with that particular view.

Mr. MCHENRY. The FSOC—the ability of the FSOC to overrule the rules of the CFPB. Ms. Warren says that this basically weakens the agency, and it's not a strong regulatory agency because you have to get 7 out of 10—really, excluding the director of the CFPB, 7 out of 9—members to vote; and the limitation on that overruling is that it would provide a systemic risk to the American financial system. High hurdle. So that means the CFPB could really eliminate particular businesses and business lines, and the FSOC wouldn't have the authority to overrule it.

Mr. Pincus, you mentioned this about the FSOC. Why is the FSOC not a powerful tool to overrule CFPB rules?

Mr. PINCUS. I think for both of the reasons you mentioned, Mr. Chairman. First of all, the supermajority requirement is very unlikely to be met. The standard that has to be applied threatens the entire U.S. financial system, an incredibly high standard.

Second of all, the process that is employed. Typically the way agencies discuss proposed regulations is there is a process before the rule is issued. What this says is the Bureau issues its rule, and

then if somebody doesn't like it, they can start what will be a very public process to overrule it, and I think there will be obvious reasons why, absent something that is almost so cataclysmic it is impossible to think about, nobody is going to want to do that.

Mr. MCHENRY. Thank you for your testimony.

With that, I yield to Mr. Cummings for 5 minutes.

Mr. CUMMINGS. Thank you very much.

I was sitting here and listening to you, Dr. Evans, and you, Mr. Pincus, I could not help but think about a rap group that has a song entitled "Get Rich Or Die Trying." And the reason why I say that is that I want to do everything in my power to protect my constituents who are suffering every day and the constituents of Chairman McHenry, by the way, and others. And we need to—I don't want us to throw up our hands and say we can't protect consumers, because we can do it and we can do it effectively and efficiently. And I am sure that is what you all are talking about, trying to get to that.

You may have a disconnect from the people I see every day, who pay the high bank fees and who have been messed over over and over and over again. And they go to work, they get on the early bus at 5:30 a.m. They scrub other people's floors, operate the elevators and then pay these high fees. One of the reasons is banks won't even locate in their areas. Payday loans all throughout the district. People who rent them appliances that they could buy.

That is why we need this protection, CFPB. And we all need to work to make it work, because the American people are paying for this and they deserve to be protected and they need protection.

Professor Levitin, you published an academic paper in 2009 entitled "A Critic of Evidence in Wright's Study of the Consumer Financial Protection Agency Act," which was a critique of a study by David Evans, who is one of our guest panelists today, and Joshua Wright, that found among other things that the CFPB Act, the section of Dodd-Frank that created the Consumer Financial Protection Bureau, could increase interest rates and reduce new jobs.

You explained that their report was just the latest phony, and I am going to quote you, I don't want them to think I am saying this about them, "The latest phony lobby statistics to come out of the banking industry," and pointed out that the study was funded by the American Bankers Association. Is that correct? Did you do that?

Mr. LEVITIN. It is correct, and my particular objection with that paper was that it tried to estimate an increase in the cost of credit due to the creation of the CFPA and the CFPB, and its methodology was this, and you will see it is very obvious the flaw in this methodology.

It said here is another piece of legislation dealing with interstate bank regulation, and one study found that resulted in an increase of cost of credit of X basis points. Therefore, the CFPB will result in an increase in the cost of credit of X times some number they pulled out of the air. And it was simply that. Just take a multiplier and apply that multiplier to an inapposite study and say that is going to be the effect of the CFPB.

I was rather shocked, because Dr. Evans has produced some really excellent academic work previously, and this was just very surprising for me to see.

Mr. CUMMINGS. Just let me ask one other question, then I will get to you, Dr. Evans—no, you go ahead, because I want to be fair to you.

Dr. EVANS. With all due respect, Professor Levitin hasn't done any research. He just testified concerning what is going to happen to prices based on absolutely nothing. When pressed to say what is going to happen to interest rates and so forth, the reaction we get, and I will quote from his testimony just earlier, it is speculative. We don't really know.

What Josh and I, Professor Wright and I tried to do, it was a study. It was not based on perfect evidence. But the particular study that Professor Levitin has pointed to is actually an analog. The best analog we could find, not a perfect analog, the best analog we could find of something that is comparable to the CFPB. It provided a baseline for the imposition of credit in the economy. That particular study that Professor Levitin just referred to showed that another regulatory bill and as a result of state restrictions on banking and credit, and so forth, led to an 80 basis point increase in interest rates. That is what you typically get with regulation.

