



Statement of the U.S. Chamber of Commerce

ON: "Open for Business: The Impact of the CFPB on Small Business"

TO: U.S. House Small Business Committee Subcommittee on Investigations, Oversight and Regulations

DATE: July 28, 2011

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

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance -- is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 115 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

INTRODUCTION

Chairman Coffman, Ranking Member Altmire, and distinguished members of the Subcommittee:

My name is Jess Sharp, Executive Director for the Center for Capital Markets Competitiveness at the U.S. Chamber of Commerce. The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. I appreciate the opportunity to testify before the Subcommittee today on behalf of the hundreds of thousands of Main Street business that the Chamber represents.

The Chamber firmly supports sound consumer protection regulation that weeds out fraudulent and predatory actors and ensures consumers receive clear and concise disclosures about financial products. We also want to work with the CFPB to ensure that the Bureau takes a targeted approach to regulation and enforcement, taking care to prevent sweeping policies that would impose duplicative regulatory burdens on small businesses and, perhaps even more importantly, that would prevent small businesses from obtaining the credit they need to expand, and create the new jobs that our economy so desperately needs.

The Chamber recognizes that building an agency from the ground up is a tough job. While the Bureau is not fully constituted because it lacks a confirmed Director, the Bureau has already begun its work, issuing requests for information that will lead to changes in mortgage disclosure, and to regulations that will define the Bureau's supervisory priorities among non-bank financial services providers. The Bureau has an opportunity to establish some clear lines of jurisdiction, and to lay out a fully coordinated and accountable process for regulation and compliance that give some certainty to the regulated community.

Ultimately, the goal should be to construct a nimble, effective, efficient, transparent, and fair new agency that fulfills its consumer protection mandate while ensuring that consumers and small businesses continue to have access to affordable credit from a wide range of sources.

CFPB OVERVIEW – HOW ARE SMALL BUSINESSES IMPLICATED?

The CFPB has broad authority to regulate the consumer financial products and services of banks and non-bank financial institutions, including, credit cards, mortgages, student loans, and payday loans.

However, the Dodd-Frank Act also gives the CFPB the authority to regulate a number of activities that are common to Main Street businesses well outside the financial services sector, and in some cases regulate the service providers to those companies.

In addition to casting this very wide net of coverage, the Dodd-Frank Act also gives the CFPB a very broad standard to enforce – the prevention of “unfair, deceptive, or abusive acts or practices” in the consumer financial products market. While unfair and deceptive practices have been proscribed for years with decades of case law to guide compliance and enforcement, the new “abusive” standard will require immediate interpretation by the Bureau that will likely continue to evolve into the future.

Together, these vague standards give the CFPB tremendous power to interpret its mandate, and give the regulated community, including small businesses, very little comfort that their companies will not feel the weight of burdensome new data collection requirements and regulation by the Bureau. The full universe of covered entities is unknown, and the standards by which those entities will be judged compliant or non-compliant have yet to be written.

SMALL BUSINESS FACTS AND FIGURES

It is widely recognized that small businesses play a critical role in the American economy, as job creators and as innovators; but they also feel the burden of regulatory compliance costs. According to the Small Business Administration’s (SBA) Office of Advocacy¹:

- There are more than 27 million small businesses in America
- Small businesses are 99.7% of all businesses.
- Small businesses employ just over half of all private sector employees, and pay 44% of total U.S. private payroll.
- Small businesses have generated 64% of net new jobs over the past 15 years, and hire 40% of high-tech workers (such as scientists, engineers, and computer programmers).

¹ [Office of Advocacy - Frequently Asked Questions - How important are small businesses to the U.S. economy? | SBA.gov](https://www.sba.gov/office-advocacy/frequently-asked-questions-how-important-are-small-businesses-to-the-u.s.-economy)

- A 2010 SBA study found that very small firms with fewer than 20 employees pay roughly \$10,585 per employee per year in regulatory costs – or 36% more than larger businesses.²

In addition, while the U.S. commercial banking system remains an incredibly important source of credit and capital to small businesses in the U.S., many small businesses do not have the option of relying on commercial borrowing to capitalize their operations. Traditional lending requires credit history, collateral, and financial statements that many start-ups or even ongoing small businesses lack.

To fund and grow their businesses, large numbers of small businesses therefore turn to the very affordable and accessible consumer financial products that individuals and families use to extend their buying power. According to research conducted by the SBA's Office of Advocacy, 80% of small firms used non-traditional sources of credit, such as owners' loans and personal and business credit cards, while 60% used six traditional types of credit, such as credit lines, mortgage loans, vehicle and equipment loans and others³. And the Federal Reserve found about 83% of all small businesses used at least one credit card, and about 41% used personal cards rather than business cards, either as a free source of working capital that is paid off every month, or as a readily obtainable revolving loan⁴.

