

*Testimony of*

**Michael J. Hunter**

*On behalf of the*

**American Bankers Association**

*before the*

**Subcommittee on Financial Institutions and Consumer Credit**

*of the*

**Committee on Financial Services**

**United States House of Representatives**



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**February 8, 2012**

Chairman Capito, Ranking Member Maloney, and members of the Subcommittee, my name is Michael J. Hunter, chief operating officer of the American Bankers Association. I come before this subcommittee not only as a representative of the banking industry, but also as someone with experience in government at both the state and federal levels. I served in the Oklahoma House of Representatives, as Oklahoma's secretary of state under Governor Frank Keating, and was chief of staff to Congressman J.C. Watts Jr., a former member of the House Financial Services Committee.

I appreciate the opportunity to present the views of the ABA on legislation that would improve the accountability of the Bureau of Consumer Financial Protection and on legislation that would provide certainty that privileged information provided to the Bureau will not be unintentionally disclosed. The ABA represents banks of all sizes and charters and is the voice of the nation's \$13 trillion banking industry and its two million employees.

Let me begin by first emphasizing that *the banking industry fully supports effective consumer protection*. We believe that Americans are best served by a financially sound banking industry that safeguards customer deposits, lends those deposits responsibly, and processes payments efficiently. Traditional FDIC-insured banks – more than any other financial institution class – are dedicated to delivering consumer financial services right the first time. Not only do banks have the compliance programs and top-down culture to prove it, banks are required to

have the financial wherewithal – in terms of capital, liquidity and asset quality – to be there when our customers need us.

The Dodd-Frank Act has certainly changed the landscape for banking regulation and for consumer protection across all financial institution participants including non-banks. The Bureau of Consumer Financial Protection (Bureau) will play a pivotal role in setting new rules that will affect access and availability of consumer financial products. The bills introduced by Reps. Jim Renacci (R-OH) and Randy Neugebauer (R-TX) address different aspects of the role of the Bureau in making decisions and what the oversight and source of funding should be. These bills are two of many options to address concerns about the role of the Bureau and its exercise of power. An important principle that underlies these and other bills is that there needs to be an effective check and balance on the Bureau's authority. We strongly support this principle of accountability and balance, and applaud Congressional efforts to assure an effective mechanism is in place to achieve it for the Bureau.

Let me comment briefly on each of these bills even though the ABA membership has taken no formal position on them. H.R. 2081 would replace the Bureau head with the Chairman of the Federal Reserve as one of the five members of the FDIC Board. The key question underlying this bill is what expertise is necessary to protect the insurance fund of the FDIC—a fund that is completely financed by premiums paid by the banking industry.

Maintaining a safe and sound banking system is at the heart of protecting the FDIC insurance fund. Safety and soundness regulators, like the Federal Reserve, FDIC and OCC, are keenly aware of how policies impact the likelihood and cost of bank failures. So, representation by these agencies on the FDIC board makes sense. In fact, the Office of Thrift Supervision (OTS) was added to the board when the separate insurance fund protecting savings institutions was merged into the FDIC. The Board became a five-member board, rather than three members; the three member board had included the OCC. The regulator with that responsibility and expertise is now the OCC after Dodd-Frank's re-organization, not the Bureau. There may be several rationales for filling the vacated seat, but none are true to the original purpose to warrant an automatic substitution of the Bureau for the OTS.

Having profitable banks is, of course, at the core of a viable long-term system that minimizes failures. We believe that consumer protection and safety and soundness go hand-in-

hand, but there is no question that consumer protection policies could be created that act in conflict with safety and soundness. Avoiding such a conflict would be critical in setting FDIC policies.

What is missing on the FDIC's board is representation from the banking industry. As noted above, the banking industry bears the full cost of the FDIC without any taxpayer assistance, yet has no voice in the priorities, policies, and staffing of the agency. Having stakeholders represented on the board rather than the Bureau or the Federal Reserve would be a better approach.

H.R. 1355 would move the Bureau under Treasury and subject it to the appropriations process. There are two key questions here: (1) how to assure accountability of decisions and assure appropriate limits on the power of the Bureau, and (2) assure that the uses of funds by the Bureau, whether provided through the current source from the Federal Reserve or through appropriations, are used effectively and disclosed fully.

On the question of accountability, there are many ways to assure this. ABA has long advocated the use of a commission or board structure to accomplish this. We believe such a structural change would provide an effective check and balance.

As the law is currently written, the Bureau's director has sole authority to decide the direction and parameters of the consumer financial product market. This vests too much power in one person to fundamentally alter the financial choices available to customers. A board or commission would broaden the perspective on any rulemaking and enforcement activity of the Bureau, facilitate continuity of the organization and enhance predictability about rulemaking over time, and provide the appropriate checks in the exercise of the Bureau's authority.

ABA supports H.R. 1121, the Responsible Consumer Financial Protection Regulations Act of 2011, introduced by Chairman Bachus, which created a five-member board for the Bureau. This bill passed this subcommittee, the full committee, and was later adopted by the full House as part of H.R. 1315.