We did a comparison to CFPB and made the point that CFPB would allow a greater set of regulatory restrictions on lending than that. We took that as a——

Mr. CUMMINGS. I have to cut you off, because I got to give Levitin a chance to respond.

Mr. LEVITIN. They took that 80 basis points, and what did you multiple it by, 2 or 3, or just some number that was yanked out of the air, and that is not scholarship. That is simply not scholarship, just to yank a number out of the air and say this study was 80 basis points, therefore CFPB is going to be 160. You can't do that. This one is 80 basis points, and we just don't know yet with the CFPB. We have to give it a chance before we find out.

Mr. CUMMINGS. Thank you. I see my time has expired.

Mr. MCHENRY. I recognize Mr. Guinta for 5 minutes.

Mr. GUINTA. Thank you, Mr. Chairman.

Dr. Evans, did you pull a number out of the air?

Dr. EVANS. No. If you read the paper and if you look at our response to Professor Levitin, which we can certainly make available to you, we used that as a baseline of 80 basis points and we couched it in very careful language. We said that this isn't accurate. This is the best we can do given the available evidence. And we gave the reader an explanation as to why they should consider multiples of 80 basis points, twice that or three times that, based on a very lengthy analysis that we did in the paper, pages and pages explaining why the CFPA, why the CFPB, has the power and has the likelihood, particularly the earlier version of the legislation, to increase interest rates.

Again, with all due respect to Professor Levitin, he has produced absolutely nothing on this topic. The notion that we are engaging in this exercise and creating this massive agency and the best we can get is "we will just have to see," for me that is not good enough.

Mr. GUINTA. Thank you for that testimony. I would concur that it is not good enough for Congress either, or it shouldn't be good enough for Congress either. This is not a notion—this issue is too important for us to guesstimate how to solve the problem. I think all Members of Congress want to solve the problem, but I have failed to see yet how this agency will correct the actions that led up to what you, Mr. Levitin, had talked about that built up to this.

So the one question I guess I would have for you, I think that you had made some statements that if the CFPB had existed from 2004 to 2008, this could have been averted. It may not have occurred. I heard that testimony earlier in the first panel as well.

So, my question would be even though this entity is supposedly going to have some responsibilities of other entities that should have prevented this or should have maybe suggested this was going to occur and we could have put some stopgap measures into place, can you tell me what exactly this agency will do, say, in the next 12 months, to ensure that this would not happen again?

Mr. LEVITIN. Well, Congress already took care of a lot of the first steps itself. Title XIV of the Dodd-Frank Act undertook a major reform of mortgage lending markets, including a requirement that for nonqualified mortgages, which is a term that regulators are going to have to define, that lenders will have to verify ability to repay. That seems like a pretty obvious first step and I am glad Congress took it.

I think it is very important to note that the major step forward with the CFPB is changing the regulatory architecture. Previously, when bank safety and soundness was yoked together with consumer protection, consumer protection always ended up being the subordinated mission and entities like the Office of the Comptroller of the Currency would routinely turn a blind eye to predatory lending practices because they were profitable and they didn't want to stop the music at the party.

The CFPB does not have that bank profitability mission. It is not tasked with maximizing bank profitability, and therefore it is an agency that is incentivized to make sure that there is good consumer protection.

Mr. GUINTA. Wasn't that, "consumer protection," didn't that exist in these other agencies? Their missions were not to have bank profitability?

Mr. LEVITIN. Sure, they were. They were tasked with bank safety and soundness, and a bank that is not profitable is not safe and sound.

Mr. GUINTA. So you are saying their sole focus was bank profitability. There was nothing, no protections, no concern, no issue with respect to the consumer?

Mr. LEVITIN. Virtually none, and I can give you some examples. The Federal Reserve had the power under the Home Owners Equity Protection Act [HOEPA], to pass regulations that would have curbed some of the worst abuses of subprime lending. It didn't act for over a decade.

Mr. GUINTA. Would Fannie and Freddie fall into this category you referred to?

Mr. LEVITIN. Fannie and Freddie are a complicated and rather sad side story to this. The real problem in the home lending mar-

ket was from the private label securitization area, and that then spilled over into Fannie and Freddie. Fannie and Freddie were really not government agencies. They weren't tasked with consumer protection. And FIFA, or OFHEO, was not tasked with consumer protection either.

