

April 23, 2010

By Electronic Mail

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

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

Re: American Bar Association Comments and Suggestions Concerning Consumer Protection Provisions in Title X of S. 3217, the Restoring American Financial Stability Act of 2010

Dear Chairman Dodd and Ranking Member Shelby:

On behalf of the American Bar Association (“ABA”), which has almost 400,000 members, we are pleased to submit to you the enclosed comments and suggestions regarding certain provisions of Title X of S. 3217, the Restoring American Financial Stability Act of 2010 (the “Act”). As the Co-Chairs of the ABA Task Force on Financial Markets Regulatory Reform (“Task Force”)¹, we have been authorized to express the ABA’s views on these important issues.

These comments and suggestions address administrative and procedural concerns about certain provisions of Title X of the Act and were recently developed by the Task Force’s Consumer Protection Subgroup. Our comments also are based on principles regarding financial services reform adopted by the House of Delegates of the ABA on August 4, 2009.² Neither the ABA nor the Task Force has taken a position in favor of or in opposition to the passage of the Act, and the limited scope of this letter and the enclosed comments are not meant to imply any endorsement of the Act.

¹ The ABA Task Force is comprised of 15 prominent financial services lawyers who have served in the top levels of government and private practice. The Task Force includes former general counsels of the U.S. Securities and Exchange Commission, the Federal Deposit Insurance Corporation and the Treasury Department, as well as members and liaisons who have held high-level positions with the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the U.S. Securities and Exchange Commission. Other members of and liaisons to the Task Force include a founder of Public Citizen Litigation Group and leading academics in the law relating to financial entities and administrative law. A complete Task Force roster is available at:

<http://meetings.abanet.org/webupload/commupload/CL116000/relatedresources/publicroster.pdf>

² The financial reform Principles adopted by the ABA in August 2009 are available online at:

http://meetings.abanet.org/webupload/commupload/CL116000/sitesofinterest_files/Report301.pdf

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The enclosed comments identify certain potential technical improvements to the structure and powers of the proposed Bureau of Consumer Financial Protection that would be established within the Federal Reserve under the proposed legislation, if enacted. In particular, our comments address the following issues:

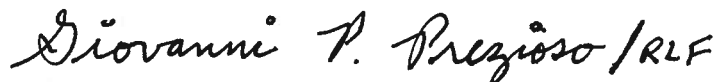
- Appointment of the Deputy Director of the Bureau by the President rather than the Director;
- Size and membership of the Consumer Advisory Board;
- Administrative law considerations relating to the Bureau's power to conduct hearings; and
- The powers of the Financial Stability Oversight Council with respect to the Bureau's rules, especially the power to stay or set aside a rule of the Bureau.

The ABA appreciates the opportunity to provide its comments and suggestions concerning certain aspects of Title X of the Act. If we can provide you or your staff with any additional information regarding the ABA's views on these issues or if we can be of further assistance, please contact Lynne Barr, the chair of our Task Force's Consumer Protection Subgroup, at (617) 570-1610 or lbarr@goodwinprocter.com, or the Task Force Co-Chairs, Giovanni Prezioso at (202) 974-1650 or William Kroener at (202) 359-6189.

Very truly yours,



William F. Kroener III



Giovanni P. Prezioso

Enclosure

cc: Members of the Senate Banking, Housing and Urban Affairs Committee
The Honorable Barney Frank, Chairman, House Financial Services Committee
The Honorable Spencer Bachus, Ranking Member, House Financial Services Committee
The Honorable Neal S. Wolin, Deputy Secretary of the Treasury
The Honorable Michael S. Barr, Assistant Secretary of the Treasury for Financial Institutions
Thomas M. Susman, Director, ABA Governmental Affairs Office

**AMERICAN BAR ASSOCIATION COMMENTS AND SUGGESTIONS CONCERNING
CONSUMER PROTECTION PROVISIONS IN TITLE X OF S. 3217, THE RESTORING
AMERICAN FINANCIAL STABILTY ACT OF 2010**

APRIL 23, 2010

1. **Section 1011.** Title X creates a Bureau of Consumer Financial Protection (the Bureau) within the Board of Governors of the Federal Reserve System (the Board), which would have a high degree of independence. Although the American Bar Association (ABA) has taken no position in favor or in opposition to the creation of the Bureau or any other new consumer protection entity, the ABA believes that financial services regulators should be independent. In addition, the ABA believes that the regulation and supervision of financial intermediaries, products, and services should be integrated and comprehensive to the extent appropriate to protect consumers.

