

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**MORGAN DREXEN, INC. and
KIMBERLY A. PISINSKI,**

Plaintiff,

v.

**CONSUMER FINANCIAL
PROTECTION BUREAU,**

Defendant.

Civil Action No. 13-01112 (CKK)

**EXPEDITED BRIEFING
SCHEDULE**

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

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Dated: August 7, 2013

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PRELIMINARY STATEMENT

This is a constitutional challenge to Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), 12 U.S.C. §§ 5481 *et seq.*, which created Defendant Consumer Financial Protection Bureau ("CFPB"). Plaintiff Morgan Drexen, Inc. ("Morgan Drexen"), which provides "back office" support for attorneys such as Plaintiff Kimberly Pisinski ("Pisinski"), has been the target of a burdensome CFPB investigation and an imminent litigation threat, where CFPB has demanded the production of documents – including privileged attorney-client communications and confidential personal material held by Morgan Drexen for lawyers like Pisinski. Plaintiffs challenge the structure of CFPB as violating the Constitution's separation of powers given: (1) the extraordinary scope of power delegated to CFPB; and (2) the lack of political oversight and necessary checks and balances.

As set forth in Plaintiffs' Statement of Undisputed Material Facts (hereinafter, "SF") the Dodd-Frank Act created CFPB as a super agency with broad discretion – consolidating rulemaking, supervision, and enforcement authority, with market wide coverage, over both banks and nonbanks that provide consumer financial products and services. Title X transferred enforcement authority from seven different agencies (each with appropriate checks and balances) to CFPB, and empowered CFPB to remedy any practice that it finds to be unfair, deceptive, or abusive (with "abusive" being a "puzzle" and "new term" that cannot be defined according to CFPB's Director, SF ¶ 39). CFPB has authority over banks, thrift, savings and loans, credit unions, and virtually every company that extends credit to consumers or tries to collect or settle consumer debt. In a very real sense, CFPB's authority extends into virtually every boardroom and living room in America.

Despite granting CFPB significant power, however, Congress withheld typical oversight, especially the President's power to remove the CFPB Director at-will, a built-in multimember

commission (which has been the hallmark of independent agencies for more than 125 years), and political accountability through the appropriations process. Congress did this after hearing testimony about immunizing CFPB from political influence. SF ¶ 12. But Congress went too far. The Constitution demands accountability for government entities that wield such extraordinary government power to protect against "tyranny." *Loving v. United States*, 517 U.S. 748, 756 (1996).

CFPB's combination of power and insulation from political accountability is unprecedented. Scholars, Members of Congress, the U.S. Chamber of Commerce, and regulated entities have identified and discussed serious constitutional issues emanating from CFPB's structural design (SF ¶¶ 132-37), but no court has passed on these questions. Moreover, the harm that flows from CFPB's unconstitutional structure is not theoretical: Congress confirmed CFPB's first Director weeks ago yet CFPB is already pushing beyond its statutory mandate and seeking to regulate lawyers engaged in the practice of law (SF ¶¶ 62-103), a state function, and aggregating personal financial information (SF ¶ 138-49), without appropriately balancing privacy and other interests. CFPB's actions have triggered a GAO investigation into its data mining practices (SF ¶ 143). For the reasons stated herein, the Court should declare Title X unconstitutional.

**SUMMARY OF PROCEDURAL
BACKGROUND AND ACCELERATED SCHEDULE**

This case was commenced on July 22, 2013 when Plaintiffs filed their Complaint and Motion for Preliminary Injunction. Plaintiffs requested expedited proceedings and submitted declarations demonstrating irreparable harm, including, but not limited to, facts showing that CFPB's investigation and demands were creating significant impairment to Morgan Drexen's and Pisinski's business and reputation, and that CFPB had threatened imminent litigation. The Court

held telephonic hearings on July 24, 2013 and July 25, 2013 "during which Plaintiffs consented to withdraw their . . . motion for preliminary injunction and both parties consented to instead proceed with an expedited briefing on the merits of Plaintiffs' Complaint." [Docket No. 8]. "[I]n order to administer this civil action in a manner fair to the litigants and consistent with the parties' interest in completing this litigation in the shortest possible time and at the least possible cost," the court ordered an "expedited procedure on the merits." *Id.* In accordance with the Court's order, Plaintiffs are filing herewith a Notice of Withdrawal of their Motion for Preliminary Injunction and substituting this Motion for Summary Judgment.¹

ARGUMENT

LEGAL STANDARD

Summary judgment is warranted when the pleadings and any discovery materials and declarations demonstrate that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). Facts are "material" if their establishment "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Although the Court must view the facts and the inferences from those facts in the light most favorable to the nonmoving party, the party opposing summary judgment may not rely solely on allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999).

¹ The expedited schedule provides as follows: "(a) On or before August 7, 2013, Plaintiffs shall file their motion for summary judgment; (b) On or before August 27, 2013, Defendant shall file its opposition to Plaintiffs' motion for summary judgment and cross-motion to dismiss and/or for summary judgment; (c) On or before September 13, 2013, Plaintiffs shall file their reply in further support of their motion for summary judgment and opposition to Defendant's cross-motion; and (d) On or before September 25, 2013, Defendant[] shall file its reply in further support of its cross-motion to dismiss and/or for summary judgment." [Docket No. 8].

THE COURT HAS AUTHORITY TO CONSIDER THIS MATTER

A. PLAINTIFFS HAVE STANDING

"[T]he gist of the question of standing" is, "at bottom," whether plaintiffs have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness" that "sharpens" the presentation of issues to the Court. *Baker v. Carr*, 369 U.S. 186, 204 (1962); *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007). To assure such "adverseness," a plaintiff must demonstrate that "[1] it has suffered a concrete and particularized injury that is either actual or imminent, [2] that the injury is fairly traceable to the defendant, and [3] that it is likely that a favorable decision will redress that injury." *Massachusetts*, 549 U.S. at 517 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Even the "threat of relatively small financial injury [is] sufficient to confer Article III standing." *Raytheon Co. v. Ashborn Agencies, Ltd.*, 372 F.3d 451, 454 (D.C. Cir. 2004) (describing holding of *Franchise Tax Bd. of Ca. v. Alcan Aluminum Ltd.*, 493 U.S. 331 (1990)). For each claim, if constitutional and prudential standing can be shown for at least one plaintiff, the court need not consider the standing of the other plaintiffs to raise the claim." *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996).