Mr. GUINTA. I note my time has expired. Thank you, Mr. Chairman.

Mr. MCHENRY. The ranking member, Mr. Quigley, is recognized for 5 minutes.

Mr. QUIGLEY. Thank you, Mr. Chairman.

Dr. Evans, Professor Levitin, I actually appreciate the disagreements here. Our judicial system is built on zealous advocates disagreeing, because from that we like to think we move toward the truth. So toward that end, while I recognize we are not going to hold hands and sing Kumbaya here, it is good to see this warm and fuzzy moment.

Dr. Evans, the professor's comments about transparency, while you may disagree with much of what this agency is about, could you talk about how transparency might help this industry and if you agree or what parts of transparency might improve things from the consumer's point of view without, as you would be unhappy with, destroying competition?

Dr. EVANS. Yes, that is a very fair question, and I appreciate it. And let me take that and just start out by saying that I am certainly not suggesting that there aren't problems to be solved. I mean, there are a ton of problems in the lending industry, there are certainly lots of problems that consumers have faced and I would be the last person to deny that there is a set of problems that some agency needs to deal with.

One of the things that is beneficial for consumers, subject to qualifications, is transparency. It is not a good thing when banks hide the ball. It is not a good thing when consumers are tricked into doing things. And it is certainly the case that there are some members of the financial services industry that have acted badly. And I am the last person to suggest that everything is okay and that there are no problems. So I am in favor of consumer protection, consumer financial protection. I think this agency could do lots of good things.

The one qualification, I guess the thing that I would really like to get across, is that as with many things we have to have a perspective on the marketplace, and, by and large, this is an industry that does a lot of great things. It helps the people in Mr. Cummings' district in lots of ways.

We just have to have the perspective that while there are bad things going on that we need to take care of, it is also an industry that does a great deal of good for consumers and small businesses, and the regulation that we have for this industry needs to be conscious of both the bad things that are going on, but it also needs to really recognize that the bad things are often exceptions and that there are lots of good things that we need to make sure we don't harm.

Mr. QUIGLEY. So would you suggest that the bad things you talked about are in large part undertaken by what was deemed the shadow banking industry? I mean, when this bill was being dis-

cussed, many of the largest financial institutions were supportive of—they weren't for this agency, but they were certainly for somebody going after the problems from what was deemed the shadow banking industry. If you want to use a different term, that is fine.

Dr. EVANS. No, I am hesitating here because I think probably one of the things that Professor Levitin and I agree on is that some of the large financial institutions engaged in practices that, you know, probably weren't a great thing for consumers. So there were elements of the financial services industry, whether it is large, whether it is shadow and so forth, you know, there were certainly issues, and those issues I think should be appropriately dealt with.

So I don't want to draw this dividing line between big financial institutions and the shadow financial institutions, because the shadow financial institutions, while we think of them as charging very high prices, in some cases they are also meeting a consumer need for people that aren't able to get loans from the large financial institutions but actually have a need that needs to be served.

So, again, I don't want to suggest that there aren't problems there, but we also need to recognize that just because we say payday lender, that not all payday lenders are doing bad things and not helping consumers.

Mr. QUIGLEY. Well, I appreciate your candor, and I would suggest to all the witnesses here that kind of candor helps us get to the truth in the end because there will be another day and another issue and another bill. In the end, what we are all trying to do is help all of our constituents. So, Dr. Evans, that helps.

Thank you, and I yield back.

Mr. MCHENRY. I now recognize Mr. Guinta for 5 minutes.

Mr. GUINTA. Thank you, Mr. Chairman. I wanted to follow up with both Mr. Zywicki and Mr. Pincus on a couple of items.

First, Mr. Zywicki, look, I understand the notion of appropriate consumer protection. I think most of us do. I think all of us probably agree that there is either redundancies or even in some circumstances additional burdens in some regulatory requirements. I think even some of us would agree with this philosophy or notion of the CFPB.

I have great concerns about the structure. I have great concerns about the ultimate power that can be provided to this one individual and to the individuals within this organization. I have serious concerns about the funding of the agency and the lack of ability for this agency to be called in front of Congress. And I think those are concerns that anybody in Congress should have, because ultimately, people in this country are going to rely on Congress to make sure that the right things are being done.

So my question to you would be in two parts, I guess. Could you talk a little bit about how this agency is structured and maybe some of the problems we should consider or see in the future; and, second, what alternatives do exist or can exist, rather than the structure that has been outlined in Dodd-Frank?

