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November 19, 2009

The Honorable Barney Frank
Chairman
Committee on Financial Services
U.S. House of Representatives
Washington, D.C. 20515

Re: Concerns Regarding the Expanded Lawyer Regulation Provisions in H.R. 3126
and Suggested Changes

Dear Chairman Frank:

On behalf of the American Bar Association, which has over 400,000 members, I write to express our concerns regarding provisions in H.R. 3126 that would grant the new Consumer Financial Protection Agency (CFPA) excessive 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. Therefore, we urge you and the Committee to consider several specific changes to the legislation (attached) that would rectify the problem while still protecting consumers.

The ABA is very concerned about the breadth of H.R. 3126, as it would affect lawyers and their ability to represent their clients and interfere with traditional state court regulation of lawyers. Although Section 125(g)(1) initially exempts attorneys who are providing "legal advice or services" from the expanded regulatory powers of the CFPA, Section 125(g)(3) eliminates the exemption for lawyers who are subject to the "enumerated consumer laws" identified in the bill that will be transferred to the CFPA and for lawyers who engage in any "financial activity" as defined in the bill.

The ABA does not oppose allowing the CFPA to regulate lawyers to the same extent that they are currently regulated under the enumerated consumer laws. However, the ABA objects to the proposed extensive new regulation of lawyers that would result from the expansive definition of "financial activity" under the bill. This would make lawyers subject to the many substantive provisions of H.R. 3126 and also make them "covered persons," such that they would be fully regulated by the CFPA just as if they were a mortgage lender or a non-bank bank.

The expansive definition of "financial activity" would allow the new agency to regulate core aspects of the confidential attorney-client relationship. In particular, because financial activity is broadly defined to include "providing services to assist a consumer with debt management...debt settlement...(or) modifying the terms of any extension of credit, or with avoiding foreclosure" (see Section 101(19)(I))—it would

allow the CFPA to regulate the legal advice and other core legal services that bankruptcy lawyers, consumer debtor lawyers, and many general practitioners routinely provide to their clients.

The expansive definition of “financial activity” also would cover many other activities in which lawyers routinely engage that are merely incidental to providing legal services to their clients. Here are a few examples of how this broad definition would make lawyers engaging in various activities incidental to the practice of law subject to the full regulatory powers of the CFPA (with the letter in parentheses indicating the relevant subsection of the definition of “financial activity” under Section 101(19)):

(F): *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.

(I): *Acting as a financial adviser.* 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.

(L): *Money transmitting.* Clients regularly instruct their lawyers to transmit money to third parties in order to complete a transaction, provide a down payment, or for other purposes.

(O): *Acting as a custodian of money.* When cases settle, the lawyer for one side or the other is often asked to hold the money until certain conditions are met (such as receiving the signed releases), at which time the lawyer transmits the money 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 engaged in a “financial activity” and hence be a “covered person” and otherwise be subject to regulation under H.R. 3126, even though the financial activity is wholly incidental to the legal services being rendered to the client.

The ABA is not seeking an exemption for the lawyer because the lawyer is a member of the state bar and subject to existing state court regulation. H.R. 3126 goes far beyond denying lawyers an exemption simply because of their professional status. The bill makes them (and their law firms) subject to the general supervision of the CFPA as “covered persons” if they engage in any financial activity described in Section 101(19), whether those activities 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 above.

To remedy these problems, the ABA would prefer that Section 125(g) of the bill be amended to eliminate the “financial activity” exception to the general attorney exclusion—which could be achieved by simply deleting the phrase “or (1)(C)” from the language of Section 125(g)(3)(B)—and delete Section 125(g)(2) that subjects most lawyers to the registration, reporting and examination requirements of Section 129. If those changes were made, the CFPA would still retain the authority to regulate lawyers to the extent that existing federal agencies currently regulate lawyers under the “enumerated consumer laws” that would be transferred to the new agency under the legislation.

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In recognition of the fact that the Committee is now preparing H.R. 3126 for final floor consideration, the ABA has prepared a limited set of amendments, a copy of which is attached in both a red-line and clean version. If adopted by the Committee, these proposed revisions to the existing lawyers' exclusion in the legislation would make it parallel to the exclusion given to accountants in Section 125(g)(1)(A).