Here, Plaintiffs have standing for several independent reasons as set forth below.

1. Morgan Drexen Is Subject to Enforcement

Morgan Drexen has standing to challenge the constitutionality of CFPB because it is directly subject to enforcement, "the paradigm of direct governmental authority." *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 824 (D.C. Cir. 1993)). In *Free Enter. Fund v. Pub. Co. Acct'ing Oversight Bd.*, 130 S. Ct. 3138 (2010), the Supreme Court held that the petitioners were "entitled to declaratory relief sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable

to the Executive." *See Free Enter. Fund*, 130 S. Ct. at 3150-51 (citing *Bowsher v. Synar*, 478 U.S. 714, 727, n.5 (1986)) for the proposition that a separation of powers violation may create a "here-and-now" injury that can be remedied by a court) (internal quotation marks omitted)).

Here, CFPB has purported to subject Morgan Drexen to its direct authority, including through the issuance of Civil Investigative Demands ("CIDs"). SF at ¶¶ 64, 75. Morgan Drexen has incurred significant costs in complying with the CIDs, has produced over 17,000 pages of documents to CFPB (SF ¶ 74) along with four of its officers for depositions (SF ¶ 77), and incurred significant attorneys' fees. SF ¶ 78. Like the petitioners in *Free Enterprise Fund*, Morgan Drexen is entitled to ensure that the investigation to which it has been subject is conducted by a constitutional agency, and Morgan Drexen is suffering a "here-and-now" injury because CFPB violates the Constitution's separation of powers.

CFPB's counsel has suggested that its CIDs are paper tigers that are not self-enforcing. *See* July 24, 2013 Hearing Tr., at 5 ("the nature of those demands is that they are not self-enforcing. So, the defendant -- or the plaintiff, really, doesn't have an obligation to comply with them under the law"); July 25, 2013 Hrg. Tr. at 6-7 (the CIDs are "not self-enforcing, so if we -- they don't actually have an obligation to do anything until we receive them -- an order from a District Court to enforce those investigative demands."). However, in contrast to these statements, the CIDs use mandatory language, referring to: "demand"; "[a]ction [r]equired"; "[a] penalty imposed by law for failure to comply"; and "must." SF ¶¶ 64-67. Instruction G to the CID states that any petition to modify the demand "must be filed . . . within twenty calendar days after service of the CID . . ." SF ¶ 68. In *Sackett v. EPA*, 132 S. Ct. 1367 (2012), the Environmental Protection Agency ("EPA") issued landowners a "compliance order" directing them to undertake certain actions and provide "access to all records and documentation related to

conditions at the Site." *Sackett* at 1371. The plaintiffs sued for declaratory and injunctive relief. *Id.* The EPA argued that "compliance orders are not self-executing, but must be enforced by the agency in a plenary judicial action" and that the compliance order was a "step in the deliberative process, rather than as a coercive sanction that itself must be subject to judicial review." *Id.* at 1373. The Supreme Court disagreed: "The mere possibility that an agency might reconsider in light of 'informal discussion' does not suffice" to defeat jurisdiction. *Id.* at 1372. *See also Free Enter. Fund*, 130 S. Ct. at 3151 ("We normally do not require plaintiffs to bet the farm by taking the violative action before testing the validity of the law") (citations and quotations omitted).

2. Morgan Drexen Faces an Immediate Threat of Further Injury

The Supreme Court has recognized that "certainly impending" injury would "constitute injury in fact" for standing purposes. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (rejecting challenge to a surveillance statute where the plaintiffs could not prove that they were the target of surveillance); *see also Dearth v. Holder*, 641 F.3d 499, 401 (D.C. Cir. 2011) (holding that where a plaintiff is seeking declaratory or injunctive relief he "must show that he is suffering an ongoing injury or faces an immediate threat of injury"). Here, CFPB has taken the position that Morgan Drexen is acting illegally. SF ¶¶ 89-93 (Shaheen Decl. ¶ 43). CFPB sent Morgan Drexen a "Notice and Opportunity to Respond and Advise (NORA)" stating that "the staff expects to allege that [Morgan Drexen] violated Sections 1031 and 1036 of the Consumer Financial Protection Act, 12 U.S.C. § 5536 and the Telemarketing Sales Rule, 16 CFR § 310." SF ¶ 92 (Shaheen Decl. Ex. 32). CFPB also threatened "injunctive and monetary relief." *Id.* CFPB's NORA letter constitutes the type "certainly impending" threat that gives Morgan Drexen standing to challenge its constitutionality.

3. Morgan Drexen Suffered Concrete and Presently-Existing Harm When CFPB Sent CIDs to Morgan Drexen's Business Partners

CFPB also caused Morgan Drexen concrete and presently-existing harm by sending CIDs to Morgan Drexen's business partners. CFPB's actions caused Morgan Drexen to lose its credit facilities (SF ¶¶ 79-80) and impacted its ability to obtain reasonable financing. SF ¶ 81. Morgan Drexen now pays 22% interest where, before the CID to US Capital, Morgan Drexen had financing at 4.5% (SF ¶ 82). CFPB also sent a CID to Morgan Drexen's attorney business partners and its marketing services business partner, which stigmatized Morgan Drexen and harmed its reputation. SF ¶¶ 83-87. The total effect of CFPB's actions in the aggregate has caused significant and concrete harm. *See Pyramid Lake Paiute Tribe of Indians v. Nevada, Dept. of Wildlife*, No. 11-16470, 2013 WL 3889091, *4 n.11 (9th Cir. 2013) (citing case law that "the total effect on the Tribe's water rights is ultimately the sum of the individual parts" and likening agency action to "death by a thousand cuts").

