

TESTIMONY OF
THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS
Before The
HOUSE COMMITTEE ON SMALL BUSINESS

THE IMPACT OF FINANCIAL REGULATORY RESTRUCTURING ON SMALL
BUSINESS AND COMMUNITY LENDERS

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Chairwoman Velazquez, Ranking Member Graves and Members of the House Committee on Small Business, I am Robert R. Harris, I am the vice chairman of the American Institute of Certified Public Accountants and managing partner of the accounting firm Harris, Cotherman, Jones, Price & Associates in Vero Beach, Florida. We are a small business with 11 CPAs in the firm. On behalf of the American Institute of Certified Public Accountants, I am pleased to present testimony regarding the impact of financial regulatory restructuring on small businesses.

The American Institute of Certified Public Accountants (www.aicpa.org) is the national, professional association of CPAs. AICPA has more than 360,000 CPA members in business and industry, public practice, government, education, student affiliates and international associates. We set ethical standards and U.S. auditing standards for the profession for audits of private companies, non-profit organizations, federal, state and local governments. We develop and grade the Uniform CPA Examination.

As a result of the economic crisis, President Obama on June 17, 2009 spoke on 21st Century financial regulatory reform. He called for a new foundation that requires “strong, vibrant financial markets, operating under transparent, fairly-administered rules of the road that protect America’s consumers and our economy from the devastating breakdown that we’ve witnessed in recent years.” To accomplish his goals, the president stated that it will be necessary to seek a careful balance that will “allow our markets to promote innovation while discouraging abuse.”

The AICPA supports this goal and the approach. But we also believe it is critical to consider the plan’s effect on small business to ensure that it does not stifle the innovation, creativity and inventiveness of the American entrepreneur that has driven our economic engine. If it is to flourish, small business cannot be overburdened with either direct or indirect regulation. It needs to be able to act in the marketplace without burdens that unduly restrict its ability to operate, and it needs to have access to credit and other services without undue impediments. This is a difficult balance to reach, but one that we must arrive at if we are to grow our economy in a manner that has appropriate safeguards.

These safeguards are both restrictions on actions and protection of consumers. The latter has not generally been a focus of policymakers in conjunction with the health of the overall economy. The recent economic crisis has shown us, however, that when a significant volume of loans is inappropriately made to consumers, consumers are not the only ones who are harmed. As we have seen, this can begin a process that freezes our credit markets and the economy as a whole.

We would like to focus on the consumer protection aspects of the president’s plan and its effect on small business. The AICPA supports financial consumer protection. CPAs currently play a vital role in providing independent advice to their clients on their financial options and assisting them in tax planning and preparation of tax returns. CPAs also provide thousands of hours of pro bono financial literacy education to Americans.

There are approximately 43,900 small CPA firms in the United States, including 33,000 sole practitioners. These small firms have approximately 9 million small business clients of the 25 million small businesses (according to Small Business Administration data) in this country.

The work that CPAs perform for clients is based on each client's specific facts and circumstances, taking into account each client's needs. CPA services are unlike many other financial services in that they are not generic products that can be sold or performed broadly; rather, they are tailored individually.

H.R 3126, The Consumer Financial Protection Act (CFPA) of 2009, which was based on the administration's vision, goes beyond the regulation of the sale of products related to consumer credit and finance and would affect independent services provided in the context of professional relationships. This will negatively affect the ability of CPAs as small businesses to provide customary and usual services to their clients. It will also harm other small businesses because their ability to receive the services offered by CPAs will be adversely affected.

The definition of "financial activity" in the bill is so broad as to include many services that CPAs routinely provide to their clients in accordance with a very strict regulatory and oversight regime. The bill would result in redundant regulation of CPAs and certified public accounting firms that are already subject to appropriate and significant oversight by the IRS, Treasury, state boards of accountancy and professional and ethical standards for AICPA's members.

CPAs should not be exempt from CFPA regulation when acting outside of the provision of customary and usual services to their clients, and we support additional oversight of financial products, such as refund anticipation loans.

