Republican Dissenting Views on H.R. 3126

We, the undersigned Members of the Committee on Energy and Commerce, submit the following comments on H.R. 3126 to express our concerns with the amending language that creates the Consumer Financial Protection Agency and modifies the responsibilities of the Federal Trade Commission.

Since the global financial crisis that began in the spring of 2007 and peaked in the fall of 2008 with the collapse of Lehman Brothers and AIG, the government takeover of Fannie Mae and Freddie Mac, and numerous bank failures, many proposals have been put forward to avert another future market crisis.

In addition to these new proposals to address systemic risk, others have sought to address unrelated practices or industries in the name of reform. Any ills that contributed to the financial crisis have become the Obama Administration's raison d'être for creating a new super consumer protection regulatory agency, the Consumer Financial Protection Agency (CFPA).

Rather than address the failure of banking regulations related to consumer protection and the failure of the States to police activities under their purview (e.g., mortgage brokers and real estate agents), the proposed legislation to create the CFPA seeks to consolidate the consumer protection jurisdiction of all banking regulators into one new agency and regulate many new activities and persons that largely are unrelated to the financial markets or the crisis of 2008.

A new regulatory body with authority this sweeping in nature cannot be evaluated properly unless its proponents first define clearly what problems they are seeking to address. The major problems in the financial markets and home foreclosures trumpeted so far would focus the legislation on the following financial products: mortgages and credit cards. Yet the Congress passed sweeping changes to address credit card abuses at the beginning of this Congress and new regulations for mortgages and the securities markets are forthcoming.

While changes in regulation of mortgages and securities markets are warranted, it is a far different matter to propose a regulator with authority over nearly every sector of the economy to improve consumer protection. Simply put, the evidence is lacking to support the need for a new super regulator for all consumer financial activities.

Examining the reasons behind the housing bubble and subsequent collapse, Congress must admit its own mistakes, including policies that have contributed to the housing bubble and subsequent implosion. Fannie Mae and Freddie Mac had long been criticized for their failure to adhere to the same standards and practices the private sector had to follow. With the implicit guarantee of the Federal government, which became an explicit guarantee once they were placed in receivership, Fannie Mae and Freddie Mac were able to fund themselves at lower costs than their competitors and gain substantial market share. In essence, they were chosen by the government to be a winner and responded as one might expect, by wielding their political influence to avoid the further regulation that was called for by many Republicans. Yet they did not have to follow the same securities regulatory requirements their competitors did. Not surprisingly, they needed more scrutiny when they were found to have misstated and manipulated their earnings. It is now

ironic that many Democrats did not call for more regulatory scrutiny over Fannie Mae and Freddie Mac as problems emerged -- problems that are now costing taxpayers tens of billions of dollars -- but wanted instead to continue to expand the policy of Federal government intervention into the housing market through additional incentives and taxpayer-supported subsidies to homebuyers.

Easy credit and lack of savings combined to create an environment where many mortgage products designed to be "affordable" emerged that could quickly be sold off to Fannie Mae or Freddie Mac. And with Congress and previous Administrations encouraging Fannie and Freddie to be more flexible with their standards and purchase more mortgages of riskier quality, taxpayers were put on the hook for more and more liabilities of these failed institutions. Rather than addressing this agency problem, the Democrat Majority's policy response seems to be to keep Fannie and Freddie subsidized by the taxpayers, continuing to buy mortgages from originators regardless of their quality. Some have blamed the financial crisis on the presumed private-sector perspective of "privatizing the gains, and socializing the risk," but none fit this model more than Fannie Mae and Freddie Mac. Unfortunately, taxpayers will be paying for the losses for years to come and potentially paying for an impending bailout of the Federal Housing Administration. None of these problems will be solved by the proposals put forward.

Title I, Consumer Financial Protection Agency

We support the goal of protecting consumers against fraud and deceptive practices but disagree wholeheartedly with the creation of a Consumer Financial Protection Agency. While we feel that the change from a single Director to a bipartisan Commission (the Consumer Financial Protection Commission (CFPC)) improves the legislation, we understand the Majority will have an amendment made in order for Floor consideration that will return the Director for an interim period of two years, after which the Director will become the Chairperson of the five member Commission. This is unacceptable and a disappointing change for anyone concerned with enacting a credible structure of governance. The creation of the Commission will benefit governance, hold the Agency more accountable, and ensure a more deliberative process in its decision-making, especially given the nearly limitless authority given to the Commission to determine what will be considered consumer financial activities and subject to the Commission's authority.

However, we do not need another "czar" empowered to control the economy with little or no accountability.