4. CFPB Demanded Privileged Information

CFPB has also substantially burdened Morgan Drexen's business by demanding that it produce documents that are protected by the attorney-client privilege. SF ¶¶ 85-86. These documents include the private notes by attorneys of their communications with clients. SF ¶ 69. Morgan Drexen maintains these documents for its business partners (attorneys like Pisinski), who expect that their client's confidences and privileges will be honored. SF ¶ 86. CFPB's demands present Morgan Drexen with a Hobson's choice: either produce the confidential data (thus violating Morgan Drexen's ethical obligations and harming its client relationships) or refuse to produce the documents and face CFPB retribution. Plaintiffs have standing to challenge this demand.

B. PLAINTIFFS' CLAIMS ARE RIPE

Courts consider two factors in determining ripeness: "[1] the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration." *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977)). Here, the Court "assume[s] that issue is suitable for judicial review" because Plaintiffs have raised "a purely legal question." *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 540 (D.C. Cir. 1999). There is "hardship to the parties" for the same reason that Plaintiffs have demonstrated standing.

Plaintiffs need not exhaust administrative remedies before bringing this challenge. *See Free Enter. Fund v. Pub. Co. Acct'ing Oversight Bd.*, 537 F.3d 667, 670-71 (D.C. Cir. 2008), *aff'd in relevant part*, 130 S. Ct. 3138, 3150-51 (2010) (sustaining a constitutional challenge to an agency's implementing statute without first requiring the plaintiff to exhaust its administrative remedies); *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986) (holding that a separation of powers violation may create a "here-and-now" injury that can be remedied by a court prior to a plaintiff exhausting its administrative remedies); *Hettinga v. United States*, 560 F.3d 498, 504 (D.C. Cir. 2009) ("Prudential exhaustion is not required where . . . [the agency] lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute"); *Andrade v. Lauer*, 729 F.2d 1475, 1490-93 (D.C. Cir. 1984) (reversing dismissal and holding that plaintiffs could bring their constitutional claim in federal court without first exhausting administrative remedies).

Unlike a plaintiff who challenges a typical enforcement proceeding, Plaintiffs' constitutional challenge relates to the foundational authority of CFPB as an institution – a question that has been raised but not passed upon by any court. Such a challenge need not be

pursued through an administrative regime. *See Gen. Elec. Co. v. Environmental Protection Agency*, 360 F.3d 188, 191-92 (D.C. Cir. 2004) (holding that GE's facial due process challenge to the CERCLA statute was not the type of pre-enforcement action that Congress sought to preclude) (citing *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974)) (distinguishing between facial, or "systemic," and as-applied, or particularized challenges in holding that a provision barring review of individual veterans benefit challenges did not bar a constitutional challenge to the statute itself."); *see also Elk Run Coal Co., Inc. v. U.S. Dept. of Labor*, 804 F. Supp. 2d 8, 15-23 (D.D.C. 2011) (exercising jurisdiction over constitutional claims challenging an administrative review process of the Mine Act).²

The Dodd-Frank Act does not provide an administrative process for reviewing the type of claim alleged here, nor does CFPB have any specialized expertise to bear on the claim. Hence, there is neither an avenue for administrative relief nor any prudential justification for requiring this challenge to be pursued through administrative channels. *See Free Enter. Fund*, 130 S. Ct. at 3150 (2010) (courts "presume that Congress does not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'") (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994)).

Free Enterprise Fund is again illustrative. There, the plaintiff brought a facial challenge to the Sarbanes-Oxley Act on the grounds that it violated the separation of powers and the Appointments Clause of the Constitution by conferring wide-ranging executive power on the Public Company Accounting Oversight Board ("PCAOB"), comprised of members appointed by

² Plaintiffs' constitutional challenge against CFPB distinguishes this case from *POM Wonderful LLC v. FTC*, 894 F. Supp. 2d 40, 44-45 (D.D.C. 2012), where Judge Roberts declined to exercise jurisdiction over a challenge brought by POM Wonderful. There, Judge Roberts relied on the fact that POM Wonderful could raise its issues as affirmative defenses in an existing FTC administrative proceeding. *Id.* at 44-45. Here, however, Plaintiffs are entitled to challenge the constitutionality of the agency purporting to exercise authority over them.

the Securities and Exchange Commission ("SEC"), without subjecting it to presidential control. *Id.* The government argued lack of jurisdiction, claiming the plaintiff should have challenged the constitutionality of PCAOB through SEC review of the Board's standards or rules, or by ignoring PCAOB's request for documents and testimony thereby provoking a sanction that could be appealed. The Supreme Court held that the plaintiff "object[s] to the Board's existence, not to any of its auditing standards," and concluded that the "general challenge to the Board [was] 'collateral' to any Commission orders or rules from which review might be sought." *Id.* at 3150. Here, as in *Free Enterprise Fund*, Plaintiffs' constitutional challenge to CFPB's existence is collateral to any CFPB action and is exclusively within the purview of an Article III court.

CFPB'S STRUCTURE IS UNCONSTITUTIONAL

A. APPLICABLE LEGAL PRINCIPLES

Administrative agencies are essential to the functioning of our federal government and have long been recognized as constitutional, provided that Congress, in creating them, ensures that such agencies: (1) satisfy the Constitution's separation of powers, which imposes "checks and balances" to limit agency power; (2) have political accountability to the President and Congress, and indirectly, the electorate; and (3) operate pursuant to an "intelligible principle" that provides reasonable limits on agency discretion.

"The Framers recognized that . . . structural protections against abuse of power [are] critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). Separation of powers is "at the heart of our Constitution," *Buckley v. Valeo*, 424 U.S. 1, 119 (1976), and is essential to defend against "tyranny," *Loving*, 517 U.S. at 756, and to "the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). The Constitution's separation of powers is "intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps." *INS v. Chadha*, 462 U.S.