CPAs have a lifelong commitment and legal obligation to serve the public interest as efficiently and effectively as possible and are already heavily and sufficiently regulated. Subjecting CPAs and the tax, financial advice, financial education and other financial services that they and certified public accounting firms and their employees provide to millions of individuals and small businesses to the additional oversight proposed in CFPA will unnecessarily increase costs to consumers without adding corresponding benefits.

The public discussion of the need for the CFPA has focused on the way the current regulatory regime has gaps in supervision and enforcement with respect to lenders, especially sub-prime lenders. However, as currently written, the CFPA bill is much broader in scope. It encompasses any financial product or service to a consumer, including acting as a financial advisor. Acting as a financial advisor includes the preparation of tax returns, tax-planning advice, financial planning advice, general advice to small businesses and family businesses, and the provision of pro bono financial literacy education.

By making the reach of the CFPA so broad, the effectiveness of the agency will be naturally diluted. By having possibly millions of persons covered by the bill, the ability of the CFPA to adequately police each covered person is diminished. CPAs provide traditional financial services to clients and are strongly, effectively, and comprehensively regulated with regard to those services. The bill would subject these customary and usual CPA services to regulation by the CFPA.

The following is a description of the relevant provisions of H.R. 3126 and which CPA – client activities would be covered by the new agency.

The bill establishes the CFPA to regulate the provision of consumer financial products or services, enumerated consumer laws, and authorities transferred from other agencies. “Consumer financial product or service” (CFPS) is defined as any financial product or service used by a consumer primarily for personal, family, or household purposes.

A “covered person” is defined as any person who engages directly or indirectly in a financial activity, in connection with the provision of a CFPS; *or* any person who, in connection with the provision of a CFPS, provides a material service to, or processes a transaction on behalf of, a covered person. This is referred to as the “secondary trigger.”

The bill broadly defines “financial activity” to include acting as a financial advisor. Acting as a financial advisor includes providing financial and other related advisory services, providing educational courses and instructional materials to consumers on individual financial management matters, or providing credit counseling, tax planning or tax preparation services.

The cumulative effect of these definitions means that CPAs and certified public accounting firms could be subject to regulation by the CFPA with regard to the following services to an individual because they would fall within one or more of the subsections that define financial activity. This list is illustrative and not exhaustive:

- Tax preparation and other compliance services including estimated income tax payments and trust and estate tax services
- Tax planning
- Tax audit representation
- Estate and retirement planning
- Personal financial planning
- Asset protection and wealth preservation
- Public service efforts related to financial literacy
- Forensic accounting
- Valuations
- Financial advice for the elderly
- Helping small businesses and family businesses.

In addition, the bill authorizes the CFPA to issue regulations or guidelines regarding the offer of a standard “plain vanilla” CPFS. How this may impact CPA services is not clear until the CFPA becomes operational.

As noted above, the definition in the act of a covered person is expansive. It includes the “secondary trigger,” which exposes a service provider such as a CPA to the regulatory authority of the CFPA if the CPA provides “a material service” to a person who actually provides a CFPS to a consumer. CPAs provide a broad range of services to clients that are businesses rather than individuals. Any service provided to a financial services business would bring the CPAs within the regulatory scope of the CPFA. We believe that this is an unintended consequence. This goes far beyond a CPA or certified public accounting firm providing products to a consumer on behalf of a covered person. It intervenes in a relationship that is intended only to provide professional services to a covered company such as tax preparation and compliance services provided to a financial services company. Such services do not directly support the activities and products of the financial services company that would be regulated by the CFPA.

As I noted above, if a business client is providing a CFPS, the CPA and certified public accounting firm that provides any material service is automatically a covered person and is subject to the provisions of the legislation and to the authority of the CFPA.

This provision is even broader than its coverage of CPA services. For example, being a payroll service provider to a financial services business, or installing a new heating and air conditioning unit in a financial services company building are material services that would bring the payroll service and HVAC company under the authority of the CFPA.