Mr. ZYWICKI. Thanks. Again, I think the Federal Trade Commission is the obvious model for how this thing should have been set up. In fact, I think all of these duties should have just been given to the Federal Trade Commission and we could have all gone home at that point and they would have done the right job. And I think

the Federal Trade Commission, where I worked from 2003–2004, is a much stronger, capable, effective agency precisely because of all of the apparatus that is set up around it. A multi-member commission, internal checks and balances, congressional oversight, all those sorts of things makes that agency much better. An agency that lacks all that is prone to tunnel vision and sort of navel gazing and that sort of thing and just sort of losing it its way. So I would strongly urge this be reformulated along the lines of the FTC.

Fundamentally, if this is the right thing here, then the FTC is wrong, and I don't think anybody thinks the FTC is wrong.

Mr. GUINTA. Can you expand a little bit on the commission? Why doesn't the CFPB have a commission, and does that suggest that the other commissions are not necessary?

Mr. ZYWICKI. It seems to suggest that if this is right, then all the other ones are wrong, and that just doesn't seem plausible to me. If this is how we are supposed to set up consumer protection, then I guess you need to wipe out the FTC, which has been here since 1914, and replace it with a director rather than a commission. The OCC is not analogous at all. The OCC is safety and soundness. It basically does accounting. It doesn't do broad scale policy analysis of the sort of things we have here.

So let me give an example, if I may. I agree totally with Mr. Cummings about his concerns with respect to access to credit. But if you think about it, the combination of CFPB, the Durbin amendment, the Credit Card Act, that sort of thing, we are going to drive because of the Durbin amendment maybe a million consumers out of the mainstream banking system. CFPB, by increasing the regulatory burdens here, is going to drive more consumers out of the mainstream banking system. We are going to put them exactly in the hands of the payday lenders and the check cashers and everybody else. We have already seen this. When you go after the payday lenders, what happens is the payday lending migrates online and then you have online payday lending. You have payday lending people migrate to pawn shops.

We are talking about a situation where when you go in with good intentions, you end up hurting the people you intend to help. And that is what I am concerned is going to happen with this.

Mr. GUINTA. Mr. Pincus, to follow up a little bit, I don't know that you heard earlier testimony, but I have some concerns about OCC versus CFPB. I believe there are clear differences between the two. Could you talk a little bit about the differences between the OCC and the CFPB in terms of oversight?

Mr. PINCUS. The clearest difference, Congressman, is that the Comptroller serves at the pleasure of the President and the Director doesn't. The Director can only be dismissed for I think the statute says inefficiency, neglect of duty or malfeasance. So it is a much more restrictive standard.

So in terms of the checks of the elected officials, much less of a check than on the OCC, than on the Comptroller. And within the Treasury Department, the Secretary does also have some ability to oversee what the Comptroller does. Again, the statute is completely clear. The Federal Reserve has zero role with respect to what the Director does. So those are the key differences, I think.

Mr. GUINTA. I appreciate that, because that is completely different than testimony we heard earlier today. Earlier today we had heard that they are similar, if not identical. And I would agree with you that that primary function of responsibility in how you can be hired and how you can be fired is paramount to the job that you are expected to complete.

I thank the chairman for the time.

Mr. MCHENRY. I thank the vice chair. I appreciate that.

Mr. Cummings is recognized for 5 minutes.

Mr. CUMMINGS. I am listening to all of this and it is so easy to forget how we got here. We can have testimony to paint over the past and talk about—my mother used to tell us don't concentrate on what you don't have, concentrate on what you do have. I have been listening and I am just trying to—thinking about $20 billion in credit card penalty fees, talking about $38 billion in overdraft fees. I am trying to figure out, where do we think this money comes from? It is coming from regular, everyday citizens.

Dr. Evans, I heard what you said about the fact that these are people who will rent you a washing machine for $75 a month when you could possibly buy one for $350, particularly in this kind of economy, that they are doing a service.

One of the things that Ms. Warren talked about today is trying to give people information. And I think information is power, I really do, but it is powerful when you use it. In some kind of way in this country we have to get to the point where we don't let the little guy and lady go down the tubes.

Some kind of way we got to get there. Because, you know what? Because you are going to always have—I live in the inner, inner, inner-city of Baltimore, so I see it every day. They don't have the big fancy cars. They may have a car that is 5 or 6 years old. They are making extremely high car payments. They are paying extremely high rent for what they are getting. They pay the most for food and the food is not very good. And they are constantly digging into a hole that gets deeper and deeper while the folks, a lot of the folks who get these fees, they move out into the suburbs, into the mansions.