In addition to the specific changes proposed above, we urge the deletion of the Waters Amendment, which is now Section 125(g)(2), because it would conflict with what we are proposing. Finally, we recommend clarification of Section 136 to avoid inadvertently granting the CFPA dual, overlapping regulatory authority with the state supreme courts to regulate lawyers when a claimant merely alleges that the lawyer is not in compliance with the existing state court rules and to make it clear that the specific lawyer exemption under this section only covers situations where a lawyer is providing a consumer financial product or service to the lawyer's consumer client.

Thank you for considering the views of the ABA on these important matters. If you would like more information regarding the ABA's proposed amendments, your staff should feel free to 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 horizontal line extending to the right.

Thomas M. Susman

Attachments

cc: Members of the House Financial Services Committee

**PROPOSED AMENDMENTS TO H.R. 3126, THE “CONSUMER FINANCIAL PROTECTION
AGENCY ACT,” AS REPORTED BY THE
HOUSE FINANCIAL SERVICES COMMITTEE ON OCTOBER 22, 2009**

UPDATED NOVEMBER 19, 2009

SEC. 125(g) EXCLUSION FOR ACCOUNTANTS, TAX PREPARERS, AND ATTORNEYS.—

(1) **IN GENERAL.**—Except as permitted in paragraph (2), the Director and the Agency may not exercise any rulemaking, supervisory, enforcement or other authority, including authority to order assessments, over—

(A) any person that is a certified public accountant, permitted to practice as a certified public accounting firm, or certified or licensed for such purpose by a State...when such person is performing or offering to perform customary and usual accounting activities...;

(B) any person other than a person described in subparagraph (A) that performs income tax preparation activities for consumers; or

(C) any individual who is providing legal advice or services for which a license to practice law is required ~~by under the law of the State in which the advice or services are provided~~ and which are performed within the scope of an attorney-client relationship established by an agreement, but only to the extent of such legal advice or services and such other services that are incidental to such legal advice or services, to the extent that such incidental services are not offered or provided by the individual separate and apart from such legal advice or services and are not offered or provided to consumers who are not receiving such legal advice or services from the individual.

~~(2) **NO EXCLUSION WITH RESPECT TO REGISTRATION OF MOST ATTORNEYS.**—Notwithstanding paragraph (1), this subsection shall not apply to any authority granted to the Director or the Agency under section 129 with respect to a licensed attorney, except to the extent a licensed attorney is solely providing legal services in connection with—~~

~~(A) the preparation and filing of a bankruptcy petition; or~~

~~(B) court proceedings to avoid a foreclosure.~~

~~(3)~~ (2) **DESCRIPTION OF ACTIVITIES.**—Paragraph (1) shall not apply to—

...

(B) any person described in paragraph (1)(B) or (1)(C) to the extent such person is engaged in any activity which is a financial activity described in any subparagraph of section 101(19) unless such activity is excluded by paragraph (1)(B) or (1)(C) above;
or

(C) any person described in paragraph (1)(A), (1)(B) or (1)(C) that is otherwise subject to any of the enumerated consumer laws or the authorities transferred under subtitle F or H.

SEC. 136. DUTIES.

(a) IN GENERAL.—

(1) REGULATIONS ENSURING FAIR DEALING WITH CONSUMERS.—...

(2) CONSIDERATIONS FOR DUTIES.—...

(3) DUTIES RELATING TO COMPENSATION PRACTICES.—...

(b) ADMINISTRATIVE PROCEEDINGS.—...

(c) EXCLUSIONS.—This section shall not be construed as authorizing the Director to prescribe regulations applicable to—

(1) an attorney licensed to practice law by a State and subject to in compliance with the applicable rules and standards of professional conduct adopted by that State, but only to the extent that the consumer financial product or service is provided by the attorney is within the attorney-client relationship with the consumer to a consumer who is a client of the attorney...

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(C) any individual who is providing legal advice or services for which a license to practice law is required by a State and which are performed within the scope of an attorney-client relationship established by an agreement, but only to the extent of such legal advice or services and such other services that are incidental to such legal advice or services, to the extent that such incidental services are not offered or provided by the individual separate and apart from such legal advice or services and are not offered or provided to consumers who are not receiving such legal advice or services from the individual.

(2) **DESCRIPTION OF ACTIVITIES.**—Paragraph (1) shall not apply to—

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(B) any person described in paragraph (1)(B) or (1)(C) to the extent such person is engaged in any activity which is a financial activity described in any subparagraph of section 101(19) unless such activity is excluded by paragraph (1)(B) or (1)(C) above; or

(C) any person described in paragraph (1)(A), (1)(B) or (1)(C) that is otherwise subject to any of the enumerated consumer laws or the authorities transferred under subtitle F or H.

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