Under Section 1011(b)(2) of Title X, the Director of the Bureau is appointed by the President with the advice and consent of the Senate, which is the standard method of appointment for principal officers under the Appointments Clause, Art II, § 2, cl. 2, including persons heading an agency with the powers that the Bureau will have. However, the person filling the office of Deputy Director will be appointed by the Director and will serve as the acting Director in the absence or unavailability of the Director, which would include a vacancy. Section 1011(b)(5) (page 1050). At least when the Deputy is serving as acting Director, the Deputy may well be a principal officer under the Appointments Clause and hence would have to be appointed in the same manner as the Director – by the President with the advice and consent of the Senate. The fact that the Director will be a member of the Financial Services Oversight Council (the Council) established by Section 111, which has substantial powers, including the power to stay or set aside rules of the Bureau, makes it even more important that the Deputy Director be appointed in the same manner as the Director (and all of the other Council members).

The alternative method provided in the Appointments Clause only applies to inferior officers, and a person serving as acting Director would not be inferior to anyone at that time. In addition, inferior officers may be appointed only by the President alone, the courts of law, or a head of a department. But because the Bureau is part of the Board, the Director probably is not the head of any department, and hence he or she probably could not appoint inferior officers.

Given the recent history of delays in Senate confirmation of many key executive branch officials (both in the current and previous Administrations), it is essential that the Deputy Director of the new Bureau be able to act fully if the position of Director is vacant (and perhaps at other times). Moreover, making the position subject to Senate confirmation will assure that the Senate has input on the appointment to this very important position. If this change is made, the Deputy Director should probably, like the Director, be removable only for cause and have a fixed term, perhaps on a schedule so that the terms of both the Director and the Deputy Director do not expire at the same time.

2. **Section 1014.** Section 1014 of Title X (page 1063) creates a Consumer Advisory Board to the Bureau, but it does not specify how many members there will be other than to provide in section (b) that not fewer than 6 members will be appointed based on “the recommendation of the regional Federal Reserve Bank Presidents, on a rotating basis.” Given this mandatory aspect for a portion of the membership, it may be advisable to provide for either a fixed size or a range of sizes for the overall membership, with all members to serve terms of a set number of years, on a staggered basis, with or without the possibility of re-appointment.

3. **Section 1053.** (a) Among the enforcement powers that the Bureau will have is the power to conduct hearings. Section 1053, page 1187. As we understand that power, it will include hearings for cease and desist orders as well as those in which the Bureau may impose fines or civil penalties. Under subsection (a)(1), the type of hearing is that “prescribed by

chapter 5 of title 5, United States Code” better known as the Administrative Procedure Act (APA). Similar language is found in subsection (b)(3). Under the APA, the requirements for formal trial-type hearings are those set forth in Sections 554, 556 & 557, but those provisions apply only where the statute requires a hearing “on the record,” which this bill does not require. If the sponsors wish to have some or all of the proceedings under Title X conducted as formal adjudications, they must so provide in the statute. Absent such specificity, the Bureau will be free to adopt whatever procedures it considers appropriate, subject to the requirements of the Due Process Clause. The requirements of Due Process vary, depending in part on the nature of the proceeding, and they may be significant where there are substantial fines or civil penalties of the kinds authorized by Section 1055(c) (page 1200-1202). Because Title X also authorizes the Bureau to go to federal court to seek civil penalties (Section 1055(a)(1)), the courts may be concerned if the Bureau significantly cuts back on the procedures for administrative adjudications as compared to those available in court, unless Congress explicitly directs that lesser procedures may be utilized.

