

February 17, 2010

The Honorable Chris Dodd
Chairman
Committee on Banking, Housing,
and Urban Affairs
United States Senate
Washington, DC 20510

The Honorable Richard Shelby
Ranking Member
Committee on Banking, Housing,
and Urban Affairs
United States Senate
Washington, DC 20510

Dear Chairman Dodd and Ranking Member Shelby:

We write today as a broad group of trade associations representing the interests of millions of businesses of all sizes and from diverse sectors of the economy to express our concerns regarding the proposed Consumer Financial Protection Agency (CFPA) as included in Chairman Dodd's Discussion Draft. We appreciate and strongly support a bipartisan approach and believe this is our best hope for getting financial regulatory reform legislation passed this year, a critical element in getting our economy and job growth back on track.

First, we'd like to make clear that we agree reform is necessary and firmly support enhanced consumer protection. Ensuring that regulators have the tools to weed out fraudulent and predatory actors, and that consumers receive clear and concise disclosures about financial products is essential. For the reasons stated below, however, we believe the CFPA, both in form and substance, is not the correct approach because it will have severe unintended consequences for consumers, small businesses, and the economy. As such, simple structural modifications to the CFPA that do not address the following concerns will not mitigate these unintended consequences.

The CFPA would have authority over a vast segment of the business community, even businesses that are not primarily engaged in consumer finance.

Although often described as a proposal targeting consumer financial products and the institutions that offer them, the authority of the CFPA, in fact, extends far beyond consumer financial businesses. Indeed, it would empower the proposed new CFPA with unprecedented, broad authority to regulate businesses and professionals across all sectors and sizes – many of which have at most a tangential relationship to consumer finance. Here are just a few examples of entities that would be covered by the bill:

- Any school or nonprofit organization that provides financial literacy education.
- Any software company that creates software to help consumers manage their money.
- Every retailer that sells phone cards or other stored value cards.
- Advertising and marketing companies, as long as they provide any services relating to financial products and services.
- Lawyers
- Print and electronic media businesses
- Utility companies, doctors, retailers, and any other business that extend credit and either impose finance charges or permit payment in four or more installments.

The CFPA will duplicate, not consolidate, existing consumer protection laws – particularly for the nonfinancial businesses not primarily engaged in consumer finance.

Even though virtually all of these nonfinancial businesses are already subject to regulation by the Federal Trade Commission (FTC), they would in addition become subject to dual regulation by the CFPA and the FTC. The legislation thus disproportionately impacts nonfinancial businesses that are least engaged in consumer finance.

In addition, the bill’s definition of “financial activity,” which is the trigger for covered person status subject to CFPA regulation, includes “engaging in any other activity that the CFPA defines, by rule, as a financial activity for the purposes of this title.” The scope of the legislation therefore really doesn’t matter; the CFPA would be able, unilaterally, to expand its jurisdiction to cover any business it wishes simply by promulgating a regulation.

A lack of preemption will lead to a confusing and complex maze of conflicting and overlapping regulation.

Rather than streamline consumer protection regulation – or even create a uniform national standard that will simplify disclosures to consumers, the proposed legislation would add to the complexity of the current system by establishing the CFPA as the floor, rather than the ceiling for state consumer protection laws.

In addition to CFPA rules, federally-regulated financial institutions would become subject to varying state consumer protection laws. And that is not all. Because the legislation would allow each state to enforce the CFPA and its regulations, without any supervisory control by the new federal agency, businesses would also be subject to varying interpretations of the statute by each state’s Attorney General as well as the CFPA’s regulations. That is a recipe for confusing consumers, as companies try to comply with overlapping, ever-changing and inconsistent disclosure rules, for example. It also will inevitably produce higher costs, and less competition, as businesses find it too costly and difficult to comply with these multiple regulatory regimes and withdraw from selected markets.

Vague regulatory standards will leave businesses guessing about how to comply with CFPA rules, drastically increase the costs associated with consumer lending, and reduce the willingness of businesses to expand their workforce. These costs will be passed onto consumers and small businesses in the form of reduced credit availability and affordability.