CPAs support financial consumer protection and already play a vital role in advising Americans on their financial options and best interests. In addition, CPAs and certified public accounting firms are already comprehensively regulated in ways that fully protect the public. With regard to the regulation of CPAs, the goals of the CFPA are already being met under the existing regulatory structure. Subjecting CPAs to the CFPA would be an unnecessary, duplicative regulatory burden that would not provide any commensurate benefit to the public. Currently consumers can rely on comprehensive state regulation and licensure, IRS oversight through the Internal Revenue Code penalty structure and Circular 230, and the AICPA’s Code of Professional Conduct and accompanying standards.

State Regulation and Licensure

State boards of accountancy license, regulate, and enforce state licensure laws and regulations with regard to all CPAs. They require CPAs to act with integrity, objectivity, due care, competence, full disclosure of any conflicts of interest, client consent if a conflict exists, maintenance of the confidentiality of all client information unless the client consents to the disclosure, disclosure to the client of any commission or referral fees, and to serve the public interest when providing any of these financial services.

State boards of accountancy also license and regulate accounting firms. The firms and CPAs who own the firms are responsible for ensuring that all employees and owners of accounting firms who are not CPAs comply with the same ethics and other rules as are applicable to CPAs.

Generally, states require CPA licensure for a person who holds himself out to the public as a CPA and/or who:

- Offer or performs professional services that involve or require an audit, examination, or review of financial transactions and accounting records.
- Renders professional services to clients in matters relating to accounting procedure and to the recording, presentation, or certification of financial information or data.
- Prepares or signs, as the tax preparer, tax returns for clients.
- Prepares personal financial or investment plans or provides to clients products or services of others in implementation of personal financial or investment plans.
- Provides management or financial consulting services to clients.

Education and Experience required for licensure as a CPA:

- Minimum college education requirements must be met. The typical requirement is 150 credit hours of college education with at least a baccalaureate degree and a concentration in accounting.
- Minimum experience levels must be reached before the CPA certificate is awarded. Most states require at least one year of experience providing services that involve the use of accounting, attest, compilation, management advisory, financial advisory, tax or consulting skills, all of which must be achieved under the supervision of or verified by a CPA.

CPA Examination: Must pass the Uniform CPA Examination.

Continuing Education: States typically require a significant level of continuing professional education to be completed in order to maintain a CPA license.

Compliance with Professional Standards: States typically require adherence to standards that align closely with the requirements of the AICPA's Code of Professional Conduct (discussed below).

Disciplinary Authority: State Boards of Accountancy hold the authority to impose penalties including revocation and suspension of licenses and imposition of administrative penalties. State Codes of Ethics include provisions that mandate integrity, objectivity, due care, confidentiality, and independence when providing services to clients. Penalties may also include fines, which may be substantial.

1. IRS Oversight of federal tax return preparation and federal tax advice

There is sufficient authority in the Internal Revenue Code for the IRS to impose penalties on tax preparers and to assure high standards of tax practice. Specific tax preparation oversight includes:

- Monetary penalties against tax return preparers: A tax return preparer is one who prepares, or employs others to prepare, for compensation all or a substantial portion of a federal tax return for another. A person providing tax advice is included within the definition of return preparer when (i) the item on which advice is given is a substantial portion of the return, (ii) the events generating the item have already occurred at the time the advice is given, and (iii) the advice is directly related to determining the existence, characterization, or amount of an entry on a return or claim for refund. Various penalties can be asserted against tax return preparers, some of which are listed below:
 - Section 6694 (understatement of taxpayer's liability) – A penalty can generally be imposed against a return preparer who prepares a return or claim for refund with respect to which there is an understatement of liability when the error resulted from an unreasonable position or reckless or willful behavior by the preparer.
 - Section 6695 (other failures) – A penalty can be imposed against a tax return preparer for failing to perform certain administrative or recordkeeping tasks, including failing to furnish a copy of the return to the taxpayer, failing to sign the return, failing to furnish an identifying number, and failure to retain a copy or a list of the returns he or she prepared.
- Monetary penalties against others associated with tax reporting, including tax advisors:
 - Section 6700 (promoting abusive tax shelters) – A penalty can generally be imposed on anyone who organizes, or assists in organizing, an entity, plan, or arrangement when that person makes or furnishes a statement regarding tax effects of that entity, plan, or arrangement which that person knows or has reason to know is false or fraudulent.
 - Section 6701 (aiding or abetting in tax liability understatement) – A penalty can generally be imposed on anyone who aids or assists with a return, claim, or other document when knowing that it will be used in connection with a material matter under the internal revenue laws, in such a way as to understate the tax liability of another person.
- Action to enjoin tax return preparers and advisors:
 - Section 7407 (enjoin tax preparation) – A tax return preparer can be enjoined from engaging in improper behavior that interferes with the proper administration of the internal revenue laws, and can be enjoined from all further tax return preparation if the improper behavior has been continual and repeated.