While the current jurisdiction of the Federal Trade Commission (FTC) is preserved in the drafted legislation, we remain concerned that the structure of dual jurisdiction and dual enforcement will be problematic and burdensome for regulated entities. It is questionable whether a brand new agency with new staff who have no experience regulating the entities currently under FTC jurisdiction can do a better job than the FTC. It is our belief the CFPC will not and therefore should not be given dual jurisdiction.

Of the many other objectionable provisions, the scope of CFPC authority is particularly troubling. A super regulator that will be in charge of nearly every sector of the economy,

including entities that have otherwise never engaged in the sale of a financial product or service but will now find themselves under multiple jurisdictions, is a recipe for disaster, is unwarranted, and is an overreach of an overactive government.

Under the legislation, the Commission will have jurisdiction over any person it deems, by rule, to be a covered person. The definitions for "financial activity" and "financial product or service" are so broad and permissive that a financial activity can be defined in any manner the Commission deems appropriate. Of particular concern is the open-ended nature of section 101(19)(P), which permits the definition to be expanded to any activity the Commission finds will have or is likely to have a material adverse impact on the creditworthiness or financial well being of consumers. Under this open-ended authority and a simple common-sense reading of the language, there is no doubt that activities such as marriage, divorce, having a child, or even the purchase of a big screen TV could be determined to be a financial activity. Additionally, the definition permits the Commission to determine any other activity that is incidental or complimentary to any other financial activity to be a financial activity. Either of these authorities will permit unlimited authority.

Notwithstanding the specific exemptions for particular industries or professions enumerated in the legislation, it appears the exemptions only apply if the Commission chooses to observe Congressional intent regarding the exemptions provided. If on the other hand the Commission decides to determine those activities or persons covered, there appears no impediment to stop the Commission from making such a determination. This authority undermines every exclusion provided in the bill for non-financial activities if the Director or Commission can simply re-define the excluded activities back within the CFPC's jurisdiction under this catch-all provision.

We are equally concerned about the approach to regulation. Currently, the broad range of statutes and regulations the CFPC can enforce only creates a floor for financial consumer regulations. If the goal is to create an effective new Federal regulator, it only makes sense to ensure their authority is not undermined. As a candidate, President Obama said that "we need to streamline a framework of overlapping and competing regulatory agencies." As the bill is currently written, it does just the opposite, allowing and encouraging the growth of up to 50 different State regulatory fiefdoms, in addition to dual Federal regulation. This directly contradicts the President's statements. If the States will be authorized to enforce the Federal laws (as they are in this proposal), we do not see the value in permitting them to write State laws that go beyond the Federal law unless the goal is to increase regulatory costs and create confusion and inconsistencies. That will only ensure that compliance costs increase as more lawyers are hired, resulting in lower job growth in the rest of the economy. Already, regulatory burdens impose mounting costs on the Nation's businesses, both small and large. According to the Small Business Administration, businesses with less than 20 employees spend more than $7,600 a year per employee in order to comply with Federal regulations. Businesses with over 500 employees spend almost $5,300 per employee in regulatory compliance. This bill will only raise those costs.

Similarly, the approach to enforcement is of great concern. H.R. 3126 gives unprecedented new financial regulatory authority to a single agency. The CFPC's broad regulatory jurisdiction would affect nearly every area of the economy, and the new agency would have independent

litigating authority to bring actions for violations. Centralizing so much authority and control in one Federal agency is cause enough for concern, but granting 51 Attorneys General enforcement powers over this exceptionally broad jurisdiction is cause for serious alarm. Covered entities will be subject to the enforcement discretion of the FTC, the CFPC, and potentially 51 Attorneys General who can all seek civil penalties. We believe this will not result in greater consumer protection, but rather will increase litigation-averse behavior by businesses that may ultimately harm and confuse consumers.

Finally, we object to the inclusion of a new undefined and subjective standard for violations. The term "abusive" expands the known standards of "unfair or deceptive" and the Commission is left to its own devices in determining its meaning. Therefore, any covered person will face great uncertainty as to how the Commission will interpret and enforce this standard as he or she tries to operate a business. By including such an undefined and elastic standard, the potential for unlimited regulation and enforcement goes up substantially.

Closely related to this standard, the CFPC is given "unfairness" rulemaking authority which is inconsistent with and clearly goes far beyond the similar authority provided to the FTC under current law. The FTC's authority was tied to section 5(n) of the Federal Trade Commission Act (FTC Act), and the FTC has no authority to declare an act or practice unlawful on the grounds that it is unfair unless: "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the FTC may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination." The ability to utilize this highly elastic concept without the restrictions of section 5(n) of the FTC Act will compound the problems associated with the inherent vagueness and elusiveness of the definition of "unfairness."