If something less than formal adjudication is desired, Congress has several choices: (i) it can spell out what those other procedures are in the statute; (ii) it can direct the Bureau to issue procedural rules governing the conduct of hearings under general standards provided by Congress; or (iii) it can direct the Bureau to adopt and use procedures used by other agencies, such as those currently used by the banking agencies, 12 U.S.C. §1818, including regulations issued thereunder. Once a decision is made as to the appropriate type of procedures for each of the major categories of administrative cases, members of the Task Force will be available to assist in drafting or reviewing the specific language. The ABA strongly believes, however, that the uncertainty of the operative language in this section of the bill must be addressed and

remedied or else the Bureau could be tied up for years in litigation over what procedures it must follow.

(b). The appeals from adjudications under Title X of the bill all go to the Courts of Appeals under Section 1053(b)(4) (page 1190). By contrast, appeals from the issuance of industry-wide rules by the Bureau under Section 1023(c)(8) (page 1091), for which no court is specified, would go to the District Courts, which are the default option for judicial review. Many of these adjudications will involve civil penalties and cease and desist orders which tend to be fact specific, ordinarily involving a single individual or one company. We suggest that the Senate reexamine the adjudication appeal provisions under subsection (b)(4) and consider whether it would make more sense to provide for judicial review of adjudications by the Bureau in the District Courts (so that the cases could be filed in the district where the claimant resides or in Washington D.C., with a further right of appeal to a Court of Appeals) or whether the current proposal calling for judicial review in the Courts of Appeals should be retained due to some special rationale that may not be readily apparent.

Section 1023. Although the Bureau has substantial independence, Section 1023 provides for a possible veto of its rules under limited circumstances by the Council, which is created by Section 111. The Council's voting members are the Secretary of the Treasury (as chair), the Chairman of the Board, the Comptroller of the Currency, the Director of the Bureau, the Chair of the Securities and Exchange Commission (SEC), the Chair of the Federal Deposit Insurance Corporation, the Chair of the Commodity Futures Trading Commission, the Director of the Federal Housing Finance Agency, and an "independent member" (nominated by the President and confirmed by the Senate) with insurance expertise. Because most of the members of the Council are not appointed directly to the Council, but become Council members because of their primary appointed position, the Government in the Sunshine Act is inapplicable to the Council.

In addition, although the Federal Advisory Committee Act (which requires transparency in the operation of various entities) would not apply because the Council is composed only of federal officials, that Act is expressly made inapplicable to the Council and to any committees it creates, although Section 111(g) requires that committee members who are not federal officials to be publicly identified.

The veto process created by Section 1023 authorizes the Council, on petition by any member agency (which would not include the insurance representative because that person is not an agency representative) to stay and, more importantly, to set aside any regulation of the Bureau, or “provision thereof,” by a two-thirds vote of the membership “if the Council decides . . . that the regulation or provision would put the safety and soundness of the United States banking system or the stability of the financial sector of the United States at risk.” No member of the Council may support such a petition unless its member agency has previously made a public determination to that effect. In addition, following a vote to stay or set aside, the Council must explain its action in a notice published in the Federal Register. However, neither the processes leading to a member’s public determination nor the eventual stay or set aside is subject to the notice-and-comment procedures of the APA. Judicial review of actions of the Council is permitted, but since the statute does not vest review in the Courts of Appeals, any review will be in the District Court.

The Veto Function. The provision for a formal veto by one agency over the rulemaking by another agency is rare in federal practice. It is allowed, for example, in the case of the SEC with regard to the rules adopted by the Public Company Accounting Oversight Board under the Sarbanes-Oxley Act of 2002. In some cases, the President has been given veto authority with regard to the actions of a federal agency (*e.g.*, with regard to the Nuclear Regulatory Commission and the export of nuclear materials). More commonly, disputes among federal

agencies have been negotiated through the White House or the Office of Management and Budget, with the rulemaking agency retaining the ultimate legal authority to determine the content of its rule (subject to the Congressional Review Act). Instilling a multi-member entity composed of the representatives of several agencies with the power to control the rulemaking of another federal agency has still fewer precedents (*e.g.*, the Endangered Species Act allows an interagency group essentially to veto specific non-rulemaking actions of the Department of the Interior). Moreover, by allowing a veto of separate “provisions” of a Bureau rule, Section 1023 essentially allows the Council to rewrite Bureau rules (for example, eliminating exemptions or perhaps even individual words, such as “not”), but not to add words, such as “not”—without the need for any public participation under Section 553 of the APA.