Then these folks who are getting up at 5:30 a.m., paying all these fees to these people who you say are doing them a great favor, they can't do for their children, they can't take care of their children the way they would like to or even close, and they find themselves in generational cycles going down, down, down, instead of going up, up, up.

That is why I go to every graduation I can go to and beg people to get an education, because you are going to broaden the gap between the have's and have-not's, because again, the people who don't have pay the most and they are the ones in most instances that get royally screwed.

So, I am just here representing my constituents, trying to make sure that we find a way out of this.

So this organization was not, the CFPB, was not established to just be something fancy and to be able to say we did something. We wanted to make sure—by the way, I don't think we had one Republican vote—we wanted to make sure that we did something to take care of all of our constituents. I don't care where they live.

So then the question becomes is how do you take this and make it work well so that those people don't keep going in a downward cycle; so that because they cannot afford the things that they need because they just paid $20 billion in credit card penalty fees, if they can get a credit card of course, and $30 billion in overdraft fees, so how do we make it work? You guys are the geniuses. You are the gurus. What do you say to my constituents, if they have a television?

Dr. EVANS. Sir, personally I have a lot of sympathy for your constituents and I understand the problems that they face and I wish I could tell you I was here today and I could give you the solution to all the problems you laid out. I think all of us would like to solve them.

I guess the one thing I would say, maybe to just put a little bit of perspective on it, is if you go 20 years ago, many of your constituents who now have credit cards probably wouldn't have been able to get them. One of the things that has happened over the last 20 years is more socially and economically disadvantaged people have been able to get credit cards, they have been able to get bank accounts, and that has actually helped them out.

One of the areas that I have worked on quite a bit, Congressman Cummings, not recently but a long time ago was minority businesses. I am sure you have minority businesses.

Mr. CUMMINGS. A lot of them.

Dr. EVANS. I am sure you have a lot of them. And one of the problems they faced 20 years ago is if they wanted to get financing on their credit cards, 20 years ago, 15 years ago, they would have had great difficulty doing that. They are now able to do that now.

So I am not suggesting your constituents don't have deep problems that need to be solved. I guess I would like to maybe persuade you a little bit that some of these financial services products, whether it is bank accounts and debit cards or credit cards, while there may be aspects of it that you see as bad, I guess I would like to persuade you that there is an aspect of them has actually has been pretty good for your constituents and that it is actually getting better over time.

Finally, I would just point out that my wife is from Baltimore and she will be amused when I go home and tell her that you compared me to anything involving rap.

Mr. CUMMINGS. I see my time is up. Thank you, Mr. Chairman.

Mr. MCHENRY. We are going to do a final round here. Mr. Guinta is recognized for 5 minutes.

Mr. GUINTA. Thank you very much, Mr. Chairman. I happen to in the last month or so visit Beach Street School in the inner-city of Manchester, New Hampshire. Many people of think of New Hampshire not as the home to an inner-city, but it has many inner-cities, many neighborhoods that are inner-cities. I happened to be mayor for 4 years of that city and have great compassion for those who are financially and socially challenged in this society.

So I think it is imperative and important for us to make sure that we have rules in place that allow a level playing field, that will allow any individual if he or she chooses, to succeed in life. I am often reminded of some of the kids that go to the Boys and Girls Club in my hometown of Manchester, New Hampshire, and

where they started and where they are today. And I am proud to be part of a family of constituents and community members who feel very strongly that it is our responsibility as Americans to lead by example, to ensure that the American dream is alive and well, and that anyone who wants a part of that American dream can reach for that American dream.

So I guess my question would be this to Mr. Zywicki, if there was an alternative that you would suggest would enhance that type of America that I could cosponsor with the gentleman from Baltimore, and I would be happy to do it, because I have great respect for him. I have watched him serve with passion and compassion and I admire his approach to trying to help his constituents, and I want to be part of that solution.

So if there was a piece of legislation that Congress could embrace in a bipartisan way to make that American dream, whether it is in Baltimore or Manchester come true, what would it be?

Mr. ZYWICKI. I certainly think incrementally the things that are on the table, I endorse all of those, the multi-member commission, that sort of thing.