919, 957 (1983). The Supreme Court has adopted a "flexible understanding" of separation of powers, recognizing "that the greatest security against tyranny . . . lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power"

Mistretta v. United States, 488 U.S. 361, 381 (1989).

Of relevance here, Article I provides that all "legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. 1, § 1. Notably, the Constitution gives Congress the power of the purse, such that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., art. I, § 9, cl. 7. Similarly, the Constitution provides that "executive Power shall be vested in a President," U.S. Const. art. II, § 1, and that "he shall take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3. The President "shall appoint" all "officers of the United States." U.S. Const. art. II, § 2, cl. 2.

Political accountability enables the public to monitor and check through the ballot box government actions to "ensure that those who wield[]" power are "accountable to political force and the will of the people." *Freytag v. Comm'r*, 501 U.S. 868, 884 (1991); *see also Edmond v. United States*, 520 U.S. 651, 663 (1997) (discussing the importance of preserving "political accountability relative to important government assignments"). Congress must also establish an intelligible principle for agencies to follow so as to avoid unlimited agency discretion and an unlawful delegation of legislative power. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The required structural protections are influenced by the scope of power delegated to the agency and its degree of discretion. *See id.* at 475 ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.").

In *Free Enterprise Fund*, the Supreme Court invalidated the structure of PCAOB, noting that "[b]y granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers." *Id.* at 3155.

Although Congress may have created CFPB in good faith to remedy certain financial ills, good intentions are not a suitable replacement for constitutionally-required checks and balances. Courts have not hesitated to invalidate similarly well-intentioned statutes that violate the Constitution's separation of powers. *See Free Enter. Fund*, 130 S. Ct. at 3164; *see also Clinton v. City of New York*, 524 U.S. 417 (1998) (invalidating the Line Item Veto Act); *Chadha*, 462 U.S. at 953-54 (invalidating a one-house veto of proposed administrative action); *Bowsher*, 478 U.S. at 726 (holding that Congress may not constitutionally remove officers charged with executing the laws, other than by impeachment); *Buckley*, 424 U.S. at 1 (holding that Congress may not appoint members of the Federal Election Commission); *Myers v. United States*, 272 U.S. 52, 176 (1926) (holding that Congress may not interfere with the President's power to remove the postmaster).

It is no answer to say that Congress acted with executive consent. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha*, 462 U.S. 919, 944 (1983). "Perhaps an individual President"—or Congress—"might find advantages in tying his own hands," the Supreme Court recently noted, "[b]ut the separation of powers does not depend on the views of individual Presidents"—or particular Congresses. *Free*

Enter. Fund, 130 S. Ct. at 3155. This is true regardless of "whether 'the encroached-upon branch approves the encroachment.'" *Id.* (quoting *New York v. United States*, 505 U.S. 144, 182 (1992)).

B. CFPB IS UNCONSTITUTIONAL WHETHER IT IS AN EXECUTIVE OR INDEPENDENT AGENCY

CFPB's structure is unprecedented because it is greatly insulated from the political branches (the President and Congress) and lacks internal checks and balances. There are at least five structural features of CFPB that, viewed in the aggregate, make CFPB unconstitutional. First, CFPB is controlled by a single Director who serves a fixed term of five years and is removable only for cause (and not at-will) by the President. SF ¶¶ 16-17 (12 U.S.C. § 5491(b)(2) and (c)). Second, CFPB is not subject to Congressional oversight through the appropriations process³; instead, CFPB automatically receives a fixed sum that it can use to carry out its activities – up to a twelve percent (12%) cap of the Federal Reserve's total operating expenses (about a half a billion dollars). SF ¶¶ 20-21 (12 U.S.C. § 5497(a)(2)(A)). Third, the final version of Dodd-Frank did not retain the original multimember commission structure in the House-passed version, a structural feature that has been the hallmark of independent agencies for more than 125 years. SF ¶¶ 104-06. Fourth, CFPB is insulated from accountability from the Federal Reserve, which does not review or approve CFPB actions. Fifth, the Dodd-Frank Act limits judicial review over CFPB actions. *See* 12 U.S.C. § 5512(b)(4)(B) (requiring that courts grant the same deference to CFPB's interpretation of federal consumer financial laws that they would "if [CFPB] were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law."). This striking provision requires *Chevron* deference for all statutes transferred to CFPB – and essentially unwinds decades of precedent

³ The appropriations process also implicates the President's authority including because the President has the right to veto any appropriations bill.

created by other agencies and courts reviewing those other agencies. CFPB's structure is unprecedented in the federal government. *See* Declaration of Law Professor Todd Zywicki [Docket No. 3-4] ¶¶ 13-20. Indeed, as described below, at least one of the checks and balances missing from CFPB is present with respect to each of the entities from whom authority was transferred. Unlike these entities, CFPB is unaccountable to the political branches of government and lacks the oversight and checks and balances that the Constitution requires.

Cases have established two different types of agency structures that comply with the Constitution: executive agencies (or departments) and independent agencies. CFPB is not structured properly as either an executive or independent agency. For executive agencies, the head typically serves at the pleasure of the President and is removable at-will by the President. This is not the case for CFPB, which limits removal of its director to "for cause," which Dodd-Frank defines as "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3).

For so-called "independent agencies," accountability is provided with other features like a multimember bipartisan structure, such as the FTC. As Professor Zywicki observes, a multimember and typically bipartisan commission structure is usually identified as a defining feature of an independent agency.⁴ *See* Zywicki Decl. ¶ 16; *see also Humphrey's Ex'r*, 295 U.S. at 624 ("The commission is to be *non-partisan*, and it must from the very nature of its duties, act with entire impartiality. . . Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a *body of experts* 'appointed by law and informed by experience.'") (quoting *Illinois Central R. Co. v. Interstate Commerce Comm'n*, 206 U. S. 441 (1907); and *Standard Oil Co. v. United States*, 283 U. S. 235 (1931)) (emphasis added). In

⁴ The Board of Governors of the Federal Reserve is not expressly bipartisan. However, its seven members serve staggered 14 year terms. 12 U.S.C. §§ 241-42. Thus, as a practical matter, the Board of Governors will be bipartisan since no party has controlled the White House for 14 consecutive years since Franklin D. Roosevelt.

addition, independent agencies are sometimes, but not always accountable to Congress through the appropriations process.

