Testimony of

Edward L. Yingling

On Behalf of the

AMERICAN **BANKERS** ASSOCIATION

Before the

Committee on Financial Services

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Chairman Frank, Ranking Member Bachus, members of the Committee, thank you for inviting me to testify today on the proposed Consumer Financial Protection Agency (CFPA) and the September 25 Discussion Draft. I am Edward L. Yingling, President and CEO of the American Bankers Association.

The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95 percent of the industry's $13.3 trillion in assets and employ over two million men and women.

Since I testified before this Committee in July on the CFPA, I will not repeat all the points I raised at that time about our industry's great concern with the CFPA proposed by the Administration. Since the Administration first proposed the CFPA, there has been a constructive debate about the merits of the overall concept and about many of its specifics. ABA wishes to thank the members of this Committee and their staffs for the attention they are giving to this important topic and to the issues ABA and others have raised.

When I testified in July, I asked the Committee to look at this issue not only from the point of view of consumers, whose concerns should be paramount, but also from the point of view of community bankers – the great, great majority of whom had nothing to do with the causes of the financial crisis, but who are struggling with the economic implications of the crisis and with a growing mountain of regulatory burdens which will almost certainly increase dramatically over the next year.

Since I last testified, I asked ABA's staff to determine the total amount of consumer regulations and guidelines to which banks are currently subject. The answer is 1700 pages of fine print, and that is

just in the consumer area. Since the median size bank has 34 employees, that means the median size bank today has 50 pages of fine print in the consumer area for each employee. That also means half the banks in the country have more than 50 pages for each employee.

I want to express the appreciation of the ABA for the consideration many members of this Committee have given to the situation of traditional banks, and to the unnecessary burden the Administration's CFPA proposal would place on these banks. There is simply no justification for imposing significant new burdens on heavily regulated banks that never made one subprime loan, nor contributed to the causes of the financial crisis.

Our country has seen a terrible financial crisis and a deep recession, which has hurt many people. Many have lost their jobs; many have lost their homes; and many have seen their savings drastically reduced. Reform is needed. For the last year, ABA has supported broad reform, including in testimony several times before this Committee. We have supported, among other reforms: the creation of a systemic risk oversight agency; the creation of a strong resolution system, one that aggressively addresses the problems caused by the too-big-to-fail concept; the filling of regulatory gaps for derivatives, hedge funds, mortgage brokers and others; reform of the accounting standard setting process; additional authority for the Fed to regulate the payments system; improved international cooperation; and improved consumer protections.

While there were many causes of the financial crisis, failures of consumer protection in the mortgage arena certainly contributed. Some consumers were given mortgages that should never have been made and, in many cases, consumers did not understand the financial risks and future obligations they were taking on. As Congress moves to strengthen consumer regulation, however, it is important to focus on what the problem areas were. The debate on the CFPA has served the valuable purpose of more clearly identifying the problems.

Those lobbying for the CFPA almost uniformly point to two main examples to support the creation of the CFPA: first, the failure of the Fed to use HOEPA to fully address abusive mortgage practices and, second, the failure of the Fed to move earlier on its credit card rule. More recently, proponents have criticized the Fed for not moving sooner on overdraft protection plans. In addition, there has been strong criticism from many parties, including the ABA, of the failure to adequately regulate the non-bank providers of financial services, particularly in the mortgage area. In fact, the fundamental weakness in HOEPA was that there was no provision for adequate enforcement on non-banks.

Thus, the two areas that have been identified in this debate as needing reform are the need for a more direct focus by federal regulators on consumer issues and the need for more enforcement on non-banks[1]. The ABA agrees that reforms are needed in these two areas.