The ABA believes that regulation and supervision of financial intermediaries, products and services should be integrated and comprehensive, both in order to protect investors and consumers of financial products and to ensure the strength and integrity of the financial system. Towards that end, there is no question that federal agencies having responsibility for the banking and financial sectors must be able to voice their concerns about the potential effect of Bureau rules on the public policies entrusted to their administration, as well as the general public interest in a sound banking and financial system. Moreover, the use of the Council to discuss such issues and even formulate a majority position for consideration by the Bureau could be an effective means of achieving this objective and would not seem controversial. But the bill goes further by allowing the Council to reject a Bureau rule, including portions thereof, although only where the rule may potentially cause extreme economic harm.

Although the petition process is not entirely clear, it appears likely that objections by one or more financial regulators to the Bureau’s decision on such an important issue will be made public in advance of any final decision on the rule, rather than being moderated in an informal

and more flexible fashion through interagency coordination effected by the White House and/or the Office of Management and Budget, or through coordination among bank regulators, as commonly occurs today. The latter approaches allow for more nuanced resolution of an interagency debate than permitted by an up-or-down vote on a veto of a regulation or part thereof. And the fact that a veto may eliminate provisions deemed harmful, but cannot add curative or even clarifying language, is a further concern with the formalized approach in the Council veto proposal.

We suggest that the Senate consider other possible alternatives if it wishes to retain some check on the Bureau's rulemaking authority, beyond that available through judicial review. For example, shifting the veto power to the President could lessen the possibility of highly publicized interagency disagreements on crucial issues and would more likely produce greater direct political accountability for the final decision. Assigning the veto authority to the Federal Reserve Board is another possibility.

The Procedure for Stay or Set Aside.

Petition to Stay or Set Aside. Under the legislation, only member "agencies" may petition to stay or set aside a Bureau regulation. Accordingly, the "independent member" of the Council with insurance expertise lacks that power, although he or she can vote on the merits of the petition (without the need, however, for making the prior determination of risk required of other voting members representing agencies).

The petition must be filed within 10 days of the publication of (apparently) final, not proposed, regulations in the Federal Register. This would seem to mean that if the risk to the banking or financial sector becomes evident after that period, the procedure is not applicable. The 10 day period is very short, especially given the other procedural requirements for filing a petition; we suggest a longer, more reasonable period (e.g., perhaps thirty days with no

exceptions) as a possible alternative. As a technical matter, the section should also expressly provide that the new, longer period runs from the publication of the “final” regulation although other provisions seem to allow only final regulations to be vetoed.

The section also requires that, prior to filing a petition, the petitioning agency must have made a good faith effort to work with the Bureau to resolve its concerns regarding risk. Presumably this would occur during the Bureau’s rulemaking process and would involve any interagency review process applicable under Executive Order 12866 (or any successor order), but perhaps that might be clarified as well.

The Decisional Process Prior to Voting to Stay or Set Aside. The section expressly makes Section 553 of the APA (notice-and-comment procedures) inapplicable to the Council’s decisional process on a petition. This raises the question of what “record” is to be used by the Council to make its merits decisions: the record compiled by the Bureau as part of its notice-and-comment rulemaking or, rather, a new record (that might incorporate all or part of the rulemaking record made by the Bureau), plus any additional material submitted specially for the stay or set-aside decision. If a new record is contemplated (as appears to be the case in light of what Council members must consider in deciding to set aside or stay, see below), the only required public participation would occur earlier when the Bureau proposed the regulation, perhaps at a time when the perceived risk to the economy was not at issue or Council members may not have yet expressed their views publicly in such a way as to alert commenting parties on what they perceived the risks to be.