- Section 7408 (enjoin conduct related to tax shelters and reportable transactions) – A tax advisor can be enjoined from engaging in conduct which is subject to certain penalties related to tax shelters or reportable transactions or in violation of Circular 230.
- Restrictions against disclosure or use of information furnished for the purpose of preparing a tax return:
 - Section 7216 (confidentiality and use of taxpayer information) –Persons or entities who prepare returns or provide services in connection with preparing returns (e.g. tax preparation software provider) are prohibited, without prior written consent of a taxpayer, to disclose or use for another purpose information that is received to prepare the return. Failure to adhere to the prohibition can result in a criminal misdemeanor conviction with a prison sentence of up to one year and/or a fine of up to \$1,000.
 - Section 6713 (improper disclosure of taxpayer information) – A civil penalty can also be imposed for the disclosure or use of tax return information without the prior written consent of an individual taxpayer, as described above.
- State taxing authority penalties.
- Treasury Department Circular NO. 230 – Section 330 of Title 31 authorizes the Department of Treasury to regulate those persons who practice before the IRS:
 - The administration of Circular 230 has been delegated to the IRS the Office of Professional Responsibility (OPR).
 - Circular 230 establishes a code of professional conduct for representing clients before the IRS, including rules for written tax advice.
 - The regulations authorize OPR to sanction, including through censure, suspension, disbarment, and monetary sanctions, those who violate designated provisions.
- Currently, the scope of Circular 230’s jurisdiction is limited to attorneys, CPAs, enrolled agents, enrolled actuaries and enrolled retirement plan agents. IRS Commissioner Shulman has promised by the end of the year to recommend a new regulatory regime to oversee all tax preparers.

2. AICPA Code of Conduct and bylaws

AICPA members are required to comply with the AICPA Code of Professional Conduct. The code requires independence, integrity and objectivity. It includes rules that require members to comply with professional standards and rules related to responsibilities to clients that require confidentiality and regulate contingent fees. The code also contains rules related to other responsibilities and practices that prohibit a member from performing an act discreditable to the profession; prohibit misleading, false or deceptive advertising; regulates commissions and referral fees and requires disclosure of such fees when permitted; and regulates the form of organization a member may use as well

as the use of CPA firm names. AICPA members are also required to comply with rules specifically directed at a tax practice.

In addition, the AICPA bylaws provides for disciplinary action without a hearing if a member is convicted of a crime punishable by more than one year in prison or is convicted of a crime related to various matters related to taxes. That bylaw section also provides for disciplinary action without a hearing if a member is disciplined by a state board of accountancy or by a regulatory authority that has been approved for such purpose by the Professional Ethics Executive Committee and AICPA Board of Directors.

The sanctions that may be imposed by the AICPA include admonishment, suspension or termination of membership. All such actions are published by the AICPA on its public website and in *The Wall Street Journal*.

In conclusion, the AICPA supports the concept of a CFPA and the goal of enhancing public protection for consumers of financial services, closing gaps in current regulations, and targeting those who use unscrupulous practices to prey on consumers. However, we do believe there are unintended and negative consequence of going beyond the selling of products related to consumer credit and finance and impacting services provided in the context of a CPA's professional advisory and client relationships.

The CPA profession is currently heavily and effectively regulated with regard to protecting consumers. Not exempting CPAs providing customary and usual services to their clients from the scope of this bill will drain necessary resources from the agency, as well as increasing costs to consumers without any corresponding benefit.

Thank you for the opportunity to testify on this important issue.