On the other hand, in our opinion, no real case has been made for major changes in two other areas: first, requiring additional enforcement on banks and credit unions; and, second, a large increase in consumer regulatory powers. On the first point, while the argument is made that federal regulators should have developed stronger regulations and done so sooner, there is little indication that, once regulations are issued, they are not generally enforced on banks and credit unions. Certainly there does not appear to be sufficient reason to impose heavy new regulatory requirements and costs on banks and credit unions for regulatory oversight and exams. On the second point, the Fed had the HOEPA authority and has the clear authority to address credit card issues (already done) and overdraft protection (in process). In fact, the expanded use of the UDAP (Unfair and Deceptive Acts and Practices) by the Fed creates a powerful general tool in addition to all the specific consumer laws.

The CFPA, as proposed by the Administration, unfortunately, goes well beyond addressing the two weaknesses identified – the need for more direct focus on consumer issues and stronger regulation and enforcement on non-banks. The Administration proposal unnecessarily imposes new burdens on banks and credit unions and creates an agency with vast and unprecedented new powers.

Discussion Draft

Last week, Chairman Frank released a new discussion draft with a number of changes to the Administration's CFPA proposal. We are pleased to note that the discussion draft addresses several issues ABA has raised and takes into account some of the potential additional burdens on traditional banks.

The discussion draft addresses the following issues:

- it removes the requirement that banks offer government designed "plain vanilla" products;

[1] As used in this testimony, the term "non-banks" refers to entities engaged in financial services that are not FDIC-insured banks or credit unions. As the Congress moves to expand regulation and enforcement on non-banks, a grey area that needs further attention is the consumer regulatory regime that should apply to bank holding companies and their non-bank subsidiaries. The ABA is currently developing recommendations in this area, and it may be that consumer regulatory oversight of such entities should be more explicitly given to the holding company regulator. This would be in keeping with recent Federal Reserve determinations.

- it removes the unworkable requirement that communications with consumers be "reasonable";
- it requires coordinated exams of banks by the CFPA and safety and soundness regulators;
- it provides a stronger dispute resolution mechanism when a bank is caught in a dispute between the consumer and prudential regulators;
- it provides a more explicit and stronger mandate to focus on the non-banks that were the primary cause of the financial crisis;
- it provides a more equitable funding structure for the CFPA; and
- the structure of the CFPA is modified to provide stronger input from the bank regulators.

These are significant improvements, and we are also pleased that Secretary Geithner expressed general agreement with these changes when he testified before this Committee last week. We also appreciate the fact that Chairman Frank had previously removed the Administration provision that would have moved CRA authority to the CFPA, a provision that would have undermined the balance we have achieved in designing CRA lending while maintaining safety and soundness principles.

The additional focus in the discussion draft on non-bank providers of financial services is particularly important. As Chairman Frank is quoted as saying in Sunday's Washington Post: "If we only had community banks and credit unions, we wouldn't be in this problem." One of our major concerns with the CFPA as proposed by the Administration is that it would not adequately focus on the non-bank sector, where the subprime mortgage crisis really began. The actions in the non-bank sector not only instigated the subprime crisis, but they skewed the markets in ways that badly affected some banks. The discussion draft rightly focuses the regulatory and enforcement authority more on non-banks than the original proposal did.

The discussion draft also provides exemptions for a number of entities. In general, we agree that it makes no sense to have the CFPA regulate normal commercial activities or incidental financial transactions. Our concern is that the exemptions be crafted in a manner that does not exempt entities by their "label" if, in reality, they are engaged in true financial activities that raise significant consumer protection issues – for example, a realtor engaged in the subprime mortgage process. We recognize the language in the draft attempts to address this issue, and we may suggest further language to strengthen the discussion draft in this regard.

Problems with the Discussion Draft

The ABA still has major concerns in the following principal areas:

- the draft removes preemption of state and local laws; without preemption, we will have a patchwork of laws that will result in increased costs and less credit availability;
- the CFPA has extensive new powers to "legislate" its own rules, rather than applying the existing rules created by Congress;
- the draft creates a new agency that, while improved in design, will conflict with the safety and soundness regulators.

