GEORGETOWN UNIVERSITY LAW CENTER

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Written Testimony of

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Committee on Oversight and Government Reform
Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs

"Who's Watching the Watchmen? Oversight of the Consumer Financial Protection Bureau"

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Witness Background Statement

Adam J. Levitin in an Associate Professor of Law at the Georgetown University Law Center, in Washington, D.C., where he teaches courses in bankruptcy, commercial law, consumer finance, contracts, and structured finance. He has previously served as the Robert Zinman Scholar in Residence at the American Bankruptcy Institute and as Special Counsel to the Congressional Oversight Panel supervising the Troubled Asset Relief Program (TARP). Before joining the Georgetown faculty, Professor Levitin practiced in the Business Finance & Restructuring Department of Weil, Gotshal & Manges, LLP in New York, and served as law clerk to the Honorable Jane R. Roth on the United States Court of Appeals for the Third Circuit.

Professor Levitin holds a J.D. from Harvard Law School, an M.Phil and an A.M. from Columbia University, and an A.B. from Harvard College, all with honors.

Professor Levitin has not received any Federal grants nor has he received any compensation in connection with his testimony, and is not testifying on behalf of any organization.

Mr. Chairman McHenry, Ranking Member Quigley, Members of the Subcommittee:

My name is Adam Levitin, and I am an Associate Professor of Law at the Georgetown University Law Center in Washington, D.C., where I teach courses consumer finance, contracts, and commercial law.

I am here today to urge the Subcommittee to not to smother the new Consumer Financial Protection Bureau (CFPB) before it becomes operational or to roll back parts of the Dodd-Frank Wall Street Reform and Consumer Protection Act. It is important that this Subcommittee continue vigorous oversight of the CFPB and other government agencies. But it is simply premature to start tinkering with the CFPB's oversight structure.

The CFPB has been designed to be more accountable than any other federal bank regulator. It has unprecedented (and possibly unconstitutional) checks on its authority. Until and unless actual problems with the CFPB's operations emerge, there is no reason to adjust its oversight structure. To date, the CFPB implementation team has won nothing but praise from its prospective regulatees.[1] In short, there is no evidence of an oversight problem that needs to be addressed.

I. WHY A CONSUMER FINANCIAL PROTECTION BUREAU?

In considering the oversight of the CFPB, it is important to recall the reasons for creating a CFPB in the first place.[2] A critical reason for the creation of the CFPB was the recognition that the current system of consumer financial protection does not work. In the current system, 17 separate statutes are enforced by ten federal agencies with other primary and often conflicting missions.[3] A chart at the end of this testimony (Figure 1) illustrates the current crazy quilt structure.

Some of these agencies have the ability to promulgate regulations, some also exercise supervisory authority over financial institutions, and some can only enforce existing regulations. Sometimes authority is over a class of institutions, and sometimes it is over a particular type of product. This situation makes industry-wide rule-making extremely difficult. For example, a rulemaking that would cover all credit cards necessitated coordination between the Federal Reserve Board, the Office of Thrift Supervision, and the National Credit Union Administration. The result has been that consumer protection gets pulled into regulatory turf wars and inaction dominated. Not surprisingly, consumer financial protection has frequently fallen between the cracks—it is an orphan mission.

Only one current agency, the Federal Trade Commission, even has consumer protection as its primary role. The FTC, however, has very limited jurisdiction in financial services—it cannot regulate federally-chartered or insured banks, thrifts, or credit unions. This leaves only bit-players in financial services within the FTC's regulatory ken. The result has been that because consumer protection has been everyone's responsibility, it has been no one's responsibility, and accountability and performance have suffered therewith.

