CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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The Honorable Michael Crapo	The Honorable Sherrod Brown
Chairman	Ranking Member
Committee on Banking, Housing and Urban Affairs	Committee on Banking, Housing and Urban Affairs
United States Senate	United States Senate
Washington, DC 20510	Washington, DC 20510

Re: Request for proposals to foster economic growth

Dear Chairman Crapo and Ranking Member Brown:

The U.S. Chamber of Commerce ("Chamber"), the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, which is dedicated to promoting, protecting, and defending America's free enterprise system, commends you for soliciting public input on legislative proposals that would foster economic growth and expand opportunity for American businesses and households. The Chamber appreciates the opportunity to provide input on behalf of our members, and we look forward to working with you and other members of Congress to enact pro-growth policies during the 115th Congress.

The 2008 financial crisis made clear that the financial regulatory system in the United States is severely out of date and in need of serious reform. Elements of our regulatory framework date as far back as the Civil War, and many agencies that were created in response to a particular historical event or hastily borne out of crisis have struggled to meet the modern needs of an economy as dynamic as the United States. It is little wonder that instead of a strong rebound to the 2008-2009 financial crisis–which typically occurs after a severe financial downturn–our economy has drifted along between one and two percent growth over the last decade. This has created financial difficulties and concerns about the future for millions of American businesses and households.

It is important to put our economic potential into perspective. If our economy moved from 2% to 3% annual growth, that would mean our gross domestic product (GDP) would double 12 years faster (23 years vs. 35 years), while simultaneously reducing our annual deficit by over $3 trillion over the next decade. If the economy went from 2.5% growth to 3% growth, average annual incomes would rise by $4,200 and 1.2 million jobs would be created over the next decade. "Fostering growth" is more than just a slogan; it is an economic imperative that could lift the tide for the millions of Americans left behind in a historically weak economy.

In September 2016, the Chamber released a reform plan entitled *Restarting the Growth Engine: A Plan to Reform America's Capital Markets*. *("Restarting the Growth Engine Plan"),* which includes over 100 recommendations for creating a regulatory system that embraces stability, competition, and growth. We have included a copy of the *Restarting the Growth Engine Plan* with this letter and are confident that many of the recommendations included in that report could be advanced with bipartisan support. To specifically address your important and timely request for legislative proposals, however, we have outlined in greater detail below some of our more urgent priorities.

Legislative Recommendation #1: A cumulative impact study assessing the impact of the Dodd-Frank Act, Basel accords and other financial regulations on the U.S. economy

In order to advance comprehensive reforms to our outdated regulatory system, policymakers and the general public must first have an appreciation for how regulation impacts growth and the ability of businesses to access the credit markets. Regrettably, financial regulators in the United States have failed to analyze the cumulative impact of the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[1] and the various Basel capital and liquidity rules that have been implemented in the United States since the financial crisis. This sharply contrasts with efforts underway in Europe to understand how the alphabet soup of post-crisis rules has affected growth and job creation.[2]

The Dodd-Frank Act alone includes some 400 rulemaking mandates, and U.S. banking regulators have promulgated several capital and liquidity rules pursuant to the Basel accords. As a result, nonfinancial businesses are finding out the hard way that regulations such as the Volcker rule, money market fund reforms, Dodd-Frank Title

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[1] Pub.L. 111–203.

[2] Call for Evidence: EU Regulatory Framework for Financial Services http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/docs/consultation-document_en.pdf

VII derivatives rules, liquidity coverage ratio, and net stable funding ratio – to name just a few – are raising their cost of capital and hindering liquidity in vital financing markets. Since regulators–notably the Federal Reserve–failed to perform an economic analysis on many of these *individual* rules, it is all the more important that they examine how the rules work in concert with one another.