Preemption

The ABA strongly supports the preemption of state laws under the National Bank Act, a preemption that has existed since the Civil War. We believe that without such preemption we will have a patchwork of state, and even local, laws that will confuse consumers, greatly increase the cost of financial services, and serve as a strong disincentive to create new products of value to consumers. A simple visual helps to show the problem: proponents of the CFPA promise it will create simple, one-page disclosures (a goal we share), but the removal of preemption will result in page after page of disclaimers and disclosures about all the differing state and local laws applicable. We clearly have national markets for consumer financial products and services, and we need to be able to apply national standards. There can, however, be a better balance and coordination between the federal and state efforts. Too often, in recent years, issues have been addressed in litigation rather than by cooperation.

CFPA Powers

As stated above, there has been little justification given for the broad new powers given to the CFPA under the Administration's proposal. The discussion draft removes two of those explicit powers – designing plain vanilla products and requiring communications to be "reasonable." However, even with those changes, the proposed CFPA would be given unprecedented power. Consider for example:

- Section 131, which changes the UDAP standard by adding the word "abusive", throwing away all the developed legal standards on UDAP and giving the agency a vague, unknown, and very broad ability to declare practices "abusive."

- Section 133, which gives the CFPA open-ended authority to regulate the manner in which consumer products and services are provided.
- Section 136 (a)(1), which mandates that the CFPA create regulations "to ensure fair dealing with consumers." "Fair dealing" is a standard so vague and broad that the CFPA could justify almost any regulatory action.
- Section 136 (a)(3), which gives the CFPA broad authority to regulate the compensation of those providing products and services to consumers, with the only limitation being that the CFPA cannot provide an overall cap.

Another provision of great concern is Section 137, which provides broad authority to obtain information from providers of financial institutions. While there are some safeguards in the provision, it could impose significant hardships on providers, particularly small firms, and could easily be abused by law firms and other groups for fishing expeditions or to threaten providers with significant compliance costs. At a minimum, providers should be allowed to recoup their costs for complying with non-routine information requests.

The broad powers and the vague legal terms used (such as "abusive" and "fair dealing") will create great uncertainty in the markets, as no one will know what the new rules of the road are for many years. This will undoubtedly cause firms to cut back on the extension of credit and to avoid testing new products and services in the marketplace for fear they will run afoul of future legal standards.

From a broader perspective, as I testified in July, the proposed delegation of authority to the CFPA is so vast that it renders all previous consumer laws enacted by Congress – including the recently enacted credit card law – mere floors. Several members of this Committee have raised concerns about this delegation, which basically gives the CFPA authority to legislate, and we believe they are correct in their concerns.

CFPA

As the debate has proceeded on the CFPA, a number of different approaches to the fundamental structure of the consumer regulator have been suggested, including:

- the CFPA as proposed by the Administration;

- the CFPA in the discussion draft, which has a single head, with an advisory board of other regulators and more coordination of exams of banks;
- the proposal from FDIC Chairman Sheila Bair to create a CFPA, but leave enforcement with respect to, and examination of, banks and credit unions to the prudential regulator;
- providing a stronger role and mandate to an enhanced, and possibly expanded, FFIEC;
- adjusting the current structure by imposing requirements for greater focus and reporting to Congress on consumer issues.

As we have previously testified at length, the ABA opposes the creation of a new agency focused on consumer protection on the fundamental principles that, first, you cannot separate the regulation of products from the regulation of the entity providing the products, and that, second, safety and soundness and consumer protection are too intertwined to separate. However, as discussed above, ABA agrees there is a need to improve the focus on consumer issues and to strengthen the regulation of non-banks. We have previously provided the Committee with suggestions to achieve these objectives, and we will continue to provide further suggestions.

Conclusion

There is a demonstrated need to strengthen consumer protection in the financial arena. ABA is committed to working with Congress to strengthen the structure of consumer protection, while avoiding undermining the availability of credit and imposing new, unnecessary costs on both consumers and financial services providers.