Nowhere can this problem be seen more clearly than in the run up to the financial crisis. Many factors contributed to the crisis, but none more so than an orgy of unsound leverage in the

[1] Kate Davidson, *New CFPB Mortgage Disclosures Win Praise for Content and Process*, AM. BANKER, May 19, 2011.
[2] Adam J. Levitin, *The Consumer Financial Protection Agency*, Pew Financial Reform Project, Briefing Paper, No. 2, 2009.
[3] *Id*.

home mortgage market. Federal financial regulators had sufficient ability to limit the excesses of mortgage lending. The Federal Reserve Board had the power to restrict some of the most predatory products under the Home Owners Equity Protection Act, and the Office of Comptroller of the Currency and Office of Thrift Supervision had broad ability to rein in the most egregious bank and bank service company activities both in direct lending and in the warehouse lending and securitization that financed non-bank mortgage lenders. None of them acted. Indeed, even this past year, in the midst of the nation's worst foreclosure crisis ever, the Federal Reserve Board proposed a rule-making that would have gutted the Truth in Lending Act right of rescission, the strongest defense homeowners have against foreclosures.[4]

Had the CFPB existed in 2004-2008, it might well have saved this country from the housing bubble and subsequent collapse. Had the CFPB existed in 2004-2008, it might well have regulated the mortgage market to curtail predatory lending practices such as widespread use of payment-option ARMs and other unsustainable financial products and insisting on the very standards that Congress demanded in title XIV of the Dodd-Frank Act, including that mortgage lending be conditioned on the ability to repay, not the ability to refinance.

Congress rightly recognized the severe shortcomings of the current system of consumer financial protection when it enacted Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act and created the Bureau of Consumer Financial Protection. In so doing, it consolidated consumer financial protection into a single agency with a single director who can be held accountable for the agency's performance. Congress also gave the new agency sufficient funding and budgetary independence to ensure that consumer financial protection, like other parts of bank regulation, will not be held hostage to politics because it is too important to financial stability. The new agency has substantial powers to regulate consumer financial products, but it is also subject to even more substantial safeguards that make it more accountable than any other comparable federal agency.

II. THE CFPB IS MORE ACCOUNTABLE THAN ANY OTHER COMPARABLE FEDERAL AGENCY

Some members of Congress and indeed of this Subcommittee have expressed concern about the CFPB's accountability. This concern is misplaced. As detailed below, *the CFPB has more limitations on its power than any other comparable federal agency*.

Administrative Procedures Act Safeguards

First, CFPB is subject to many of the same restrictions as other federal agencies. Thus, the CFPB is subject to the Administrative Procedures Act and must follow notice-and-comment procedures for rulemaking and adjudication.[5] This means that the CFPB will be required to take account of and respond to a range of views and concerns on any regulatory issue on which it undertakes rule-making and that these rule-makings can be challenged in federal court.

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[4] Donna Borak, *Consumer Groups, Lawmakers Press Fed to Withdraw TILA Plan*, AM. BANKER, Jan. 6, 2011.

[5] P.L. 111-203, 124 Stat. 2025, § 1053, July 10, 2010, *codified at* 12 U.S.C. §5563 (making CFPB hearings and adjudications subject to the Administrative Procedures Act, 5 U.S.C. §§ 553-554).

OIRA Small Business Impact Reviews

Similarly, CFPB rulemaking is subject to Office of Information and Regulatory Affairs (OIRA) review for small business impact.[6] Only the Environmental Protection Agency (EPA) and Occupational Safety and Health Administration (OSHA) are subject to similar requirements.

Specific Statutory Limitations on CFPB Rulemaking

The CFPB is specifically limited by statute in its rule-making power. Title X of the Dodd-Frank Act requires that the CFPB make particular findings, including cost-benefit analysis, in order to exercise its authority to restrict or prohibit acts and practices as unfair, deceptive, or abusive.[7] Title X of the Dodd-Frank Act also prohibits the CFPB from imposing usury caps[8] and prohibits the CFPB from regulating non-financial businesses.[9]

The CFPB cannot mandate the offering of any financial product and it cannot force financial institutions to extend credit. At most, then, the CFPB can curtail the offering of certain financial products. But it bears emphasis that it cannot force financial institutions to offer any particular product. This is a critical point because it means that it is virtually impossible for CFPB actions to be a source of systemic risk.

Statutory Budget Cap

The CFPB is subject to a budgetary cap unlike any other federal bank regulator. Some members of Congress have expressed concern over the CFPB's budgetary independence. While most regulatory agencies are funded through the appropriations process, federal bank regulators are budgetarily independent, and these are the proper comparison for the CFPB. Viewed in this framework, the CFPB is actually less independent than other federal bank regulators. If the Office of Comptroller of the Currency or FDIC or OTS wishes to increase its budget, it can simply increase its assessments on banks without so much as a by-your-leave to Congress. Similarly, the Federal Reserve can simply print money. The CFPB, however, is restricted to a capped percentage of the Federal Reserve's operating budget.[10] This means that the CFPB actually has less budgetary independence than any other federal bank regulator.

