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ABA DAY IN WASHINGTON  
PLANNING COMMITTEE

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March 22, 2010

The Honorable Christopher J. Dodd  
Chairman  
Committee on Banking, Housing  
and Urban Affairs  
United States Senate  
Washington, D.C. 20510

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

Re: Concerns Regarding the Expanded Lawyer Regulation Provisions in  
Revised Consumer Financial Protection Act and Proposed Amendment

Dear Chairman Dodd and Ranking Member Shelby:

On behalf of the American Bar Association, which has nearly 400,000 members, I write to express our concern regarding the newly revised "Consumer Financial Protection Act" (CFPA or the Act), contained in Title X of the "Restoring American Financial Stability Act of 2010." These comments have been prepared in coordination with the ABA's Task Force on Financial Markets Regulatory Reform, which includes prominent lawyers who work with all elements of the financial services industry, as well as with consumers of financial services products.

In summary, our concern is that portions of the Act would grant to the new Bureau of Consumer Financial Protection (the Bureau) expansive new powers to regulate lawyers engaged in the practice of law. The exercise of this new regulatory authority could undermine both the confidential attorney-client relationship and the ability of state courts to supervise and discipline lawyers. In order to rectify the problem while still protecting consumers, we urge you and the Committee to amend the Senate bill to include the same "practice of law" exclusion that was included in the House-passed financial reform bill, H.R. 4173. A copy of our proposed amendment that closely parallels the House language is attached.

Although Section 1027(e)(1) initially exempts attorneys engaged in the practice of law from the Bureau's authority to conduct examinations (but not from the Bureau's many other expansive regulatory powers), Section 1027(e)(2) eliminates the exemption for lawyers who provide any "consumer financial product or service" as that term is defined in the bill. As we explain below, the breadth of subsection (e)(2) essentially eliminates any exemption for lawyers, even for conduct directly regulated by state courts as the practice of law.

The ABA does not oppose allowing the Bureau to regulate lawyers to the same extent that they are currently regulated under the "enumerated consumer laws" identified in the bill. However, the ABA objects to the proposed extensive new

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regulation of lawyers that would result from the expansive definitions of “covered person” and providers of any “consumer financial product or service” under Sections 1002(5), (6) and (13) of the bill.<sup>1</sup> Including lawyers under these overly-broad definitions would improperly subject them to the many substantive provisions of the CFPB such that they would be fully regulated by the Bureau just as if they were a mortgage lender or a non-bank bank.

The expansive definition of “consumer financial product or service” under Section 1002(5), which incorporates the definition of “financial product or service” in Section 1002(13), would allow the new consumer protection bureau to regulate core aspects of the confidential attorney-client relationship. In particular, the broad definition would allow the Bureau to regulate any lawyer or law firm “providing services to assist a consumer with debt management...debt settlement...modifying the terms of any extension of credit...(or) avoiding foreclosure”. See Section 1002(13)(A)(viii)(II). Similarly, Section 1024(a)(1)(A) dealing with “Supervision of Nondepository Covered Persons” requires the Bureau to issue a new rule regulating any covered person who “offers or provides...loan modification or foreclosure relief services” in connection with consumer real estate mortgages. Therefore, both of these provisions in the bill would allow the Bureau to regulate the legal advice and other core legal services that bankruptcy lawyers, consumer debtor lawyers, real estate lawyers, general practitioners, and many other lawyers routinely provide to their clients.

The broad definitions of “consumer financial product or service” under Section 1002(5) and “financial product or service” under Section 1002(13) also would cover many activities in which lawyers routinely engage that are merely incidental to providing legal services to their clients. Here are a few examples of how these broad definitions would make lawyers engaging in various activities incidental to the practice of law subject to the full regulatory powers of the Bureau (with the letter in parentheses indicating the relevant subsection of the definition of “financial product or service” under Section 1002(13)):

(A)(iii): *Providing real estate settlement services.* In many jurisdictions, lawyers act as real estate settlement attorneys, checking to be sure that the contract of sale and the terms of the mortgage are met, and then disbursing the money as their client has directed as part of the closing of the real estate transaction.

(A)(viii): *Providing financial advisory services.* In every divorce where the parties have property to divide or where alimony or child support is at issue, and in many bankruptcy cases as well, the lawyer has an obligation to provide a certain amount of financial advice, usually including at least tax if not financial planning advice, to the client.

(A)(iv): *Transmitting or exchanging funds.* Clients regularly instruct their lawyers to transmit funds to third parties in order to complete a transaction, provide a down payment, or for other purposes.

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<sup>1</sup> “Covered person” is defined in Section 1002(6) of the Act as “(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person.” (emphasis added) Therefore, the term “covered person” and the term “consumer financial product or service” (as further defined in Section 1002(5) and (13)) are intertwined and very closely related.

(A)(iv): *Acting as a custodian of funds.* When cases settle, the lawyer for one side or the other is often asked to hold the funds until certain conditions are met (such as receiving the signed releases), at which time the lawyer transmits the funds as directed. Also, lawyers often hold client funds in a retainer or other trust account for payment of legal fees, irrespective of legal specialty.