But what I would urge this panel to think about going forward, because the CFPB will likely turn out to be a failure. If it is not, if these accountability issues are not fixed, this thing is going to run off the rails and it is going to be a job killer and it is going to raise the cost of credit and everything else and it is going to hurt the people it is specifically intended to help.

So hopefully that will—that is unfortunate, but I think that is entirely predictable. I hope that causes people to reexamine this.

Let me stress again, I think that there is an urgent need and a great opportunity for a new approach to consumer financial protection. In my testimony I talk about the difference between market reinforcing regulation on the one hand and market replacing regulation on the other hand. I am all for savvy regulation that makes use of technology, harnesses the power of competition and consumer choice. A lot of the things that this agency might do, like a simplified mortgage disclosure form, would be great. Going back and paring back some of the mountains of junk that has been attached to the Truth in Lending Act would be great.

My concern is that in order to bring about heightened competition and consumer choice, we could do that. Doing things like creating vague, open-ended standards of liability, like the ability to sue somebody for an abusive product because somebody in Washington thinks that somebody out there is too stupid to be able to understand the products that they are purchasing, not based on anything that I can tell, that is not going to help people.

We know—the concern I have is both for middle class people to be able to have choice and competition, and I am concerned about lower income people who already have very limited credit options. And if we have a regulator that takes away options from people that already have limited options, that is not a very good way of making those people's lives better off. And we know this even just from regulating payday lending. When you get rid of payday lending, what happens? Evictions go up, bounced checks go up, utility shutoffs all go up in a situation like that.

So I think that the desire for Washington bureaucrats to think that they know better about how consumers and people live their lives I think is a folly and I would think we would want to go in a different direction toward competition and consumer choice.

Mr. GUINTA. Thank you. I yield back to the chairman.

Mr. MCHENRY. The ranking member is recognized for 5 minutes.

Mr. CUMMINGS. I want to thank the gentleman from New Hampshire for his kind words, and I really mean that. Thank you.

I am trying to figure out where do we—you were talking, Dr. Evans, about helping folks, helping minority contractors. One of the things that I have noticed is when we pull together minority contractors, and not just minority contractors, others too, one of the things they talked about was just in light of all the problems we have been experiencing with the economy, just being able to get credit. A lot of them had opportunities but they couldn't even get a line of credit or the line of credit was canceled. And, you know, for some of these small firms, a $10,000 line of credit is, as I am sure you well know if you have worked with minority contractors, that is like worth $1 million just to get from payday to payday and whatever.

I was wondering, Mr. Guinta was talking, I was just thinking to myself this other question. You know, there are a lot of organizations now that are spending a lot of energy and effort in this whole thing of financial literacy, and I am just wondering how much that plays in. Mr. Guinta very sincerely said he is trying to find solutions, as I am, and I am wondering how much value that has. Because I do believe that sometimes people don't know how to handle money.

Some folks, they don't know. They just have never been taught. And balancing checkbooks, if you have fees for bouncing checks, I remember somebody told me once a banker said something to the effect if people stopped bouncing checks, he would be out of business. I think he was exaggerating a little bit. But that is a lot of money. You know what happens. You bounce one, and then because that one bounces, you have a whole series of bouncing, and then the next thing you know you have bounced all the way around the world.

So I am just wondering, there is a certain part of it is personal responsibility, but as my mom used to say, there is nothing like a person who don't know what they don't know. And I was just wondering how significant a role do you think that plays in trying to help people?

I know there are some people that may be informed, they just don't have the resources. But there are other people that maybe if they were taught at an early age that a penny saved is a penny—however it goes, you know, if you hold on to it you are in good shape.

So I was just wondering.

Dr. EVANS. So you are asking an economist whether we ought to have more economic instruction in the schools?

Mr. CUMMINGS. Yes, that is right.

Dr. EVANS. Yes. We absolutely should.

Mr. CUMMINGS. Do you think it helps a lot, if it is done right?

Dr. EVANS. I do. I think there is not enough instruction in the school systems on how finances work, how the economy works, and I think probably that is something that Adam and I probably agree on, that getting more of that in society, both in the school system and generally in society would be a good thing.

I know that is one of the things that the CFPB is supposed to be doing and I think I would applaud them for doing that. So I think that would be helpful. I think it would be helpful for your constituents, and I think it would be helpful, frankly, for a lot of people.

If I could just quickly comment on the first part of your remarks though concerning the minority contractors, I absolutely hear you. I know tons of businesses in the last few years that had their lines of credit canceled, and it is a very tough time the last few years for small businesses.