The budgetary independence of bank regulators and the CFPB represents what prominent conservative legal scholar Richard Epstein has termed "second order rationality," namely steps people take to protect themselves against their own lack of self control. It is tempting for Congress to play politics with bank regulation or consumer protection. The independent funding of the bank regulators and CFPB is designed to be guard against that very possibility. The CFPB's budgetary independence recognizes that federal budgets are complex, negotiated deals that don't allow for proper airing of policy issues. In a federal budget, the CFPB's funding might be held hostage for issues that have nothing to do whatsoever with the CFPB like deficit reduction. One of the insights from the mortgage crisis is that consumer protection is simply too central to economic stability to subject to the politic of the appropriations process.

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[6] P.L. 111-203, 124 Stat. 2112, § 1100G; 5 U.S.C §§ 601-612; Executive Order 12866 of September 30, 1993.
[7] P.L. 111-203, 124 Stat. 2005-06, § 1031, July 10, 2010, *codified at* 12 U.S.C. § 5531
[8] P.L. 111-203, 124 Stat. 2003, § 1027(o), July 10, 2010, *codified at* 12 U.S.C. § 5517(o).
[9] P.L. 111-203, 124 Stat. 1995-98, § 1027(a), July 10, 2010, *codified at* 12 U.S.C. § 5517(a).
[10] P.L. 111-203, 124 Stat. 1975, § 1017(a)(2), July 10, 2010, *codified at* 12 U.S.C. § 5497.

GAO Review

The CFPB's budget is subject to an annual audit by the Government Accounting Office, with the results reported to Congress.[11]

Financial Stability Oversight Council Veto

CFPB rulemaking is subject to a veto by the Financial Stability Oversight Council. This is unique for federal bank regulators.[12] The OCC and OTS's preemption actions, for example, are not subject to review by other federal regulators, even though they were a key element in fostering the excesses in the housing market.[13] The FSOC veto provides an unusually strong check on CFPB rulemaking, not least because no CFPB director would wish to risk a FSOC rebuke.

Congressional Oversight

Finally, the CFPB is subject to oversight by Congress itself. The CFPB Director must make periodic reports to Congress and appear before Congressional committees.[14] This Subcommittee's actions, as well as those of the House Financial Services Committee, show that this oversight is serious, diligent, and exacting. Congressional oversight is perhaps the best guarantor that the CFPB will not abuse the authority delegated to it.

III. RESTRUCTURING THE CFPB FROM A UNITARY DIRECTORSHIP TO A FIVE-PERSON COMMISSION

One proposal for "reforming" the structure of the CFPB is H.R. 1121, the Responsible Consumer Financial Protection Regulations Act of 2011 (the "Bachus Bill"), which would replace the CFPB's unitary director with a five-person commission. While I understand the belief that a five-person commission might result in a more collegial rule-making discourse, there are several strong reasons to eschew such a structure, which will ultimately render the CFPB less effective and less accountable.

In structuring administrative agencies, Congress has variously elected between two models: the Founders' traditional model of a unitary agency director and the Progressive/New Deal era model of five-person commissions. The Founding Fathers' model for executive agencies featured a single principal officer appointed by the President with the advice and consent of the Senate. This model is reflected in the federal cabinet agencies. Thus, the Treasury is governed by a single Secretary, rather than by committee. The traditional unitary director model is also featured in the Office of Comptroller of the Currency, the Office of Thrift Supervision, the Internal Revenue Service, the Social Security Administration, Medicare, and the Environmental Protection Agency. This model enhances accountability and enables streamlined, decisive leadership and decision-making.

An alternative agency model arose during the Progressive era and was warmly embraced by New Deal liberals. That is the five-person commission. Thus, Progressive era agencies like

[11] P.L. 111-203, 124 Stat. 1976-77, § 1017(a)(5), July 10, 2010, *codified at* 12 U.S.C. § 5497.

[12] The only other federal regulatory agency that I have identified that is subject to an override by another agency is the Public Company Accounting Oversight Board (PCAOB), and as discussed *infra*, the Supreme Court found the PCAOB structure to be unconstitutional.