CFPB does not conform to the recognized models of agency structure and accountability: it is neither an executive nor an independent agency. It is effectively an independent agency housed inside another independent agency, isolated from effective accountability to Congress, the President, or the Federal Reserve. Indeed, CFPB lacks even the limited accountability that the PCAOB had to the SEC—a structure that was held to be unconstitutional. As Professor Zywicki states, "CFPB [is] one of the most powerful and publicly unaccountable agencies in American history" (Zywicki Decl. ¶ 17) — in fact, wielding so much unaccountable power and discretion as to be unconstitutional.

We discuss each of these factors below and the importance that courts place on the role they play in creating political accountability and providing for appropriate checks and balances. Whether the Constitution requires one of these factors or several is a question the Court need not reach given the unprecedented circumstance that *none* are present in CFPB.

C. CFPB DOES NOT HAVE CONSTITUTIONALLY-REQUIRED POLITICAL ACCOUNTABILITY

To pass constitutional muster and to maintain democratic accountability, CFPB must be subject to political oversight, typically through the President's removal power and Congress's power of the purse. The Dodd-Frank Act stripped away these mechanisms and severed the necessary responsiveness to the electorate.

No Presidential Power to Discipline Through At-Will Removal. First, the Director's protection from presidential removal interferes with the democratically-elected President's ability to supervise his Article II power and therefore, the electorate's ability to check CFPB. The Dodd Frank Act calls CFPB an executive agency and gives CFPB executive authority. SF ¶ 15 (12

U.S.C. § 5491(a)). Article II vests all of the "executive power" in a democratically-elected President precisely to ensure both that the people can easily identify and correct its misuses and to ensure that the execution of executive power is free from legislative influence. *See Free Enter. Fund, supra*. In dividing the powers of the Federal Government among three coordinate Branches, the Framers "consciously decid[ed] to vest Executive authority in one person rather than several." *Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring). Congress may not "impermissibly interfere[] with the President's exercise of his constitutionally appointed functions." *See Mistretta*, 488 U.S. at 382; *Morrison v. Olson*, 487 U.S. 654, 685 (1988).⁵ By prohibiting the President from removing the Director at-will, the Dodd-Frank Act violates this stricture. As the Supreme Court has held, "[b]y granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers." *Free Enter. Fund*, 130 S. Ct. at 3155.

No Appropriations Oversight. Article I, Section 9 provides, in part: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Dodd-Frank exempts CFPB from the congressional appropriations power because the Dodd-Frank Act authorizes the Director to unilaterally requisition half a billion dollars (12% of the Fed's budget), without congressional approval. SF ¶¶ 19-21. In fact, Dodd-Frank states: "Notwithstanding any other provision in this title, the funds derived from the Federal Reserve System pursuant to this subsection *shall not be subject to review* by the Committees on Appropriations of the House of

⁵ In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court held that tenure protection for the Independent Counsel was constitutionally sustainable only because the Independent Counsel was an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and without policymaking or significant administrative authority. *Id.* at 691.

Representatives and the Senate." 12 U.S.C. § 5497(a)(2)(C) (emphasis added). This eliminates the electorate's ability to check CFPB's power through Congress. Thus, Congress's "ultimate weapon of enforcement" – the power of the purse – which essentially gives voice to the electorate – is unavailable. *United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974).

In other cases, courts have grappled with which political institution -- Congress or the President – had the power to oversee a federal agency, a classic separation of powers dispute between two coordinate branches.⁶ In this case, by disabling removal and insulating CFPB from the appropriations process, Congress has eviscerated CFPB's political accountability to both itself and the President, and violated the constitutionally-required protections for the electorate.

D. CFPB DOES NOT HAVE A CONSTITUTIONALLY-REQUIRED MULTIMEMBER COMMISSION

Given the scope of CFPB's power and its corresponding lack of political accountability, Congress's departure from the structure of other independent agencies by establishing a single Director instead of the House-passed multimember commission (SF ¶¶ 2-4) is a constitutional violation. The Dodd Frank Act aggregates unilateral decision making authority over all CFPB regulatory and enforcement decisions in a single tenure-protected Director serving for a fixed five-year term. SF ¶¶ 16-17. There is no internal check on the Director's judgment or decision. The Director need not confer with anyone, and no vote or deliberation or expression of minority viewpoints at CFPB need occur, prior to the Director's exercise of power.

This stands in sharp contrast to the multimember commission structure that for more than 125 years has been the hallmark of other so-called "independent agencies" which – like CFPB – exercise broad rulemaking and enforcement powers. For example, the FTC, SEC, Commodity

⁶ See *Bowsher*, 478 US at 734 (1986) ("by placing the responsibility for the execution of the [laws] in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.").

Futures Trading Commission ("CFTC"), Federal Communications Commission ("FCC"), Federal Energy Regulatory Commission ("FERC", and the Consumer Products Safety Commission ("CPSC") (SF ¶ 106)⁷, as well as other agencies, use a multimember commission structure. The Federal Reserve operates under the authority of a Board of Governors. SF ¶ 107 (12 U.S.C. § 241). The subject of *Free Enterprise Fund* also uses a multimember structure. *Free Enter. Fund*, 130 S. Ct. at 3142; 15 U.S.C. § 7211(e)(1) (establishing a five person Board for PCAOB).