What we need to do in order to fix that problem is we need to get money flowing to small businesses to get them moving again. And this probably isn't the right opportunity to go into all the reasons why they are not getting it, but one problem is some of the capital requirements that banks and in particular community banks have. As you probably know, community banks are one of the major sources of lending for small businesses. So there are a multitude of problems that I think minority and other small businesses face at this point that we could probably give some attention to.

Mr. CUMMINGS. I will be in contact with you on that. Mr. Levitin?

Mr. LEVITIN. Briefly. First to address the constriction of capital to small businesses, it is important to note that that constriction of capital happened before any new Federal regulation went into place. That started in really the fall of 2008 in particular, and that was the result of a lack of regulation. That was not caused by regulation. I think we need to keep that in mind.

As far as financial literacy, you know, it is hard to argue against it, except the evidence there is really not very convincing. There isn't real good evidence that it works. If you stop and think about it for a second, of course it doesn't.

You know, I think I am pretty financially literate, and I guarantee you there are a lot of lawyers around at Mr. Pincus' firm and other firms that can draft forms that I will not understand, and they are paid very well to do it, and I know it because I used to be paid to do that.

Mr. MCHENRY. The gentleman's time has expired. I recognize myself for the final 5 minutes of the day.

That is by far the most shocking thing that I have heard here today, that financial literacy doesn't matter. That is insane. With all due respect, I would tell you that if I look at a form and I say it is too complex for me to understand, I will not sign it. Right? And it is skepticism, that additional bit of financial literacy, and I am not trying to attack you. But, look, maybe your point is that financial literacy isn't going to fix everything. I would accept that.

Mr. LEVITIN. Sure. Not everyone is as skeptical as you are. I wish that were the case.

Mr. MCHENRY. But there are those that are more financially literate.

Mr. LEVITIN. But skepticism is not financial literacy. It is just skepticism.

Mr. MCHENRY. Right. Okay. Well, I understand. Maybe we should teach skepticism.

Mr. LEVITIN. I think that would be a very good thing.

Mr. MCHENRY. To a skeptical American public. Look, I do want to ask a few questions that I want to better understand.

There are two—well, the headline of this hearing was "Who's Watching the Watchmen." Let's get back to that. I don't want to lose sight of this kerfuffle with Ms. Warren earlier today because she wanted to leave.

I think the American people have a lot of questions about this Bureau. People that are providing credit, those that are accessing credit, those that hope to borrow, those that are trying to have a business providing some level of lending, either short term, long term, whatever it may be, have a lot of questions about this Bureau. And it is very clear that Ms. Warren is not intent on being very forthright about her ideas for this. So, that is why we have an expert panel, to get a diversity of views.

Mr. Zywicki, in terms of inspector generals, would it be helpful to have a Special Inspector General for the CFPB?

Mr. ZYWICKI. Yes.

Mr. MCHENRY. Dr. Evans.

Dr. EVANS. Yes.

Mr. MCHENRY. Mr. Levitin.

Mr. LEVITIN. I would need to think about that issue further. I am happy to submit written comments on it.

[The information referred to follows:]

[NOTE.—The information referred to was not provided to the subcommittee.]

Mr. MCHENRY. Certainly. I would appreciate that.

Mr. Pincus.

Mr. LEVITIN. I think I would like to think about it. I mean, the Fed Inspector General has that job now, and I think the question you are asking is should it be a more focused focus.

Mr. MCHENRY. What would you think of that?

Mr. PINCUS. I think I should talk to my client before I get back to you.

[The information referred to follows:]

[NOTE.—The information referred to was not provided to the subcommittee.]

Mr. MCHENRY. Smart man.

Cost-benefit analysis, OIRA. So we have an enormous swath of our government, the greater portion of our government is required to actually do a solid cost-benefit analysis. There is a lot of oversight and balance for that. Do you think it would be appropriate and helpful that the CFPB be subject to OIRA?

Mr. ZYWICKI. Absolutely. Yes.

Mr. MCHENRY. Why?

Mr. ZYWICKI. Independent agencies typically are not subjected to OIRA oversight, but the reason is because they are multi-member commissions, so you basically substitute that accountability and

that internal deliberative process where you essentially go through a cost-benefit analysis like we did at the Federal Trade Commission.