[13] *See* Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007) (upholding OCC preemption of state attempts to regulate subprime mortgage lenders); Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. ON REG. 143 (2009) (detailing OCC and OTS preemption of state mortgage regulations without substituting equivalent federal regulations).

[14] P.L. 111-203, 124 Stat. 1974, § 1016, July 10, 2010, *codified at* 12 U.S.C. § 5496.

the Federal Trade Commission and the classic New Deal agencies like the Securities and Exchange Commission, Federal Deposit Insurance Corporation, and National Labor Relations Board feature five-person commissions, and the National Credit Union Administration has a three-member board. The multi-member commission model is also featured by the Federal Reserve Board of Governors, the Federal Communications Commission, Federal Election Commission, Equal Employment Opportunity Commission, Federal Mine Safety and Health Review Commission, Commodities Futures Trading Commission, and Consumer Product Safety Commission. For some of these agencies there is a limit of the number of commissioners who may belong to any political party, while other agencies, like the Federal Reserve Board, have geographic appointment requirements.

The scholarly literature on agency design has not achieved any consensus as to the superior form of organization.[15] Instead, it recognizes that there are trade-offs involved. Thus, the five-person commission model encourages more collegial discourse and deal-making, but comes at the expense of accountability and efficiency. Moreover, it often provides little protection for the minority party on the commission; minority commissioners' views are typically disregarded and provide extremely limited protection against abuses by the majority.

In the case of the CFPB there are particularly salient reasons *not* to adopt a multi-member commission structure. For consumer financial protection, we should want a structural bias toward action rather than inaction. We have seen the result of financial regulators asleep at the switch. The price tag was hundreds of billions of dollars in taxpayer-funded bailouts of Wall Street. It is hard to believe that any member of Congress would want to replicate such a situation. Ensuring that the CFPB retain an organization structure than enables efficient, issue-driven decision-making requires maintaining the CFPB's current single director structure.

The CFPB's Unitary Directorship Fosters Efficient Decision-making and Avoids Gridlock and Horse-Trading

A single director is able to exercise decisive leadership in promulgating rules and enforcing them. A single director also does not have to engage with horse-trading with other commission members to wrangle up votes on an issue. This means that each issue will be decided on its own merits, rather than as part of a multi-issue deal involving commissioners' pet projects. Such a streamlined decision-making structure avoids the gridlock that often faces commissions. The five-person commission structure proposed by H.R. 1121, would induce inefficiency in government, as it permit rules to be promulgated only when a quorum (generally 3/5 commissioners) affirmatively votes for the rules.

The quorum requirement is a particular concern because of the frictions in the Senate confirmation process. Numerous administrative and judicial positions remain unfilled today because of the difficulty at achieving confirmation of nominees given the Senate's internal rules that effectively create supermajority requirements not found in the Constitution. The effect has been not only to block many nominations, but also to chill potential nominations. The Senate's confirmation process has become so dysfunctional that a bipartisan group of Senators (including Majority Leader Reid, Minority Leader McConnell, and Senators Schumer, Alexander, Collins,

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[15] *See, e.g.,* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2011). The last time the federal government formally examined the question of agency structure, in 1971 during the Nixon Administration, the President's Advisory Council on Executive Organization (known as the "Ash Council," after its Chairman Roy L. Ash) issued as *Report on Selected Independent Regulatory Agencies*, Feb. 11, 1971, that recommended replacing multi-member commissions with single-executive agencies.

and Lieberman) has introduced legislation, S. 679, which would reduce or streamline the number of executive branch positions requiring Senate confirmation by one-third.

This state of affairs presents the most serious threat to the effectiveness of the modern administrative state—federal agencies have had to operate without directors or chairmen or even quorums because of the increased frictions in the confirmation process. As a result, these agencies are less effective or simply ineffective at ensuring that the law is carried out. Thus, in recent years, the Federal Trade Commission, the Consumer Product Safety Commission, and the National Labor Relations Board have all gone through spells where they have been unable to operate because a quorum did not exist.

Simple math says that five confirmations are more difficult to achieve than a single confirmation (even if multiple appointments sets up opportunities to make political deals on appointments). Put differently, adopting a five-person commission instead of a unitary directorship is likely to hobble the CFPB. While I would hope that is not the motivation for such a proposal, it could well be the consequence.