In each of these examples, and many others, the lawyer would be offering or providing a “consumer financial product or service” and hence be a “covered person” and otherwise be subject to regulation under the CFPB, even though the financial activity is wholly incidental to the legal services being rendered to the client.

The CFPB makes lawyers (and their law firms) subject to the general supervision of the Bureau as “covered persons” under Section 1002(6) if they offer or provide any “consumer financial product or service” described in the bill, whether those services are core legal services—such as the providing of legal advice to the client—or services that are incidental to the legal services provided, as described in detail above. By granting the Bureau sweeping powers to regulate all these legal services, the legislation could erode the confidential relationship between lawyers and their clients, including the attorney-client privilege, and therefore could undermine the client’s right to effective counsel.

The expanded lawyer regulation provisions in the CFPB also threaten to undermine the ability of state courts to effectively supervise and discipline lawyers. For centuries, lawyers have been primarily regulated by the highest court of the state in which the lawyer is licensed. During that time, the courts have developed extensive regulations governing all aspects of the practice of law, including strict ethical codes and disciplinary rules. By granting the Bureau expansive new powers to regulate lawyers, the legislation will likely result in federal agency rules that could conflict with and undermine the state courts’ traditional supervision and regulation of lawyers. This overlapping federal-state regulation could also cause confusion over the standards that lawyers must follow in dealing with their clients.

To remedy these problems, the ABA urges you and the Committee to adopt the attached proposed amendment that is substantially identical to the amendment previously crafted by leaders of the House Judiciary and Financial Services Committees and incorporated into the House-passed financial overhaul legislation, H.R. 4173, last December<sup>2</sup>. In particular, the ABA recommends that the attached “Exclusion for Practice of Law” provision be added to the Senate bill in place of the narrow “Exclusion for Attorneys” provision currently contained in Section 1027(e) of the bill.

If this change to the Senate bill were adopted, the Bureau would still retain the authority to regulate lawyers to the same extent that existing federal agencies currently regulate lawyers under the “enumerated consumer laws” and the authorities that would be transferred to the Bureau under

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<sup>2</sup> Subsections (e)(1) and (2) of the proposed amendment to the Senate bill closely track Section 4205(n)(1) and (2) of the House-passed financial reform bill (H.R. 4173). Subsection (e)(3) of the proposed Senate amendment is substantially identical to Section 4205(n)(3) of the House bill as agreed to by the leaders of the House Judiciary and Financial Services Committees but which failed to appear in the House engrossed version of H.R. 4173 due to a clerical error. House leaders have indicated their intent to restore this agreed language when the House takes further action on the legislation.

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subtitles F and H of the legislation. Therefore, the amendment would continue to protect consumers while preserving the confidential attorney-client relationship and traditional state court regulation of lawyers.

Thank you for considering the views of the ABA on these important matters. If you would like more information regarding the ABA's proposed amendment, please contact me at (202) 662-1765 or our senior legislative counsel, Larson Frisby, at (202) 662-1098.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman

Attachment

cc: Members of the Senate Banking, Housing and Urban Affairs Committee  
Members of the ABA Task Force on Financial Markets Regulatory Reform

**PROPOSED AMENDMENT TO THE “RESTORING AMERICAN FINANCIAL  
STABILITY ACT OF 2010” (TITLE X—CONSUMER FINANCIAL PROTECTION ACT)  
INTRODUCED BY SEN. CHRISTOPHER DODD ON MARCH 15, 2010**

On page 1088, strike lines 7 through 18 and insert the following:

(e) EXCLUSION FOR PRACTICE OF LAW.—

(1) IN GENERAL.—Except as provided under paragraphs (2) and (3), nothing in this title shall apply with respect to an activity engaged in by an attorney, or engaged in under the direction of an attorney, as part of the practice of law under the laws of a State in which the attorney is licensed to practice law.

(2) RULE OF CONSTRUCTION.—

(A) IN GENERAL—Paragraph (1) shall not be construed to limit the exercise by the Director and the Bureau of any rulemaking, supervisory, enforcement, or other authority, including authority to order assessments, regarding any activity that constitutes the provision of a consumer financial product or service described in any subparagraph of section 1002(13) and is not provided as—

(i) part of the practice of law; or

(ii) incidental to the practice of law, to the extent that such activity is provided exclusively within the scope of the attorney-client relationship and is not otherwise provided by or under the direction of the attorney to any consumer who is not receiving legal advice or services from the attorney in connection with such activity.

(B) CONSTRUCTION.—Paragraph (1) shall not be construed to limit the authority of the Director and the Bureau with respect to any activity to the extent that such activity is otherwise subject to any of the enumerated consumer laws or the authorities transferred under subtitle F or H.

(3) EXCEPTION.—Notwithstanding paragraph (1), an attorney’s activities related to assisting another person in preventing a foreclosure shall be subject to this title except to the extent such activities constitute, or are incidental to, the provision of legal services to a client of the attorney.