This has neither of those, and so if you are not going to have at least a multi-member commission, you need to have something like OIRA. We have been talking most of the time here about the inherent tradeoff between higher costs and consumer protection, access to credit, those sorts of things, and a serious, rigorous external check and cost-benefit analysis I think with be very valuable, unlike the sort of haphazard thing that is in there now.

Mr. MCHENRY. Dr. Evans, you mention it in your testimony. Would you comment?

Dr. EVANS. Well, yes, if it is done seriously.

Mr. MCHENRY. What would you point to as a good way of cost-benefit analysis being done? Is it currently being done in government, period?

Dr. EVANS. Yes, this is not an area I am an expert on. Todd knows more about it than I do. My impression is that it is not currently being done very well anywhere.

Mr. MCHENRY. Mr. Levitin.

Mr. LEVITIN. I would concur with Dr. Evans that the current OIRA process is a bit of a disaster. It ends up being mainly a cost analysis, not a cost-benefit analysis.

Mr. MCHENRY. Would that be helpful though?

Mr. LEVITIN. Well, I would note that the CFPB statute requires a cost-benefit analysis, and that if the CFPB's analysis is not good, it can be challenged in court. So it already has that baked in. I am not sure that OIRA does anything except create an obstacle for government action.

Mr. MCHENRY. Thank you. Mr. Pincus.

Mr. PINCUS. Well, I think it would be great. I think what OIRA does is bring some external rigor both to the cost-benefit analysis, but also brings other policy voices to the table. I mean, one of the values of the OIRA process is it is not just the agency that is proposing the rule, it is the whole government that gets a chance to have input, and that is what you want in an area where you have such conflicting—not necessarily conflicting, but a multitude of policy interests.

Mr. MCHENRY. Thank you. To the point of cost-benefit analysis, it is currently required for the CFPB for small institutions. It is not across-the-board, is my understanding.

Mr. LEVITIN. My understanding is that under the CFPB's unfair, deceptive and abusive practices, that it is included. But, you know, without looking, having the statute before me——

Mr. ZYWICKI. I believe it is sort of an internal cost-benefit analysis. OIRA reviews only for the small business divisions, I think.

Mr. PINCUS. I was just going to say, Mr. Chairman, one problem is all the things we are talking about only apply to rules, and what Ms. Warren said and certainly what other agencies such as the FTC have done have basically set standards through enforcement actions.

So I think another whole area of important discussion is where an enforcement position gets taken, and either through settlement or whatever becomes something that is prevailed on, what is the

check on that as something that then legitimate businesses are going to say hey, I better start complying with this. Even though it is one enforcement action, I could be next.

Mr. MCHENRY. That was one of my questions of Ms. Warren, was the relationship to the mortgage settlement. It is very clear that they were not intent on communicating very much of what they are doing, and their agency isn't even up and running. So it is a great concern that we have, is that there are not internal controls within this agency, whereas a balanced approach would have a board oversee it, even like Ms. Warren's original proposal, to be quite frank about it, where there would be internal debate or wrestling with rulemaking rather than one director simply doing it.

The additional thing that is clear from today is that the CFPB will neither increase access to credit nor reduce the cost of credit. That is for certain, and I think there is wide agreement on that. I would say further that it is also clear that the current Special Assistant, the Assistant to the President and Assistant to the Treasury Secretary, Ms. Warren, has been calling the shots at organizing this Bureau. It has been a rather less than transparent operation, if we can be very direct about it. Her answers were less than forthcoming and they raise more questions than they actually provide answers. That is what we have learned over the course of the last 3 hours in this committee room.

I certainly appreciate this panel's testimony. Thank you for waiting through the afternoon, and thank you for your forthrightness and willingness to sort of engage in this discussion, because it is enormously important, not simply to policymakers in Washington, not simply to academics or business folks, but to the small business person who hopes the small person, and in another of my colleague's terms, who wants to start a business.

My dad, who wanted to start a business out of the garage, and he started that business on a credit card, something he told me to never do, except for that business put five kids through college, put a roof over our head and an opportunity.

So I want to make sure that people have access to credit, whether it is a person trying to make it to the next paycheck or the person who has an aspirational goal of employing people and growing this economy. That is really what it is all about.

We can have a debate about how you achieve it, but this CFPB is not the construct to make that more available, achieve greater opportunities for those individuals that we care so much about.

Thank you for your testimony. I certainly appreciate your willingness to be here today. This meeting is now adjourned.

[Whereupon, at 4:20 p.m., the subcommittee was adjourned.]

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