A 2016 CFA Institute study found that over a five year period, liquidity in high yield investment grade corporate bonds had decreased, there were fewer dealers in the marketplace, the time needed to execute a trade had increased, and there had been an increase in unfilled orders. It is no coincidence that these negative developments coincided with a substantial increase in financial regulation. Had the federal banking regulators chosen to conduct an economic analysis of these rules upfront as required under the Riegle Community Development and Regulatory Improvement Act[3], many of the harmful consequences we are seeing rippling throughout our economy could have been avoided.

A cumulative impact study is therefore necessary to examine the economic impact of post-crisis rules on the financial markets, growth, and the ability of businesses to obtain the financing they need.

Legislative Recommendation #2: Promote accountability at the Consumer Financial Protection Bureau

Strong, clear, and predictable consumer protection policy is important and necessary to protect consumers and support efficient capital markets. The Chamber firmly believes that consumers are best protected when consumer credit markets are based upon competition and transparency, which provides borrowers with the options and information they need to make good decisions.

Since its creation in Title X of the Dodd-Frank Act, the Consumer Financial Protection Bureau ("Bureau") has been in an ideal position to help promote such consumer protection, while fostering competitive and transparent markets. Unfortunately, the Bureau has all too often implemented policies that lead to restricted consumer choice in the name of "protection," and has operated with little transparency or accountability to the public. Rather than issuing guidance or regulations to establish "rules of the road," the Bureau has too often chosen to single out individual institutions and regulate through enforcement actions instead. This approach is counterproductive. The lack of clear standards has stifled innovation and

[3] Pub L. 103-325

limited the scope of financial services offered to consumers. We urge Congress to address this problem by requiring the Bureau to establish clear instructive guidelines for a given area or practice, through notice and comment, before having authority to bring an enforcement action or criticize the practice in the examination context, particularly where the basis for the action or criticism would be citing unfair, deceptive, or abusive practices.

A recent court decision has also affirmed that the Bureau's structure is a Constitutional anomaly, and we anxiously wait to hear what the entire court decides after rehearing the case *en banc*. This Constitutional flaw highlights the need for Congress to assert its Article I authority under the U.S. Constitution in order to bring greater accountability to the Bureau through the appropriations process and by putting the Bureau under a bipartisan, balanced commission structure.[4]

Confidential Supervisory Information Proposal would put Privacy at Risk and Impede on Established Constitutional Rights and Attorney Client Privileges

A good first step is to prohibit the Bureau from implementing its 2016 proposal to silence companies it is investigating, which would be a flagrant violation of First Amendment rights and a stunning regulatory overreach. Companies that are the subject of civil investigative demands or other requests from the Bureau may have good reason to share that information with investors or other third parties. The Bureau's attempt to silence businesses undermines important Constitutional protections, and Congress has every right to prohibit the Bureau from taking any further action on this ill-advised proposal.

The same proposal would permit the Bureau to share financial institutions' confidential supervisory information ("CSI") with "a Federal, State, or *foreign governmental authority or an entity exercising governmental authority*."[5] While the Bureau is already sharing with federal and state governments, including state Attorneys General, expanding CSI sharing to foreign government and other governmental bodies is extremely problematic and there is no reason given in the Bureau's proposal stating why it needs to share with these organizations. Moreover, the Bureau would also like to share CSI with organizations that do not even have jurisdiction over the inspected

[4] *PHH vs. Consumer Financial Protection Bureau,* Decided October 11, 2016 at pg. 27 (asserting "the Director of the CFPB can be considered even more powerful than the President…. In essence, the Director is the President of Consumer Finance. The concentration of massive, unchecked power in a single Director marks a departure from settled historical practice and names the CFPB unique among traditional agencies).
https://www.cadc.uscourts.gov/internet/opinions.nsf/AAC6BFFC4C42614C852580490053C38B/$file/15-1177-1640101.pdf

[5] Proposed 12 C.F.R. § 1070.2(a) (emphasis added).

company or the CSI.[6] The American Civil Liberties Union[7] and American Bar Association[8] both opposed the proposal due to the privacy concerns and infringement on attorney-client privilege, respectively.