A Five-Person Commission Would Create Unnecessary Big Government Bloat and Waste

Changing from a unitary directorship to a 5-person commission would also contribute to big government bloat. There is no reason to pay five people top-of-the-executive-branch pay scale salaries and benefits for work that could be done by one person, not to mention the personal staff, office space, and other accommodations for five commissioners. A five-person commission is simply wasteful and should not be pursued, particularly when we are facing a federal budget crisis.

A Five-Person Commission Would Reduce CFPB Accountability

A single CFPB director is clearly accountable to both Congress and the American people. A CFPB Director who oversteps his authority or who fails to do enough to protect consumers cannot deflect blame for his actions. A gang of commissioners, on the other hand, can always avoid responsibility by pointing to the other four people who make up the commission. If Congress wants to maximize CFPB's accountability, responsiveness, efficiency, and effectiveness, the unitary directorship should be retained.

The CFPB's Unitary Directorship Is Necessary as a Counterweight to the OCC

A major reason for the creation of CFPB was to create a counterweight to the strength of the federal bank regulators. The primary mission of federal bank regulators is to ensure the safety-and-soundness of their regulatory charges. ***Safety and soundness means, first and foremost, profitability.*** It is axiomatic that a financial institution that is not profitable cannot be safe and sound. Consumer financial protection, however, is often inconsistent with bank profitability. Financial institutions only engage in unfair, deceptive and abusive acts and practices because they are profitable; they are not done for spite or Sadism. Predatory mortgage lending, for example, exists only because it is profitable.

Federal bank regulators have repeatedly shown that they will favor bank profitability over consumer protection. Thus, a major impetus for the creation of the CFPB was to separate consumer protection regulation from safety-and-soundness regulation so that consumer would not be subordinated to bank profitability.

To do so effectively, however, it is necessary to give the CFPB the same tool-kit as the most powerful of the federal bank regulators, the Office of the Comptroller of the Currency (OCC). The OCC has a unitary director, an independent source of funding, and substantial statutory independence from Treasury. This allows the OCC to act quickly and decisively and without undue quotidian political pressure and without the politicking and horse-trading that goes on with multi-member commissions. The OCC has proven itself to be a capable and aggressive advocate for the interests of national banks, even at the expense of the national interest.

The CFPB is deliberately designed to be a parallel and counterweight to the OCC to allow consumer protection concerns to be given equal weighting to bank profitability (also known as safety-and-soundness) and avoid the problems that result when consumer protection is subordinated to bank profitability. This requires having a unitary directorate, rather than a multi-member commission.

If Subcommittee is convinced, however, that a five-person commission is the proper structure for the CFPB, I would urge the Subcommittee to also adopt a five-person commission structure for the Office of Comptroller of the Currency, which would then be the sole federal financial regulator with a unitary directorship. What is good enough for consumers should be good enough for banks.

I would urge the Subcommittee against adopting a five-person commission model for the CFPB. The CFPB has not yet had a chance to get up and running and there is no reason to think that the unitary directorship is a particular problem; the CFPB should be given a chance to prove itself before it is reconfigured by Congress. Given the multiple safeguards that already exist to ensure that the CFPB does not act arbitrarily and capriciously action, it becomes apparent that changing the CFPB from a unitary directorship to a five-member panel would add little. Instead, switching to a five-member panel would tilt the balance at the agency to gridlock and inaction, would add unnecessary big government bloat, and would reduce accountability.

IV. FINANCIAL STABILITY OVERSIGHT COUNCIL REVIEW AUTHORITY

A second area of proposed "reform" of the CFPB would be to lower the thresholds for the Financial Stability Oversight Council veto. H.R. 1315, the Consumer Financial Protection Safety and Soundness Improvement Act, (the "Duffy Bill"), would amend section 1023 of the Dodd-Frank Act[16] to reduce the thresholds for a Financial Stability Oversight Council veto of CFPB rulemaking. It would do so in two ways.