The multimember structure and its attributes of collegial decision-making pervade federal administrative regulatory and enforcement authority exercised in the United States. For example, the SEC is composed of five Commissioners who are appointed by the President with the advice and consent of the Senate. No more than three Commissioners may be members of the same political party. 15 U.S.C. § 78d(a). The SEC's canons of ethics state that SEC's pluralistic decision-making is designed to "safeguard against the domination of this Commission by less than a majority." 17 C.F.R. § 200.57. A "quorum" is required for the SEC to conduct business. 17 C.F.R. § 200.41. "Valid agency action depends on the effective concurrence of a majority of the designated quorum."⁸ *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967); *accord Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579 (D.C. Cir. 1996). "The requirement of a quorum is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons." *Assure Competitive Trans., Inc. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980) (citation omitted).

⁷ The statutory citations are: FTC (15 U.S.C. § 41); SEC (15 U.S.C. § 78d(a)); CFTC (7 U.S.C.A. § 2); FCC (47 U.S.C. § 154); FERC (42 U.S.C. § 7171(b)(a)(5)); and CPSC (15 U.S.C. § 2053(a)).

⁸ "A quorum is '[t]he minimum number of members who must be present at the meetings of a deliberative assembly for business to be legally transacted.'" *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1341 (D.C. Cir. 1983) (citations omitted).

Courts have recognized that a multimember agency structure safeguards fairness and individual liberty. See *David B. Lilly Co., v. United States*, 571 F.2d 546, 548-49 (Fed. Cl. 1978) (upholding an order of the Renegotiation Board only after ensuring that the respondent's position was considered as part of a "deliberative process" among a quorum of the Board). In *Lilly*, the critical factor was "the integrity of the deliberative process through which the Board acts." *Id.* at 549. The respondent to the Board's action had "a right to present his claim to a quorum of the Board" and the "quorum of the Board must fully consider the claim." *Id.* Former SEC Chairman Arthur Levitt, testified before Congress that the Commission's experience substantiates the presumption that deliberation is beneficial to the Commission's functions: "The Commission believes that the ability to confer as a larger, five member body has contributed greatly to the quality of the Commission's decision-making process."⁹

Here, whether such a multimember agency structure is constitutionally required in light of the scope and breadth of CFPB is a matter of first impression. An affirmative answer is justified by the circumstances of this case. Congress has consistently used multimember deliberative bodies to head independent agencies that have power similar (albeit not as broad) as CFPB (including the FTC and SEC). The Supreme Court in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) approved the prohibition on presidential at-will removal of FTC commissioners only after noting the protections afforded by the multimember structure of the FTC. *Id.* at 624 (noting that the agency would act with "impartiality" through the "the trained judgment of a body of experts."). Requiring a multimember commission is consistent with the

⁹ *Deregulating Capital Markets: Hearings on Securities Reform and H.R. 2131, the Capital Markets Deregulation and Liberalization Act of 1995 Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Commerce*, 104th Cong. (1995) (testimony of Arthur Levitt, Chairman, U.S. Securities and Exchange Commission). In *Free Enterprise Fund*, the Court assumed that SEC commissioners were removable for cause, even in the absence of a statutory for-cause removal restriction, noting the multimember structure of the agency and the fixed terms for its commissioners. 139 S. Ct. at 3153 (2010).

logic, history, and structure of the separation of powers doctrine to avoid tyranny that is threatened by the concentration of legislative, executive, and judicial power in a single unelected individual. A multimember structure diffuses power among various members, and creates a vital internal check that allows for collective deliberation among persons with diverse views, expertise, and backgrounds. The Constitution may not require that every independent agency have a multimember commission format; however, under the circumstances presented here, where there is an extremely broad delegation yet where political accountability (and judicial review) are seriously curtailed, a multimember format provides a modicum of the checks and balances envisioned by the Framers of the Constitution.

E. CFPB'S LACK OF STRUCTURAL PROTECTIONS IS UNCONSTITUTIONAL IN LIGHT OF CONGRESS'S BROAD DELEGATION OF POWER

Each of the structural features described above -- especially the lack of presidential power to remove the Director at-will, the absence of congressional appropriation oversight, and the lack of a multimember commission structure -- raise serious constitutional issues. Combined together, however, the constitutional violation is unavoidable.

An independent way to evaluate the constitutionality of CFPB's structure is to undertake a two-part inquiry to: (1) evaluate the overall scope of delegated power and degree of agency discretion; and (2) assess the sufficiency of the overall combined structural protections of accountability and checks and balances in light of the scope of delegated power and degree of agency discretion. Stated differently, the level of regulatory discretion and scope of delegation inform the degree of structural accountability and checks and balances needed. *See Whitman*, 531 U.S. at 475 ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."); *see generally Morrison v. Olson*, 487 U.S. at 695-97 (finding less protection is necessary when the agency in question had a targeted and

narrow scope of delegated power exercised by inferior officers). The more unfettered the powers exercised or delegated, the greater is the need for internal as well as external, congressional and presidential, checks to preserve the separation of powers and promote democratic control of government.

Here, in step 1, CFPB has great power and great discretion. CFPB was created to exercise the authority of seven separate agencies and assume market wide coverage. As noted above, with respect to virtually every boardroom and living room, CFPB exercises rulemaking, adjudicatory, and enforcement powers; it conducts investigations, issues subpoenas and civil investigative demands for the attendance and testimony of witnesses and production of documents and materials, and commences administrative and judicial proceedings; it can take actions, including direct enforcement action, to prevent "unfair," "deceptive," or "abusive act[s] or practice[s]" ("UDAAP" authority) where the term "abusive" is, according to CFPB's Director, "a little bit of a puzzle because it is a new term" and its meaning will have to be developed on a case-by-case basis. SF ¶¶ 36-39.

In step 2, however, instead of providing *additional* protections in light of the broad delegation, Congress created unprecedented *insulation*. Concentration of power in a single Director, free from congressional appropriations oversight, who does not serve at the pleasure of the President, and whose agency is subject to curtailed judicial review – all of these structural features create extreme isolation from political process and checks and balances. CFPB's lack of structural protection cannot be reconciled with its broad delegation of power.