Title II, FTC Improvements

Under section 201, the FTC is given authority to conduct across-the-board rulemakings under the expedited Administrative Procedures Act (APA), rather than under the present Magnuson-Moss rulemaking procedures. Congress instituted the Magnuson-Moss rulemaking procedures in the 1970s due to its growing concern that the FTC, which at the time was carrying out multiple wide-ranging concurrent rulemakings, should be required to carry out more structured rulemaking procedures. In light of the Commission's extremely broad powers over vast segments of the nation's economy, Congress, at that time, believed that expedited rulemaking authority (180 days) could lead to a serious "rush to judgment", allowing the FTC to make major, industry-wide regulatory changes without adequate time for industry input and thoughtful consideration.

History repeats itself and provides an instructive lesson as to why the Magnusson-Moss requirements were enacted by a Democrat-majority Congress three decades ago. At that time Congress recognized the FTC had jurisdiction over all commercial activities that were not specifically excluded. This broad jurisdiction was given to the FTC knowing it could not be

expected to be an expert for every industry. Keeping current with industry developments for every sector of the economy is an unrealistic expectation.

Current rulemaking proposals indicate the FTC may be headed off track again. FTC has noticed a proposed rule regarding debt relief services under APA rulemaking procedures using its alleged authority under the Telemarketing Abuse and Prevention Act. While we withhold our position on the merits of the proposed rule, the process used to issue it raises concerns. The industry is segmented between for-profit and non-profit businesses. Yet the proposed rule can only reach those entities under the FTC's jurisdiction - meaning it will not apply to non-profits and will affect only 20 percent of the industry that operates for profit. The proposed rule takes the extreme position of banning the advance fee compensation model of the for-profit entities. Given that over 85 percent of the debt relief industry is occupied by non-profits -- which the FTC has no information on and no jurisdiction over -- it is not clear on what basis it is proposing the rule. Additionally, it is not clear whether the FTC in this rulemaking has weighed the competitive effects or whether changes will help consumers if it drives out the for-profit providers and creates a monopoly for the non-profits. At the very least, this is not a complete record. Congress should ensure that the rules the FTC promulgates are based upon a complete record of all the facts and information.

In fact, there has been no showing that the Magnuson-Moss requirements have hindered the FTC from carrying out a rulemaking it wished to pursue.

It is true that Congress has given the Commission APA rulemaking authority under specific statutes, such as the Children's Online Privacy Protection Act, the Telemarketing and Consumer Fraud and Abuse Prevention Act, and others. However, those delegations came only after extensive hearings and an opportunity for industry input. That has not happened in this case. Also, those Acts include well-defined and specific standards for the Commission to enforce. In fact, the expansion of APA rulemaking authority in H.R. 3126 applies to the entire scope of the broad, general powers of the FTC to regulate false, deceptive or unfair acts or practices over virtually every segment of commerce.

Mr. Timothy Muris, who served as Chairman of the FTC from 2001 to 2004, testified at a July 14, 2009, hearing of the U.S. Senate Commerce Committee Subcommittee on Consumer Protection, Product Safety, and Insurance to strongly urge the Congress to retain the Magnuson-Moss rulemaking procedures at the FTC. Muris stated:

"The administration's proposal would do more than just change the procedures used in rulemaking. It also would eliminate the requirement that unfair or deceptive practices must be prevalent, and eliminate the requirement for the Commission's Statement of Basis and Purpose to address the economic effect of the rule. It also changes the standard for judicial review, eliminating the court's ability to strike down rules that are not supported by substantial evidence in the rulemaking record taken as a whole. The current restrictions on Commissioners' meetings with outside parties and the prohibition on ex parte communications with Commissioners also are eliminated. These sensible and important protections should be retained."

The FTC is not an agency that has specific subject matter expertise over a particular area of the

economy, such as the SEC, the CFTA, or the EPA. Therefore, it is more important for the agency to follow the detailed and focused procedures of Magnuson-Moss rulemaking procedures when carrying out an industry-wide rulemaking.

There are a number of procedural safeguards in Magnuson-Moss that are important and should be preserved. These safeguards include the following requirements: (a) the Commission must identify a pattern of activity -- a prevalence, as opposed to one instance -- before engaging in a rulemaking; (b) a rule may be overturned by the courts if it is not supported by substantial evidence taken as a whole; and, (c) the Commission provide a statement as to the economic effect of the rulemaking. All of these protections are presently being abrogated by H.R. 3126. They are all sensible requirements and there is no reason to believe that these rules will hinder the FTC in forceful rulemaking.

We do not find the argument that all other Executive Branch agencies may promulgate rules pursuant to APA particularly relevant. No other agency has the breadth of jurisdiction of the FTC, and therefore, comparing these many different agencies' authorities and procedures is inappropriate and misleading.