The legislation makes it “unlawful for any person” to engage in any unfair, deceptive or abusive act or practice. These provisions impose broad liability on anyone – not just a “covered person” – any time the CFPA determines that their conduct is unfair, deceptive or abusive, even if no regulation is in place requiring particular disclosures or prohibiting particular practices. These standards—which the agency can apply retroactively even when it has not issued any regulations to provide guidance for businesses—are vague, cannot be applied uniformly across consumers or products and will create undue costs and uncertainty for lenders, small businesses and consumers.

The CFPA would separate regulation of consumer products from regulation focused on the safety and soundness of the financial institutions that offer them. This threatens the stability of the financial system by separating two inextricable regulatory goals.

Separating the regulation of financial products from regulatory expertise regarding the safety and soundness of financial institutions threatens consumers as well as the stability of the entire financial system.

Expansion of FTC authority is out of place in financial regulatory reform.

The CFPA proposal passed by the House of Representatives (as part of H.R. 4173, the Wall Street Reform and Consumer Protection Act of 2009) would amend the Federal Trade Commission Act (“FTC Act”) by removing existing procedural safeguards on the rulemaking and enforcement capabilities of the Federal Trade Commission (“FTC”). While we understand that these FTC-related provisions are not part of the financial regulatory reform legislation being developed in the Senate Banking Committee, the Senate Commerce Committee is currently considering them as part of its work on FTC reauthorization and we are concerned that the provisions will be married with financial reform legislation before it is considered by the full Senate.

The provisions in question would eliminate procedural safeguards that were imposed upon FTC rulemaking decades ago, after Congress determined the Commission had repeatedly overstepped its regulatory authority. The legislation couples this unrestrained rulemaking authority with enforcement powers to seek civil penalties for unfair or deceptive acts or practices; to seek such penalties without coordinating with the Justice Department; and to pursue companies that allegedly provide “substantial assistance” in an FTC Act violation, even without actual knowledge of the violation. Taken together, these provisions grant such sweeping powers that the FTC could essentially act as an unelected legislature governing industries and sectors across the economy.

These provisions would afford the FTC unprecedented and sweeping powers to execute its broad mandate, in addition to the new and duplicative authority granted to the CFPA.

We appreciate your consideration of these concerns. Now is absolutely the wrong time to create a new agency with unclear, unfocused and overbroad regulatory authority that will reduce access to credit for America’s small businesses and consumers. Stimulating the availability of capital across the country is critical to economic recovery and job growth. Unfortunately, we believe the CFPA or an alternative with similarly broad and duplicative authority will be counterproductive to these goals. We look forward to working with you towards an alternative to the CFPA that will protect consumers without choking the economic growth that our country so urgently needs.

Sincerely,

Alarm Association of Florida, Inc.
Alliance of Automobile Manufacturers
American Association of Advertising Agencies
American Advertising Federation
Arizona-New Mexico Cable Communications Association

American Escrow Association
American Financial Services Association
American Land Title Association
Associated Builders & Contractors
Association of National Advertisers
Association of Pool and Spa Professionals/Metro New York
Associated Wire Rope Fabricators
Business Roundtable
Consumer Data Industry Association
Consumer Electronics Association
Direct Marketing Association
Electronic Retailing Association
Electronic Transactions Association
Financial Services Institute
Financial Services Roundtable
Inland Pacific Chapter of Associated Builders & Contractors
Interactive Advertising Bureau
Manufactured Housing Institute
National Association of Wholesaler-Distributors
National Automobile Dealers Association
National Electronic Distributors Association
Property Casualty Insurers Association of America
Real Estate Services Providers Council, Inc.
The National Business Coalition on E-Commerce and Privacy
United States Organizations for Bankruptcy Alternatives
U.S. Chamber of Commerce
U.S. Chamber Institute for Legal Reform

Cc: The Members of the United States Senate