Small Business Data Collection would Limit Access to Small Business Credit and Hinder Economic Growth

The Chamber also believes that Congress should repeal Section 1071 of the Dodd-Frank Act, which instructs the Bureau to oversee a bulk data collection of small business loans, purportedly similar to a Home Mortgage Disclosure Act ("HMDA") collection. However, the impending 1071 collection would be nothing like the HMDA data already collected by mortgage lenders for the following reasons:

1. Underwriting for mortgages is completely different than for small business loans, which varies greatly depending on the size of the business, collateral, and other factors;
2. Lenders will be in jeopardy of violating the Equal Credit Opportunity Act ("ECOA") because underwriters are not permitted to ask the race, gender, or other protected characteristics when underwriting a non-mortgage loan, however Section 1071 mandates the collection of this exact data;
3. The demand for small business lending is nothing like the demand for housing, while the future 1071 data would not account for a lack of demand of loans from certain populations, and instead, fault the lender for not issuing loans that may not have been requested.

Since the CFPB already has ECOA authority and the ability to perform small business data examinations, which it is already conducting, there is no reason to go forward with the onerous and impractical Section 1071. Pursuing a Section 1071 data collection will undoubtedly strain and reduce access to credit for small businesses, ultimately have the effect of imposing enormous costs on lenders and borrowers, and effectively create an open-ended enforcement mechanism for the Bureau and other organizations to bring enforcement actions and litigation against compliance-minded businesses. For these reasons, we believe it is in the best interest of American small businesses and our economy for Congress to repeal it.

Legislative Recommendation #3: Reining in the Financial Stability Oversight Council

[6] Proposed 12 C.F.R. § 1070.43(b) (1).
[7] https://www.wsj.com/articles/cfpbs-proposal-to-silence-companies-under-investigation-draws-criticism-1477607280
[8] http://www.americanbar.org/news/abanews/aba-news-archives/2016/10/aba_urges_cfpb_topr.html

Title I of the Dodd-Frank Act created the Financial Stability Oversight Council (FSOC) which is comprised of the heads of all of the federal financial regulators. FSOC was given broad authority to-amongst other things-coordinate regulatory efforts amongst agencies, identify gaps in regulation that could pose risks to U.S. financial stability, and to monitor domestic and international regulatory proposals and their possible impact upon the stability of U.S. financial markets.

Unfortunately, since its creation FSOC has focused almost exclusively on the authority it was granted to designate certain nonbank financial institutions as systemically important financial institutions ("SIFIs"), thereby subjecting them to enhanced regulation by the Federal Reserve. To date, FSOC has designated four nonbank institutions as such, and two currently remain designated.[9] These nonbank SIFI designations are in addition to the Dodd-Frank Act's mandate that all banking institutions with more than $50 billion in assets are by definition SIFIs and subject to enhanced regulation. It is worth noting that both approaches–the discretionary nonbank designation efforts by FSOC as well as the $50 billion threshold for banks included in the Dodd-Frank Act–have received bipartisan criticism from numerous members of Congress.

For example, the nonbank SIFI designation process has received criticism from both Republicans and Democrats for its lack of transparency, due process, disregard of existing financial regulatory regimes and inconsistent use of authorities. Institutions that are possible targets of designation are often kept in the dark, and have little opportunity to challenge or respond to findings made by FSOC. With respect to insurance, FSOC has largely ignored or discounted the state insurance regulatory regime and relied upon an inappropriate and unrealistic "run" scenario as the primary basis for regulating insurers as SIFIs. FSOC's myopic focus on designating a few individual nonbank companies has diverted attention and resources away from its other mandates. The problem became so severe that during the 114th Congress, 60 members (29 Republicans and 31 Democrats) co-sponsored H.R. 1550, the Financial Stability Oversight Council Improvement Act of 2015, which would have implemented a number of transparency and due process protections in the nonbank SIFI designation process. The House Financial Services Committee approved H.R. 1550 in November 2015, with all Republicans and a majority of Democrats cosponsoring the legislation, supporting the bill in Committee markup, or both.