F. THE DODD-FRANK ACT TRANSFERS AUTHORITY TO CFPB FROM AGENCIES THAT HAVE CONSTITUTIONALLY COMPLIANT CHECKS AND BALANCES

Congress created CFPB in order to consolidate in one agency the authority to supervise, make rules, enforce and issue orders and guidance for federal consumer financial laws. In doing

so Congress transferred authority to CFPB from seven other agencies -- (1) the Federal Reserve Board of Governors; (2) Comptroller of the Currency ("OCC"); (3) Office of Thrift Supervision ("OTS"); (4) Federal Deposit Insurance Corporation ("FDIC"); (5) National Credit Union Administration ("NCUA"); (6) FTC; and (7) Department of Housing and Urban Development ("HUD"). 12 U.S.C. § 5581. Although Congress is free to exercise its discretion consistent with the Constitution, it cannot transfer authority to enforce laws from agencies that have appropriate checks and balances and accountability to one that has neither of these protections.

Section 1063(i) of the Dodd-Frank Act requires CFPB to publish a list of rules and orders that it will enforce as a result of the transfer of authority described above. CFPB published such a list in July 2011. Identification of Enforceable Rules and Orders, 76 Fed. Reg. 43569 (July 21, 2011). This list demonstrates the unprecedented breadth and scope of authority transferred from seven accountable agencies to a single unaccountable agency. CFPB now has enforcement and other related authority over forty-nine (49) pre-existing consumer financial protection rules, including the Equal Credit Opportunity Act, Fair Credit Reporting Act, Truth in Lending Act, Truth in Savings Act, Adjustable Rate Mortgages Act, the Telemarketing Sales Rule, and the Real Estate Settlement Procedures Act.

The accountability and checks and balances that previously existed with respect to these forty-nine consumer financial protection rules is set forth below. Strikingly, the Dodd-Frank Act insulated CFPB from the type of rigorous judicial review that previously surrounded these rules by requiring that courts defer to the interpretation of CFPB and not any other agency with respect to interpretation of these rules.¹⁰ In addition, in its federal register notice, CFPB left itself

¹⁰ The possibility of conflicting interpretation exists for two reasons. First, in some instances, CFPB shares jurisdiction with another agency for enforcement of a rule. *See* 12 U.S.C. § 5581(b)(5) (outlining the authority of the CFPB and Federal Trade Commission to enforce consumer law). Second, CFPB was not given jurisdiction over some consumer financial protection rules for certain designated persons.

considerable discretion in determining whether to continue to apply existing guidance issued with respect to these forty-nine rules by the transferor agency. Identification of Enforceable Rules and Orders, 76 Fed. Reg. at 43570.

Federal Reserve. The Federal Reserve is overseen by a seven member board, including a Chair and Vice-Chair, who each serve 4 year terms. 12 U.S.C. § 242. The 7 board members serve 14 year staggered terms, the term of a board member expiring every 2 years. *Id.* Thus, the Federal Reserve is held accountable by the deliberative nature of a multimember commission. Additionally, each new President has the opportunity to appoint at least two board members.

OCC. The OCC is charged with the specific task of chartering, regulating and supervising all national banks and federal savings associations. It has a single director who serves a five year term at the pleasure of the President and can be removed for any reason, provided that the President communicate the reasons for removal to the Senate. 12 U.S.C. § 2. The Comptroller must carry out his duties under the "general direction" of the Secretary of the Treasury (12 U.S.C. § 2) and, unlike CFPB,¹¹ cannot appoint his immediate subordinates. Instead the Secretary of the Treasury appoints Deputy Comptrollers. 12 U.S.C. § 4.

OTS. Title III of the Dodd-Frank Act eliminated the OTS. 12 U.S.C. § 5412. Before its elimination, OTS was headed by a single director who serves a five year term at the pleasure of the President. 12 C.F.R. § 500.10. The statute did not provide tenure protection through "for cause" removal (12 USC § 1462a(c)(2) (prior to 2010 amendment)), and the Office of Legal Counsel expressed the view that the Director served at the President's pleasure. *See Post-Employment Restriction of 12 U.S.C. § 1812(e)*, 2001 WL 35911952, at *4 (O.L.C. Sept. 4, 2001) ("We do not endorse the view that tenure protection for the Director should be inferred

¹¹ 12 U.S.C. §§ 5491, 5493(a).

under the statute here") (available at <http://www.justice.gov/olc/2001/otspost2.pdf>) (last visited Aug. 5, 2013). In addition, like the OCC, the Director carried out his or her duties under the general oversight of the Secretary of the Treasury and the Secretary was authorized to appoint the OTS Deputy Directors. 12 U.S.C. 1462a(a)-(b) (prior to 2010 amendment).

FDIC. The FDIC insures deposits in banks and thrift institutions and identifies, monitors, and addresses risk to the deposit insurance funds. The FDIC is run by a five person Board of Directors, all of whom are appointed by the President and confirmed by the Senate. 12 U.S.C. § 1812(a)(1).¹² No more than three may be from the same political party. 12 U.S.C. § 1812(a)(2).

NCUA. Congress created the NCUA was to charter and supervise federal credit unions and insure credit union deposits. It is governed by a three member board that serve staggered six year terms. 12 U.S.C. § 1752a(a)-(c). Each board member is appointed by the President and confirmed by the Senate. *Id.* No more than two board members can be from the same political party. *Id.*

FTC. The FTC is charged with enforcing the Federal Trade Commission Act 15 USC § 45 which prohibits deceptive or unfair acts or practices as well as issuing regulations and enforcing various federal statutes designed to protect consumers. It is governed by a five-person Commission that serves staggered five year terms. 12 U.S.C. § 41. Each Commissioner is appointed by the President and confirmed by the Senate. *Id.* In addition, the President also has authority to designate the Chairperson from among the five Commissioners. *Id.* Unlike the banking agencies described above, the FTC's budget is appropriated by Congress. 15 U.S.C. § 57c.