OUR CONCERNS ABOUT THE CFPB'S IMPACT ON SMALL BUSINESSES

The CFPB poses two significant threats to small businesses:

First, small businesses may be subject to the CFPB's regulation and other oversight because they engage in one of the 10 broadly described activities laid out in the law, or are a service provider to one of those companies. Virtually all of these businesses are already subject to oversight by the Federal Trade Commission. The Chamber fears that overlap and duplication will be inevitable as the federal agencies sort out lines of jurisdiction and responsibility. In the meantime, even those businesses that are ultimately deemed to be outside the CFPB's authority may see their compliance costs go up in the short term because there is still so much uncertainty about the extent of the CFPB's jurisdiction

² [The Impact of Regulatory Cost on Small Firms; Nicole V. Crain and W. Mark Crain Lafayette College Easton, PA](#)

³ http://www.sba.gov/sites/default/files/09finfocus_0.pdf

⁴ http://www.federalreserve.gov/newsevents/conferences/sbc_smallbusinesscredit.pdf

Second, CFPB regulation may decrease the availability or increase the costs of the forms of credit small businesses rely on to provide working capital or credit, as described above – home equity loans, credit cards, etc. In this scenario it is even possible that policies that seem to benefit consumers could indirectly harm their small businesses by limiting their access to the credit they need. This is particularly troubling given the already challenging lending environment. According to a June 30 story in the Wall Street Journal, “In the past six months, only 17% of loan-seeking businesses with less than \$5 million in annual revenue landed bank financing.”⁵ When traditional sources of commercial lending dry up, small businesses fall back on the consumer tools available to them.

RECOMMENDATIONS

Legislative Changes

The best way to mitigate against one-sided, or otherwise harmful policymaking is to ensure that decisionmakers are forced institutionally to hear from a diverse range of opinions and viewpoints in a transparent process, and that their decisions are subject to proper oversight and accountability through the public’s elected representatives. Last week, the House approved an important piece of legislation that would make changes to the Bureau’s structure and operations to increase its accountability to Congress, and to ensure that the Bureau’s decisions are based on diverse inputs.

H.R. 1315 would replace the Bureau’s current single director position with bipartisan, multimember leadership, giving the agency more stability and balance over the long term, and would give small community credit unions and banks a voice in the process that allows the Financial Stability Oversight Council (“FSOC”) to override Bureau regulations that harm safety and soundness.

The risks of agency tunnel-vision, overreach, and politicization are real for all government regulators, including the Bureau. If these risks are not properly addressed at a **structural** level, agencies inevitably will, over time, abandon sound regulatory principles.

The Need for Small Business Committee Oversight

The Bureau, like the Environmental Protection Agency and the Occupational Safety and Health Administration, is statutorily required to convene Small Business Regulatory Enforcement Fairness Act (“SBREFA”) panels to assess proposed

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<http://online.wsj.com/article/SB10001424052702304314404576411901168183390.html?KEYWORDS=EMILY+MAL+TBY>

regulations expected to have a significant impact on a substantial number of small businesses and to recommend less burdensome alternatives. This requirement is a very important part of the Bureau's existing legal framework given the potential harm to small businesses that could result from ill-advised rulemaking in the consumer finance area. But, for several reasons, the panel process is an imperfect accountability mechanism, and one that is unlikely to impose a robust **independent** check on the Bureau's activities that affect small businesses. Without this Committee's constant oversight, the Bureau may not fulfill its duties under SBREFA.

First, the Bureau itself is responsible for the threshold determination that a proposed regulation is expected to significantly impact a substantial number of small entities, and the terms "significant" and "substantial" are not statutorily defined. Thus, it will in large part be up to the Bureau whether or not a panel is even convened. Moreover, case law has established that agencies may only consider **direct** impacts on small businesses in determining whether or not to convene a SBREFA panel, and may not consider indirect "ripple effects"—even those that are reasonably foreseeable.⁶

Second, the Bureau does not have to adopt the panel's recommendations, which are advisory, and need only supply a reasoned explanation for adopting or rejecting them. If the Bureau's leadership is determined to push ahead with a regulation despite its adverse impact on small businesses, this hurdle will not prove difficult to overcome. This Committee's attention to SBREFA panel findings will help the Bureau internalize the recommendations and revise regulatory proposals in conjunction with the panel's advice.