While member agencies voting to set aside a regulation must have made a prior public determination of risk “at a public meeting where applicable,” there is no requirement in this Section for such a meeting (it is not clear what other law, if any, requires such a meeting), nor is it clear what, if any, public participation must be allowed at such a meeting. The Government in

the Sunshine Act applies to some of the agencies that are members of the Council, but not others (and not to the Council), and there are also exemptions that might well apply. The issue of a public meeting, and its unequal application among the member agencies, requires further clarification. There is also no requirement that any information resulting from such a meeting (if held) must be brought to the attention of Council members prior to voting. Moreover, if, as appears to be the case, the intent is to have the decision based on a newly created record, the procedures for compiling it are not specified in Section 1023. All that is contemplated is that, prior to voting, members must have considered “any relevant information provided by the agency submitting the petition and by the Bureau.”

Finally, the more informal the procedures for record building are, the less helpful that record is likely to be to the reviewing court. This will result in one of two consequences: either remands for additional record-building to permit effective judicial review (an unlikely prospect in light of judicial precedents precluding judicial imposition of procedural constraints on agencies and the very tight timetable for a final decision specified in the system) or, more likely, judicial approval of the Council’s decision with little or no scrutiny. If the Senate expects a different approach to judicial review of a Council veto, it should specify what the record for that review shall be.

Judicial Review of Council Actions. Subsection (c)(8) provides that “[a] decision by the Council to set aside a regulation prescribed by the Bureau, or provision thereof, shall be subject to review under chapter 7 of title 5, United States Code.” Since the provision does not specify that the reviewing court should be a Court of Appeals, judicial review actions will have to be brought in a District Court (see 5 U.S.C. § 703). In either case, standing is confined to persons suffering “injury in fact” from the Council’s action. The so-called “zone of interest” test will further limit standing, though it is not clear what provision(s) of the statute will define that

“zone.” For example, does it include the statutory provisions governing the Bureau’s rulemaking, which do not limit the Council’s discretion to set aside, and yet are the ones that are designed to protect consumers of financial services? If this is not made clear, consumers may not have standing to contest the set-aside or stay of a regulation designed to protect them. And what about the Bureau? Is it contemplated that it can seek review of a Council veto? Suits by one agency against another are not the ordinary way to resolve inter-agency differences. At a minimum, the statute should indicate whether the Bureau can sue to overturn a Council veto.

Given the broad choice of venues for bringing actions in District Courts under the APA where Congress has not otherwise specified venue, challenges to Council action can take place almost anywhere in the country (wherever a plaintiff resides), creating the possibility of inconsistent decisions. Forum shopping and a race to the courthouse are, therefore, likely prospects—ones that, at a minimum, will create delays as the courts attempt to consolidate cases or otherwise coordinate their actions. Further delays would ensue as appeals proceed to the Courts of Appeal. In many settings, Congress has avoided these results by providing for review of agency rules in the Courts of Appeal, and sometimes exclusively in one Circuit. See, e.g., Rec. 75-3 of the Administrative Conference of the United States (“Direct review [of a rule] by a court of appeals is appropriate whenever: (i) An initial district court decision respecting the validity of a rule will ordinarily be appealed or (ii) the public interest requires prompt, authoritative determination of the validity of the rule”). If the appeal goes directly to a Court of Appeals, the race to the courthouse problem is solved by 28 U.S.C. § 2112. Many statutes also limit the time period during which judicial review can be sought, generally to 60 days. In addition, if there is a time limit, the usual rule is that the time for filing is tolled during petitions for rehearing, which suggests the need for clarification of whether there would be any tolling while the Council is considering what to do.

Finally, Section 1023, in authorizing judicial review, does not explicitly address review of agency inaction, which is judicially reviewable in some circumstances under the APA.

Because of the unusual role of the Council, the general rules about such review would not seem applicable, and the Senate should clarify whether the failure of the Council to issue a veto is itself reviewable, beyond the review that is available over the underlying rule that the Bureau has issued.