[9] GE Capital lost its designation after downsizing in 2016; MetLife successfully challenged its designation in court, a case that currently remains under appeal.

While support for H.R. 1550 shows there is a clear bipartisan consensus that the nonbank SIFI designation process is broken, we believe that the Senate should go a step further and ultimately adopt the approach envisioned in House Financial Services Committee Chairman Jeb Hensarling's Financial CHOICE Act. In last year's draft of the bill, Section 211 of the Financial CHOICE Act fully repealed the FSOC's ability to designate any nonbank as a SIFI.[10] Despite spending the better part of five years trying to make the case for why certain nonbanks should be subjected to heightened regulation and supervision under the Federal Reserve, the FSOC should have to convince the public that such designations would promote financial stability and economic growth.

Adopting a bank-like regulatory framework for an insurance company, asset manager, or other business only has the effect of curtailing reasonable and needed risk-taking for growth while morphing the financial system into a homogeneous, systemic risk itself. We fully support stripping FSOC's authority to bring even more companies under the Federal Reserve's regulatory umbrella, and urge the Senate to take up legislation that would do so.

There is also broad agreement that the $50 billion threshold for banks is arbitrary, and that a bank's designation should be dependent on the potential risks it carries rather than asset size. In the House of Representatives last Congress, 135 members (115 Republicans and 20 Democrats) cosponsored H.R. 1309, the Systemic Risk Designation Improvement Act of 2015, which would replace the asset threshold with a requirement that FSOC actually determine a bank could pose a systemic threat before designating it. This bipartisan showing of support further underscores how the entire SIFI designation process is flawed.

We believe that the Senate should explore ways to amend the bank designation process if Congress determines that bank designations continue to be appropriate, and that the Senate should take up language included in Section 211 of the CHOICE Act to prohibit nonbank SIFI designations.

Legislative Recommendation #4: Proposals to facilitate capital formation

This month marks five years since President Obama signed the Jumpstart our Business Startups ("JOBS") Act into law, one of the most successful modernizations of our securities laws in recent years. The JOBS Act has led to a meaningful increase

[10] http://financialservices.house.gov/uploadedfiles/bills-114hr-hr5983-h001036-amdt-001.pdf

in the number of companies that have gone public, and also provided a number of ways for businesses to raise capital through private channels.

As significant as the JOBS Act was, there is much more that Congress and the Securities and Exchange Commission ("SEC") can and should do to help small-and medium-sized enterprises raise the capital they need to expand and hire. Unfortunately, the SEC for years has ignored its statutory mandate to facilitate capital formation, so it has often fallen to Congress to advance such measures.

We believe that a smart approach to this issue would be to take up Title X of the Financial CHOICE Act, which is a compilation of a number of bipartisan measures that cleared the House Financial Services Committee or the full House during the 114th Congress. We recognize and appreciate that the Senate Banking Committee has already advanced a number of measures included under Title X, but there are several others that we think merit consideration.

For example, Title X includes provisions that would modernize the regulatory regime for business development companies ("BDCs"). BDCs are closed end investment funds that are a vital source of capital for middle market business across the country, which are critical for economic growth and job creation. In fact, BDCs have a statutory mandate to invest much of their capital in small-and medium-sized businesses, yet continue to operate under a regulatory regime that is better suited for the 1980s. This is all the more important as middle market companies often feel the squeeze when lending standards tighten and credit markets are not as liquid as they used to be. We believe that legislation to modernize BDC regulation is a pro-growth, bipartisan initiative that should be prioritized in the 115th Congress.

Title X also includes provisions that enhance the oversight of proxy advisory firms, who wield enormous influence over corporate governance in the United States. Two proxy advisory firms–ISS and Glass Lewis–control roughly 97% of the market, yet operate with little transparency and are riddled with conflicts of interest. The Chamber has long been concerned about the decline of public companies in the United States and its resulting consequences for growth and job creation. The power that proxy advisory firms wield over public companies is yet another reason for why more businesses will elect to stay private in the future. As such, subjecting proxy advisory firms to an entirely appropriate SEC oversight regime is a top Chamber priority for this Congress.