First, it would reduce the necessary vote from a supermajority of 2/3s of the FSOC members (including the CFPB Director), that is 7 out of 10 votes if all members were present, to a simple majority of FSOC members, not including the CFPB, that is 5 of 9 votes. It would also reduce the necessary finding from the CFPB "regulation or provision would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk" to a less exacting finding merely that the CFPB rulemaking is "inconsistent with the safe and sound operations of United States financial institutions." Finally, by deleting section 1023(c)(5) of the Dodd-Frank Act, the bill would require the FSOC to take a vote if any FSOC member raised an objection to a CFPB rulemaking.

[16] P.L. 111-203, 124 Stat. 1985, § 1023, July 10, 2010, *codified at* 12 U.S.C. § 5513.

The FSOC veto power provides an unnecessary and possibly unconstitutional check on the CFPB and should be eliminated, rather than made more stringent.[17] Irrespective, *the Duffy Bill's proposed finding for an FSOC veto would render virtually every CFPB rulemaking in doubt*. Indeed, under the Duffy Bill's proposed standard—whether the CFPB rulemaking is "inconsistent with the safe and sound operations of United States financial institutions"—it would be impossible for the CFPB to implement several recent pieces of Congressional legislation, including Title XIV of the Dodd-Frank Act, the Mortgage Reform and Anti-Predatory Lending Act.[18]

As noted, above, safety and soundness means, at core, profitability. To the extent that a proposed CFPB regulation would reduce the profitability of a financial institution, it would reduce that institution's safety and soundness. Thus, any CFPB regulation, even if it merely increased compliance costs, would be "inconsistent with the safe and sound operations" of a financial institution.

While bank regulators have argued that consumer protection goes hand in hand with safety and soundness because it is unsafe for a bank to systematically exploit its customers or engage in unfair and deceptive practices, the run up to the financial crisis provides clear evidence that federal bank regulators were unwilling to put the brakes on unfair and deceptive mortgage lending. Similarly, the run up to the Credit CARD Act of 2009 shows that federal regulators were unwilling to act on unfair and deceptive credit card acts and practices until Congress itself started to move. Only then did the Federal Reserve, OTS, and NCUA hustle to amend their UDAP regulations.

To understand just how overbroad the Duffy Bill's proposed rule is, consider, for example, consider if there had been a CFPB in 2005, and it had proposed a rule that would have severely restricted the underwriting of payment-option adjustable-rate mortgages (so-called pick-a-pay mortgages) to borrowers who have demonstrated an ability to repay. Such a rulemaking would have put an end to the "Countrywide special," that was the hallmark of Angelo Mozillo and Countrywide, the nation's largest mortgage lender.

Such a restriction would have significantly curtailed Countrywide's mortgage lending business, and would surely have resulted in the OCC or OTS demanding an FSOC veto. Yet such a move could hardly be called radical. Congress itself passed just such a requirement in section 1411 of the Dodd-Frank Act,[19] and a parallel requirement for credit cards in section 109 of the Credit C.A.R.D. Act of 2009.[20]

Indeed, we actually have an example from 2008 of a bank regulator challenging a proposed consumer financial protection regulation on safety-and-soundness grounds. In August 2008, Comptroller of the Currency John C. Dugan wrote to the Federal Reserve Board to urge it to insert two significant exceptions to the proposed Regulation AA (unfair and deceptive acts and practices) credit card rule that would limit the ability of card issuers to reprice or colloquially

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[17] I would urge that if Congress adopts the five-person commission model for the CFPB per the Bachus Bill, it should eliminate the FSOC veto over CFPB actions

[18] P.L. 111-203, 124 Stat. 2137-2212, §§ 1401-1498, July 10, 2010.

[19] P.L. 111-203, 124 Stat. 2142, § 1411, July 10, 2010, *codified at* 15 U.S.C. § 1693c ("no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments.").

[20] P.L. 111-24, 123 Stat. 1743, § 109, May 22, 2009, *codified at* 15 U.S.C. § 1665e ("A card issuer may not open any credit card account for any consumer under an open end consumer credit plan, or increase any credit limit applicable to such account, unless the card issuer considers the ability of the consumer to make the required payments under the terms of such account.").