On funding of the Bureau, we believe that the Bureau should be accountable to Congress to show how it is using its resources and to demonstrate that it is taking a balanced approach to its rulemaking and enforcement. For example, the financial crisis pointed to an enormous gap in the

regulation and supervision of non-bank financial providers. The system failed to enforce laws—*already on the books*—against predatory practices by many of those non-banks. Therefore, ABA strongly recommends that the Bureau be held accountable for directing its resources to the most glaring gap in regulatory oversight—a failure to supervise and pursue available enforcement remedies against non-bank lenders committing predatory practices or other consumer protection violations.

Traditional bankers will be examined year-in and year-out for compliance with all of the pre-crisis consumer protection laws—and any new rules forthcoming from the Bureau—while non-bank lenders may once again escape supervision and melt back into the forest. The banking industry already has a compliance culture and financial wherewithal to assure compliance with consumer regulations. The same cannot be said of non-banks. Thus, there needs to be great transparency regarding the Bureau’s funding to assure that the focus is on closing the gaps on non-banks, including a break-out of Bureau expenditures attributable to bank versus non-bank regulation and supervision. Mandated transparency on the Bureau’s non-bank expenditures will better enable Congress to fulfill its own oversight function.

Let me address a separate issue on the protection of confidential information, which H.R. 3871, is intended to clarify for the Bureau. We appreciate Rep. Bill Huizenga’s (R-MI) leadership on this key issue.

To facilitate the Bureau’s exercise of its supervisory power, consistent with how Congress has bestowed this power on other agencies, the information provided to the Bureau by supervised entities must retain the same level of protection for legally privileged communications as afforded by other supervisory agencies. Congress’s grant of supervisory authority to the Bureau naturally implies protection of this fundamental principle of privilege. Such protection is critical to ensure the supervision process works as intended.

Banks currently have express legal protection that allows them to be comfortable in voluntarily turning over privileged documents upon the request of the banking agencies. While the Bureau has made commendable efforts to address this issue through the regulatory process, ABA believes it appropriate to add certainty and facilitate good communications between banks and the Bureau by enacting the same, express rules regarding privilege of information for the Bureau as those already established for the other federal banking supervisors.

In the past, Congress has wisely acted to lay to rest the threat of wasteful litigation challenging the protections that should be accorded to information shared by a bank with its supervisor. Congress addressed this situation by amending the Federal Deposit Insurance (FDI) Act in two instances. In 1992, Congress enacted 12 U.S.C. 1821(t), which provided for the ability of regulators to share information obtained from a bank with other federal agencies without the privilege on that information being waived. In 2006, Congress, enacted 12 U.S.C. 1828(x), which permits a financial institution to furnish material to any "Federal banking agency" or any state or foreign bank supervisor in the course of a supervisory or regulatory process without privilege being waived.<sup>1</sup> As a result of these two congressional actions, the examination and supervisory processes are able to be carried out more cooperatively, openly, and efficiently.

Unfortunately, 1821(t) and 1828(x) of the FDI Act were not amended to include the Bureau, creating uncertainty in the regulatory process of the Bureau. All parties would like this uncertainty to be removed, and the Bureau should have parallel treatment with the other banking agencies in this regard. Acknowledging the problem, the Bureau issued a bulletin on January 4, 2012, which stated that "the provision of information to the Bureau pursuant to a supervisory request would not waive any privilege that may be attached to such information." The Bureau has also signaled its intent to issue a regulation to expressly protect privilege.

ABA supports the Bureau's non-waiver analysis and its expected effort to incorporate this position in a regulation protecting shared privileged communications. Nevertheless, supplying a statutory confirmation of the protection of privilege would help alleviate needless uncertainty and added legal costs resulting from the current situation, as well as the possibility that the

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<sup>1</sup> The specific issue of concern relates to the waiver of privilege—i.e., how a party may waive its right to privilege. Courts have generally held that if the privileged material is given to another party, the right to claim privilege has been waived as to all other parties. Thus, the question arose that if a bank gave otherwise privileged material to a bank regulator as part of, say, an examination, did that waive the right of the bank to claim privilege on that material if a third party sought it in a legal dispute? The banking regulators long took the position that if a bank provided information to them in a supervisory context, under compulsion from the regulator, then privilege was not waived because production was not voluntary. However, over time courts began to hold that privilege was waived in many comparable cases involving other regulators, and that trend began to appear in cases involving banking regulators as well. This uncertainty over privilege was harmful to the examination and supervisory process in that it resulted in needless discussion and negotiation over providing information to the regulators. Neither the banks nor the regulators wanted this needless uncertainty.

Bureau's position might be subject to legal challenge. In recent hearings in both the House and Senate, Richard Cordray stated that he supports such legislation.

We appreciate Rep. Huizenga's work on this important issue. We would suggest a technical modification to the bill to also address the privilege issue with respect to the sharing of information with other federal agencies. The bill currently only addresses one of the statutory provisions noted above. With this addition, the Bureau would be put on equal footing with the other banking agencies. We look forward to working with Congressman Huizenga and the subcommittee on this very important issue.