Other Considerations

While your request for legislative proposals is limited, the Chamber believes there are a number of other policy proposals that would engender greater economic growth and job creation. We have outlined some of these below.

Tax Reform

The Chamber would be remiss if, in the context of pro-growth policies, we did not emphasize the imperative need for comprehensive tax reform. The country's tax code has not been fundamentally restructured in 31 years and it is out of date, overly complex, and distorts sound business decisions. The Chamber strongly supports comprehensive tax reform and has developed principles that call for lower rates for all businesses, a more internationally competitive system, proper cost recovery rules, certainty, simplicity, and proper transition rules. Put simply, it is hard to overstate the importance of tax reform during the 115th Congress and we are eager to work with Congress in order to make reform a reality.

Retirement Savings

Robust retirement savings not only ensure that Americans are financially secure during their retirement, but it also plays a significant role in providing capital to the economy so that businesses can grow and create jobs. Over $24 trillion in assets are currently held in tax deferred retirement accounts across the U.S. These assets are invested in mutual funds, stocks, bonds, annuities and other securities that help provide funding for businesses of all sizes as well as governments that provide infrastructure and other community good. Indeed, as the Chamber itself found in a 2014 study by Oxford Economics–Another Penny Saved–which we co-sponsored, lifting U.S. savings rates can directly contribute to significantly improved economic growth in the future while also limiting citizens dependency on means-tested federal aid programs. Incenting savings, then, is intrinsically pro-growth. Cutting savings incentives is an anti-growth policy error. Given these basic findings, it is imperative that Congress consider policies that institute appropriate protections but encourage Americans to save early, have access to affordable financial advice, and provide a range of options from which to invest.

To that end, the Chamber continues to have serious concerns over the rule finalized by the Department of Labor ("DOL") last year that would impose new regulations on financial advisors and make it harder for low and moderate income households to receive financial advice. While seemingly good in theory, the so-called "fiduciary" rule is unduly complicated and wrought with serious defects, and will only jeopardize retirement security for large swaths of the American public. The rule imposes a regulatory framework under the Employee Retirement Income Security Act

("ERISA") upon a segment of the market with which the Department of Labor has no expertise.

We believe that any efforts to modernize standards of conduct for broker-dealers who advise clients with individual retirement accounts ("IRAs") should be addressed under the federal securities laws. The SEC–as well as the Financial Industry Regulatory Authority–already have broad jurisdiction and sufficient authority to police wrongdoing, and to ensure that brokers and advisers provide investors with disclosures regarding any potential conflicts. We therefore encourage the Senate Banking Committee to explore alternatives to the DOL's heavy-handed approach.

"FinTech" and Financial Innovation

The emerging financial technology or "FinTech" space—which includes a number of innovations ranging from payment technologies to distributed ledger technologies such as Blockchain—holds tremendous promise for economic growth in the future. When approaching issues related to FinTech, we believe that Congress and the financial regulators should adopt the Hippocratic Oath: "First, do no harm." Policymakers should encourage new technologies and their potential to disrupt the manner in which certain aspects of our financial system operate. Hostility to innovation is never a good policy, and will only make it more difficult for the United States to remain competitive in a global economy.

As part of the Restarting the Growth Engine Agenda, the Chamber recommends a Presidential Commission On Financial Regulatory Restructuring, which could be a means for policymakers to adopt a policy of embracing FinTech. It is worth remembering that one of the big reasons why the internet grew so quickly is that policymakers made a critical decision to embrace the technology in the 1990s and did not attempt to overregulate it. We believe we are at a similar technological inflection point today when it comes to FinTech and hope Congress and the Administration will take a comparable approach.