We believe the example of the speed with which the Consumer Product Safety Improvement Act of 2008 (CPSIA) and the resulting unforeseen consequences on the law is illustrative of the potential problem with this grant of fast-track rulemaking. While that legislation was founded upon the best of intentions -- and while it was limited to what we then considered a relatively limited portion of industry (the world of children's products) -- we have observed the unforeseen impact on thousands of businesses. Unfortunately, many of these unintended consequences could have been avoided had the affected industries had an opportunity to submit comments. No one was excluded from that legislative process; however, because CPSIA moved from legislation to law in under one year, there was not sufficient time for downstream manufacturers and retailers to become aware of CPSIA's proposals and thus weigh in. We do not believe it is a stretch of the imagination to extrapolate the example of CPSIA by a multiple factor. The FTC's rules on commerce reach from Wall Street to Main Street, with the former dedicating full-time staff to monitoring and commenting upon Congressional action while the latter has no such resources.

Further, we note this Committee's history of granting the FTC APA rulemaking for particular issues. That ad hoc approach ensures the appropriate amount of Congressional oversight for an Executive Branch body with the breadth and reach as the FTC. This history also illustrates that the Commission's argument for more responsive rulemaking authority is not without at least some merit in certain contexts. As an alternative to fast track rulemaking power, however, we proposed an alternative that blended both rulemaking approaches. It would permit the quicker, more flexible rulemaking approach of the APA but mandate certain extra procedures to make such a process more deliberative. We remain strong supporters of this approach versus general APA rulemaking authority, particularly if general civil penalty authority is provided to the FTC. We also believe this model should be extended to the new CFPC given its similar expansive authority.

Finally, as mentioned above, we do not believe the FTC requires both general civil penalty

authority and general rulemaking authority. The Commission's primary justification for requesting APA rulemaking is so that it may be more responsive to fraudulent or unfair or deceptive activities in the marketplace. With a faster rulemaking process, there is no justification for empowering the FTC to impose civil penalties on someone who has no notice that his or her conduct is illegal. If the activity of concern is of such magnitude as to harm consumers on a wide scale, the FTC may simply issue a cease and desist order while undertaking a rulemaking under APA. In granting the FTC civil penalty authority, there is no need for fast track rulemaking. We vociferously oppose granting the FTC both of these powers.

The Civil Penalties section 201(a) dramatically changes the regulatory powers of the FTC by providing a sweeping scope of authority the Commission has never had since its inception in 1914. Under current law, the FTC may only seek civil penalties where the party in question is on notice that his or her conduct is unlawful, unfair, or deceptive. A party is considered on notice where there is an existing rule clearly defining conduct that is permitted, or, alternatively, where the Commission issued a formal cease and desist order in instances where no law or regulation exists to clearly define permissible and impermissible conduct.

H.R. 3126 grants the FTC general civil penalty authority under its section 5 unfair or deceptive acts or practices standard. Under current law, the standard remedy for an initial violation of the FTC Act is a cease and desist order. The FTC can pursue monetary penalties only for violations of FTC rules or cease and desist orders.

Under the authority provided in H.R. 3126, the FTC can now seek monetary penalties for unfair or deceptive acts or practices even if the party in question is not on notice that his or her conduct is unlawful because there is not a specific rule addressing the act in question. Unfortunately, the concept of unfair or deceptive acts or practices is similar to Justice Potter Stewart's famous "I know it when I see it" standard. This means individuals, small businesses, and other companies will be subject to what is essentially a strict liability standard for undefined conduct. In our view, where strict liability is warranted, that conduct should be as well-defined as in other areas of the law where strict liability is mandated. With the current civil penalty authority at $16,000 per violation, with each day considered a new violation, honest companies and small businesses that have no idea that the FTC considers their conduct unfair will be subject to potentially crippling fines reaching into the thousands -- and perhaps millions -- of dollars.

Finally, perhaps most significantly, and as aforementioned, it is our view that if Congress grants the FTC general rulemaking authority under the APA, general civil penalty authority is unnecessary. If the argument for APA rulemaking authority is for quicker, more responsive rulemaking ability, the Commission will have the ability to put parties on notice of unlawful conduct by promulgating rules in just months in most cases. Combining these two new authorities is a dangerous proposition that flies in the face of any notion of fairness and could result in exactly what the Commission seeks to redress -- unfair practices, but unfair practices undertaken by the Commission. In granting the FTC general civil penalty authority -- and thereby the ability to seek civil penalties in the absence of placing "bad" actors on notice of their unfair or deceptive conduct -- we essentially dispense with the need for rulemaking authority altogether.

The Aiding and Abetting section 201(b) creates a new aiding and abetting violation within section 5 of the FTC Act. The language lowers the standard for aiding and abetting beneath the existing standard for other violations of section 5: it will be unlawful to knowingly or recklessly provide substantial assistance. The law currently requires the FTC to establish independent culpability of third parties under section 5. This change would import criminal law concepts into a civil statute.

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