Third, SBREFA covers only the rulemaking process, and those organizing the Bureau have made clear that its preferred method of regulation will be through supervision/examination and enforcement actions. That means that small business considerations need not be taken into account in all, or even most, of the Bureau's activities. We urge the Committee to pay close attention to the Bureau's use of guidance and memoranda that can bypass rulemaking procedures and, thus, bypass SBREFA.

Indeed, actions speak louder than words, and it is noteworthy that those organizing the Bureau appear to be ignoring SBREFA with respect to the significant rulemaking efforts that they have begun. Thus, there is no indication that the Bureau's organizers have initiated the SBREFA process with respect to their proposed reforms of

⁶ See *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985).

mortgage disclosure forms⁷—even though these changes plainly will affect small businesses. And the same is true with respect to the recently initiated effort to identify the entities that will be subject to the Bureau’s supervision authority⁸—even though the supervision program may include registration and other requirements that would be especially burdensome to small businesses and could adversely affect the availability of the forms of consumer credit on which small businesses rely. Those pointing to the SBREFA process as an important check on the Bureau’s authority should explain why the Bureau’s organizers have failed to follow the SBREFA process thus far.

While the SBREFA requirement did not take effect until the transfer date, there is no reason why voluntary compliance with SBREFA could not have been part of the initial rulemaking processes that the Bureau’s organizers have undertaken. That is especially true when—as in the instance of the mortgage disclosure rule—significant decisions have already been made (narrowing the possible approaches to several different disclosure options), decisions that could and should have been illuminated by the information that the SBREFA analysis would provide.

Similarly, there is no reason why the Bureau cannot voluntarily undertake SBREFA-type analysis before extending to small businesses generally legal principles established in the enforcement context.

In February, the Chamber and a number of other trade associations sent a letter to Treasury Secretary Geithner, laying out a series of additional recommendations to guide the Bureau’s development and early decisionmaking, with a specific focus on preventing disparate harm to small businesses. The letter requested the Bureau:

1. *Prevent Duplicative and Inconsistent Regulation of Main Street Businesses*

As of July 21, 2011, the CFPB has broad new authority from other agencies, and should move to quickly clarify lines of jurisdiction to prevent sending mixed and overlapping messages. The CFPB should make clear its relationship with the FTC and the State Attorneys General as required under Dodd-Frank. In addition, the Dodd-Frank Act gives the CFPB the ability to exempt any category of businesses from coverage under the Act. The Bureau should exercise that authority to relieve from regulation under the Act Main Street

⁷ See CFPB Mortgage Disclosure Team, “Know Before You Owe: We’re Back,” *available at* <http://www.consumerfinance.gov/know-before-you-owe-were-back/> (soliciting public comment).

⁸ See 76 Fed. Reg. 38,059 (June 29, 2011).

businesses with a minimal, and tangential, involvement in the activities that trigger the Act's coverage—as well as to clarify the scope of the Act's exemptions.

The Chamber followed up with a separate letter on June 16th, 2011 to the CFPB and the FTC calling on the agencies to use an open process to establish a bright jurisdictional line between the agencies to prevent duplication and make clear to the regulated community who they should look to for compliance standards. The Bureau should be responsible for enforcement activity for businesses that primarily provide financial services, and the FTC should be responsible for Main Street businesses that offer a financial service as an adjunct to their primary, non-financial business or are a service provider.

2. Preserve Small Business Access to Credit

The CFPB must keep in mind at every stage of its rulemaking and compliance processes that many small businesses access credit the same way individuals do. Preserving options in the financial products market is good for our job creators, so the Bureau's decisions should be tailored carefully to prevent broad outcomes that dry up essential sources of capital.

3. Ensure Coordination with Federal and State Prudential Regulators

Regulation of consumer financial products can have an impact on an institution's safety and soundness, so the CFPB must move quickly to establish a high-level consultation process with the prudential regulators.

4. Defer Rulemaking Until After Confirmation of a Director

To the extent that the Bureau has limited regulatory authority absent a Director in place, we believe that this authority should not be invoked. Congress intended a confirmed Director to make these decisions, not unelected, non-confirmed bureaucrats.

CONCLUSION

Small Main Street businesses were not to blame for the financial excesses that led to the recession, but they will help lead this country out of the economic wilderness. We need to ensure that regulatory impediments are not thrown in their path needlessly. Regulation always hits small businesses the hardest, but the CFPB can take steps to exclude companies that are only tangentially involved in the financial services sector, or work closely with covered small businesses up front to reduce the heavy burden of regulation and other compliance costs.

Thank you again for the opportunity to testify before the Subcommittee today. The Chamber looks forward to working with Congress and the CFPB to help achieve these objectives. I am happy to answer any questions you may have.