Improving the Bank Examination Process

Community and regional banks are a critical source of financing in communities across the country, but unfortunately often pay a disproportionate regulatory cost that hinders their ability to lend to consumers and businesses. In many instances, the examination process for such institutions has also become opaque, unpredictable, and does not include a fair and objective appeals process.

The Chamber supports legislation that would create an objective and impartial third party process for financial institutions to appeal decisions that regulators have made during examinations. Regulators and bank examiners are far from perfect, and can often times take an ill-advised, heavy handed approach against small lenders that only serve to harm the institution and its customers. We believe that legislation such as S. 774 in the 114th Congress, the Financial Institutions Examination Fairness and Reform Act (Sen. Moran) should be taken up by the Banking Committee this Congress.

Credit Value Adjustment

The credit valuation adjustment (CVA) is the fair value adjustment to reflect counterparty credit risk in valuation of OTC derivative contracts. Under the Basel III regulatory framework, banking organizations are assessed a CVA capital charge, so as to capitalize the risk of future CVA changes.

Unlike Europe, the United States includes un-cleared derivatives with end-users – farmers, manufacturers, and commercial businesses – in the CVA capital charge calculation. As a consequence, end-users incur higher transaction costs on their commercial hedging transactions. This policy discourages prudent risk management, places U.S. end-users at a competitive disadvantage compared to their European counterparts, and inhibits commercial growth and job creation.

Congress has long recognized the non-systemic nature of end-users' derivatives activities. Exempting end-users from the CVA capital charge calculation would be consistent with relief previously granted with respect to margin and clearing requirements.

Consumer Access to Financial Education and Credit Monitoring

In order to make informed decisions, consumers need to know their unique financial situation and how their previous financial decisions have impacted their financial health to inform their decisions going forward. To this end, many consumers depend on financial education or credit monitoring programs provided by entities such as financial intuitions and credit reporting bureaus. Not only do financial services providers and credit bureaus agree on the importance of this information, but so does the CFPB. At a Consumer Advisory Board meeting on March 2, 2017, CFPB Director Richard Cordray asserted "it is necessary to stimulate even greater consumer awareness of the credit reporting system and how it matters to people's lives. People cannot take control of their finances if they do not recognize how this system exerts substantial influence over their financial choices. We have attacked this problem by

championing the Open Credit Score initiative and related developments, which are aimed at making credit scores and credit reporting information more readily available to consumers at no cost."[1] As a result tens of millions of consumers are provided free credit scores annually, and nearly 120 million receive access to their scores through risk-based pricing and adverse action notices each year. All of these disclosures direct the consumer to contact the national CRAs.

Regrettably, judicial misinterpretations of the Credit Repair Organizations Act ("CROA") of 1996 have jeopardized the ability of credit reporting bureaus to provide consumers with basic education services, and have opened the bureaus up to private rights of action by the ever-opportunistic trial bar. We believe that a legislative fix to CROA is necessary to clarify Congress did not intend to sweep in well-intentioned credit bureaus under the CROA private right of action regime. Amending CROA would give consumers improved access to innovative credit education solutions that would have tangible impacts on their lives. Last year the Policy and Economic Research Council released a study showing that nearly two-thirds of consumers and small businesses (62 percent) were able to increase their credit scores within three months of receiving these types of personalized credit education services. In addition, nearly 90 percent of small business owners said they had a better understanding of credit reports and credit scores after completing an education session with a nationwide consumer reporting agency.

Only with this fix will credit bureaus be able to provide consumers with the protection and education they need to make smart decisions regarding their finances without the threat of litigation from the opportunistic trial bar.

Conclusion

We appreciate this opportunity to provide input on pro-growth legislative initiatives and we look forward to working with you and other members of Congress on these important issues.

[1] Prepared Remarks of CFPB Director Richard Cordray at the Consumer Advisory Board Meeting (March 2, 2017) https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-consumer-advisory-board-meeting-march-2017/

Sincerely,

Thomas Quaadman