"rate jack" cardholders.[21] Duggan wrote that the restrictions "raise safety and soundness concerns" because they limited the ability of issuers to re-price their loans if issuers determined that the risk profile of the customer had worsened.[22] If the CFPB had proposed such a rule, the OCC would surely have challenged it before the FSOC as "inconsistent with the safe and sound operations of United States financial institutions." Yet, Congress itself passed an even tougher restriction on credit card repricing less than a year later.[23]

Under the Duffy Bill's standard, several laws passed by Congress in recent years, such as the Credit C.A.R.D. Act and the Mortgage Reform and Anti-Predatory Lending Act would themselves be unenforceable by regulation because the laws themselves might reduce bank safety-and-soundness (i.e., profitability), so any faithful rule-making would have to as well. The effect of the Duffy Bill would be to eviscerate several recent, popular, consumer financial protection statutes.

The Consumer Financial Protection Bureau is a new agency tasked with protecting the financial security of American families, ensuring that they can get the information necessary to make responsible, informed financial choices. Congress created the Bureau to ensure that American families can trust the financial products they use to help them achieve their goals, rather than ensnare them with tricks and traps that lead to financial distress. The Duffy Bill's proposed expansion of the FSOC veto would place bank profits ahead of the well-being of American families, and would put us on a return course to the financial crisis of 2008.

The FSOC Veto Is Possibly Unconstitutional

I would also note that the FSOC veto under section 1023 of the Dodd-Frank Act is already of dubious constitutionality. On June 28, 2010, a fortnight before the enactment of the Dodd-Frank Act, the Supreme Court handed down its judgment in a case captioned *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[24] In this case, the Supreme Court held that it was an unconstitutional violation of the separation of powers to restrict the President in his ability to "remove a [principal] officer of the United States, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States".[25] This ruling raises the question of whether by giving the FSOC veto power over CFPB rulemaking, Congress has impermissibly restricted the power of the President to "take Care that the Laws be faithfully executed" through his appointee as Director of the Bureau of Consumer Financial Protection. It also raises the concern that the CFPB is not truly an independent agency as it would be subject to a veto exercised in part by cabinet agencies.

The existing FSOC veto power is already constitutionally suspect, and proposals such as the Duffy Bill, which would make exercise of the veto authority mandatory and on a hair-trigger basis, would only increase the likelihood that section 1023 of the Dodd-Frank Act offends the Constitution. I would strongly urge the House to request opinion of counsel on the FSOC veto's constitutionality before taking any action in regard to it.

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[21] Letter from Comptroller of the Currency John C. Dugan to Jennifer Johnson, Secretary, Board of Governors of the Federal Reserve System, Re: Docket Number R-1314, August 18, 2008.

[22] *Id.*

[23] P.L. 111-24, 123 Stat. 1736-37, § 101, May 22, 2009, *codified at* 15 U.S.C. § 1666i-1.

[24] 130 S. Ct. 3138 (2010).

[25] *Id.* at 3147.

V. The Role of the CFPB in the Mortgage Servicing Fraud Investigation

Some members of Congress, including from this Committee, have expressed concern over the role of the CFPB in the federal and state investigations into mortgage servicing fraud and settlement discussions.[26] I am not in a position to discuss the specific role of the CFPB in those discussions, but note that the mortgage servicing fraud investigations involves potentially the largest consumer financial fraud in US history.

The specific concerns expressed—namely that the CFPB and Professor Warren did something improper by "doing more than provide advice" but instead by "recommend[ing] the goals and provid[ing] a detailed framework for the structure of the settlement"—are simply baffling, as there is no plausible *legal* impropriety with CFPB involvement. Instead, the only plausible objection to CFPB involvement with the servicing fraud settlement discussions is a *political* objection to having a strong and knowledgeable consumer advocate involved in the settlement talks.

As an initial matter, it is important to note that even if one believes that there is a problem with the CFPB having provided recommendations to other federal agencies regarding the mortgage servicing fraud settlement discussions, this is not a problem that could create on-going oversight concern. As of the CFPB's effective date of July 21, 2011, the CFPB will be the primary government agency for dealing with mortgage servicing, irrespective of whether it has a director.

At most, then the issue deals with CFPB activity prior to July 21, 2011. Prior to the CFPB's effective date, it is beyond peradventure that the CFPB lacks any authority to settle claims on behalf of the US government, and no one has suggested that the CFPB transition team has claimed such authority. So any activity by the CFPB must necessarily fall short of being in any way binding and therefore could not be an affront to Constitutional limits on delegation or create an oversight problem.