¹² Two of the five board members are ex officio but are also appointed by the President to their other position (Comptroller of the Currency and the Director of CFPB).

HUD. HUD is a cabinet level agency. 42 U.S.C. § 3532(a). Like other cabinet officials, the HUD Secretary is appointed by the President and confirmed by the Senate and serves at the pleasure of the President. *Id.* In addition, HUD's budget is appropriated by Congress. 42 U.S.C. § 3535(s).

In summary, the supervision, interpretation, promulgation of regulations, and the enforcement of the consumer financial laws was previously under the auspices of agencies subject to a robust system of checks and balances and accountability. Each of the transferee agencies had at least one of the following: Presidential removal power, multimember commissions, bipartisan representation, and/or congressional budgetary appropriation. By transferring authority to CFPB, the Dodd-Frank Act put an end to these checks and balances. These laws, which reach into virtually every boardroom and living room in America, are now under the auspices of an agency which has a single Director, removable by the President only under extreme circumstances, and who needs no budgetary appropriations from any other branch of government or government agency. The following chart, submitted to the Senate by the U.S. Chamber of Commerce, demonstrates that these features are not aggregated in any other comparable agency.

| | Checks and Balances on Leadership Power and Decision Making | | | | | | Budget Oversight |
|---|---|--|--|--|---|-----------------------------|------------------------------------|
| | Commission/Board Structure | Requirement of Bipartisan Representation on Commission/Board | Outside Officials Serve on Agency's Decisionmaking Body or Appoint Some of Its Top Officials | Head Subject to At-Will Removal by the President | Cabinet Official Statutorily Authorized to Supervise Agency | Dedicated Inspector General | Budget Dependent on Appropriations |
|  CONSUMER FINANCIAL PROTECTION BUREAU | X | X | X | X | X | X | X |
|  Federal Reserve System | ✓ | | | | | ✓ | |
|  National Credit Union Administration | ✓ | ✓ | | | | ✓ | |
|  Office of the Comptroller of the Currency | | | ✓ | ✓ | ✓ | | |
|  Office of Thrift Supervision | | | ✓ | ✓ | ✓ | | |
|  Social Security Administration | | | ✓ | | | ✓ | ✓ |
|  Consumer Product Safety Commission | ✓ | ✓ | | | | ✓ | ✓ |
|  Federal Communications Commission | ✓ | ✓ | | | | ✓ | ✓ |
|  Federal Deposit Insurance Corporation | ✓ | ✓ | ✓ | | | ✓ | |
|  Commodity Futures Trading Commission | ✓ | ✓ | | | | ✓ | ✓ |
|  Securities and Exchange Commission | ✓ | ✓ | | | | ✓ | ✓ |
|  Federal Energy Regulatory Commission | ✓ | ✓ | | | | | ✓ |
|  Federal Trade Commission | ✓ | ✓ | | | | ✓ | ✓ |

Statement Andrew Pincus on behalf of the U.S. Chamber of Commerce on "Enhanced Consumer Financial Protection After the Financial Crises," *U.S. Senate Committee on Banking, Housing, and Urban Affairs*, at 29 (July 19, 2011) (available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=19e3efe3-0c50-47df-bb3c-b75ff93e7a5f) (lasted visited Aug. 5, 2013).

G. CFPB'S UNCONSTITUTIONAL STRUCTURE HAS HARMED PLAINTIFFS

In many cases involving the separation of powers, the potential for injury caused by agency overreach remains theoretical. Here, however, CFPB is overstepping its bounds by attempting to regulate lawyers like Pisinski (through their support provider, Morgan Drexen) who are providing bankruptcy services. Regulation of lawyers is prohibited under CFPB's

enabling statute. *See* 12 U.S.C. § 5517(e) (providing that CFPB "may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law"). CFPB has taken the position that this exception does not apply to the regulation of debt settlement under the Telemarketing Sales Rule because it is transferred authority under 12 U.S.C. §§ 5581-5587.¹³ However, CFPB is seeking to expand this limited exception, for example, by demanding production of information concerning the amount of any given "engagement fee under the bankruptcy fee agreement" and any "bankruptcy filing fee." (SF ¶ 76) (Shaheen Decl. Ex. 34). Of course, whether someone is engaged in the unauthorized practice of law is reserved to the States under the Tenth Amendment.

Equally troubling, the GAO is investigating whether CFPB is using such personal financial data (provided to lawyers in the context of attorney-client confidentiality) to build a database without adequately balancing privacy concerns. The scope of CFPB's power and its actions in investigating Morgan Drexen call to mind the warning that "[t]he accumulation of all powers, Legislative, Executive, and Judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 46, p. 334 (H. Dawson ed. 1876) (J. Madison).

¹³ The FTC has taken the position that the prohibitions relating to debt settlement found in the Telemarketing Sales Rule apply to attorneys who otherwise meet the jurisdictional requirements for the Rule. Whether the FTC was constitutionally correct in making that determination, (see *Am. Bar Ass'n v. F.T.C.*, 671 F. Supp. 2d 64 (D.D.C. 2009), *vacated as moot*, 636 F.3d 641 (D.C. Cir. 2011) (invalidating attempt by FTC to regulate lawyers)), is not a question this Court need now address because CFPB's attempt to exercise jurisdiction over the provision of legal counseling relating to bankruptcy falls outside the scope of the TSR.

RELIEF REQUESTED

Plaintiffs request that the Court enter an order declaring unconstitutional those portions of Title X of the Dodd-Frank Act that create CFPB. If the Court does so, Congress can remedy CFPB's structure to comply with the Constitution's separation of powers. Indeed, Congress has specifically considered remedies, such as replacing the Director with a multimember commission. SF ¶ 132.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that their motion for summary judgment be granted.

Dated: August 7, 2013

Respectfully submitted,

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