Concerns over advising versus recommending express a distinction without a difference. To advise means to make suggestions and proposals. If one retains an expert for advice, one typically expects suggestions and proposals. As it happens, it is hardly evident that the CFPB even provided "a detailed framework for the structure of the settlement." The only public document regarding the settlement produced by the CFPB, a 7-page powerpoint presentation, is hardly a "detailed framework." Instead, it is an analysis of the extent of unjust enrichment of several large banks as a result of mortgage servicing fraud—calculated at *$24 billion*, making this the largest consumer fraud in history—and a barebones analysis of the cost of various levels of mortgage principal reduction. It has nothing to do with the detailed servicing standards proposed by the attorneys general, and does not make any recommendations.

Thus, the issue is solely whether it was improper for members of the CFPB, including political appointees such as Professor Elizabeth Warren, Assistant to the President and Special Advisor to the Treasury Secretary, to be involved in the settlement talks. The clear and undeniable answer to this question is no. There is no Constitutional limit whatsoever on the executive branch's ability to seek advice from individuals who have not been confirmed by the

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[26] Letter from Rep. Spencer Bachus & Rep. Shelly Moore Capito to Prof. Elizabeth Warren, dated Mar. 30, 2011, *at* http://financialservices.house.gov/media/pdf/033011warrenltr.pdf; Letter from Rep. Shelley Moore Capito, Rep. Scott Garrett, Rep. Patrick McHenry, & Rep. Randy Neugebauer to Sec. Timothy Geithner, May 6, 2011.

Senate. The executive branch routinely hires experts and consultants for all sorts of matters, and the entire K Street lobbying industry does nothing if not providing advice and suggestions.

Unconfirmed political appointees, as well as common citizens, have provided members of the executive branch with advice from the days of the Founding Fathers to present. Moreover, the President's Constitutional recess appointments power means that the advice and consent of the Senate cannot be relied upon as a check to limit whom the executive branch involves in policy discussions. As long as political appointees do not have a personal conflict of interest at stake and are not engaged in electioneering—and neither has been alleged here—there is no plausible basis for an objection to Professor Warren's involvement in a servicing fraud settlement. Instead, objections to Professor Warren's involvement are nothing more than cover for objections to the substantive positions attributed to Professor Warren.

Indeed, it is worth noting that this is not the usual case of a political appointee providing political advice about a policy decision. *Instead, the question here is whether there is something inappropriate about the country's leading consumer finance law expert advising the Treasury Secretary about mortgage servicing and foreclosures.*

It's hard to think of a more appropriate person to have in the room for servicing fraud settlement discussions. Professor Warren has more expertise about mortgage servicing than virtually any federal employee. No federal bank regulator—OCC, OTS, FDIC, Federal Reserve—has particular expertise in servicing issues, and HUD's expertise is limited to FHA/GNMA regulations. As Chair of the Congressional Oversight Panel, Professor Warren led the production of three substantial and groundbreaking reports on mortgage foreclosures and servicing issues. Moreover, as the CFPB will be picking up responsibility for regulating the entire residential servicing industry going forward, it only makes sense for the head of the CFPB transition team to be involved in the talks.

Unfortunately, following Congressional complaints about the CFPB involvement in the servicing talks, the CFPB was excluded from the talks, and the OCC and Federal Reserve entered into what can charitably be called Potemkin settlements with the major servicers. The result is that rather than resolving the problems in the servicing industry—which are presently the leading source of systemic risk for the US financial system—we have a problem that is continuing to fester, as the attorneys general, HUD, and private litigants continue to pursue the issue. This episode represents nothing less than political interference with bank safety-and-soundness regulation, and I worry that it will rebound to the detriment of the financial system and economy as a whole, much like earlier deregulatory episodes.

CONCLUSION

The Consumer Financial Protection Bureau has not even had an opportunity to begin to exercise its regulatory authority. It is simply premature to consider reforms to its oversight, as it is not yet clear whether any changes to the oversight structure are needed, much less what those changes are. Let's give the CFPB a chance to prove itself and not return to the pre-2008 period when the lack of effective consumer financial protection facilitated the destructive housing bubble and financial collapse from which we have still not recovered.

Figure 1. The Current Consumer Financial Protection Regulatory Structure vs. the Regulatory Structure with the Consumer Financial Protection Bureau.[27]