

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

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

Plaintiffs,

v.

**CONSUMER FINANCIAL
PROTECTION BUREAU,**

Defendant.

Civil Action No. 13-01112 (CKK)

EXPEDITED BRIEFING SCHEDULE

**LOCAL RULE LCvR 7(h)(1)
STATEMENT OF FACTS IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Plaintiffs Kimberly A. Pisinski ("Pisinski") and Morgan Drexen, Inc. ("Morgan Drexen") (together, "Plaintiffs"), by and through their undersigned counsel, and pursuant to Federal Rule of Civil Procedure 56, Local Rule LCvR 7(h)(1), and this Court's Scheduling and Procedure Order [Docket No. 8], present the following material facts in support of their Motion for Summary Judgment against Defendant Consumer Financial Protection Bureau ("CFPB"):

I. LEGISLATIVE HISTORY: INTENT TO CREATE A SUPER AGENCY OF UNPRECEDENTED POWER AND INDEPENDENCE

1. On June 17, 2009, President Obama proposed a "sweeping overhaul of the financial regulatory system, a transformation on a scale not seen since the reforms that followed the Great Depression." Remarks by the President on 21st Century Financial Regulatory Reform (available at http://www.whitehouse.gov/the_press_office/Remarks-of-the-President-on-Regulatory-Reform/) (last visited Aug. 1, 2013).

2. The President's June 30, 2009 draft legislation proposing the creation of CFPB adopted a multimember commission. Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. §§ 111-114 (1st Sess. 2009) (as introduced).

3. The financial reform legislation reported by the House Energy and Commerce Committee adopted a multimember commission structure for CFPB. H.R. Rep. 111-367, pt. 1, at 8-9 (2009).

4. The House-passed bill adopted a multimember commission structure for the CFPB. H.R. 4173, 111th Cong. § 4103 (2009) (enacted).

5. The Senate-passed version of the legislation replaced the multimember commission structure with a single Director. *See* 156 CONG. REC. S4034, S4078 (daily ed. May 20, 2010) (amending the bill).

6. The Majority Report of the Senate Committee on Banking, Housing, and Urban Affairs stated in part that CFPB was supposed to remedy "the failure of the federal banking and other regulators to address significant consumer protection issues" which led to "what has become known as the Great Recession." S. Rep. 111-176, at 9 (2010).

7. Michael S. Barr, Assistant Secretary for Financial Institutions, Department of the Treasury, stated before Congress that "[w]e believe that the Federal regulatory structure for consumer protection needs fundamental reform. We have proposed to consolidate rule-writing, supervision, and enforcement authority under one agency, with marketwide coverage over both nonbanks and banks that provide consumer financial products and services." *Creating A Consumer Financial Protection Agency: A Cornerstone of America's New Economic Foundation, Hearing Before the S. Comm. On Banking, Housing, and Urban Affairs*, S. Hrg. 111-274 (2009) (statement of Michael S. Barr, Assistant Secretary for Financial Institutions, Department of the Treasury).

8. Christopher Dodd, Chairman, Committee on Banking, Housing, and Urban Affairs, stated "[a]n independent consumer protection agency can and should be very good for

business, not just for consumers. It can and should protect the financial well-being of American consumers so that businesses can rely on a healthy consumer base as they seek to build long-term profitability. It can and should eliminate the regulatory overlap and bureaucracy that comes from the current Balkanized system of consumer protection regulation. It can and should level the playing field by applying a meaningful set of standards, not only to the highly regulated banks but also to their nonbank competitors that have slipped under the regulatory radar screen." *Creating a Consumer Financial Protection Agency: A Cornerstone of America's New Economic Foundation, Hearing Before the S. Comm. On Banking, Housing, and Urban Affairs, S. Hrg. 111-274* (2009).

9. Travis B. Plunkett, Legislative Director, Consumer Federation of America, stated that "the new agency would consolidate and streamline Federal consumer protection for credit, savings and payment products that is now required in almost 20 different statutes and divided between seven different agencies." *Id.* (statement of Travis B. Plunkett, Legislative Director, Consumer Federation of America).

10. Richard Blumenthal, Attorney General for Connecticut, stated before Congress that the new agency would be a "Federal Consumer Financial Super Cop." *Id.* (statement of Richard Blumenthal, Attorney General, State of Connecticut).

11. Rachel Barkow, Professor of Law, New York University School of Law, stated "[m]any of these agencies fall short in their efforts to protect consumers because they become captured by the industries they are charged with regulating. The experience of these agencies therefore offers some valuable insights in thinking about how to structure the CFPA . . . Agency capture is further exacerbated by the fact that industry groups are also well positioned to contribute to political campaigns and to lobby, which in turn gives them influence with the

agency's legislative overseers." *Proposed Consumer Financial Protection Agency, Hearing Before Subcomm. on Commerce, Trade, and Consumer Protection*, 111th Cong. (available at http://democrats.energycommerce.house.gov/Press_111/20090708/testimony_barkow.pdf) (last visited Aug. 5, 2013).

12. Richard Christopher Whalen, Senior Vice President and Managing Director of Institutional Risk Analytics stated that "[a] unified federal supervisor should combine the regulatory resources of the Federal Reserve Banks, SEC, the OCC, and the Office of Thrift Supervision, to create a new safety-and-soundness agency explicitly insulated from meddling by the Executive Branch and the Congress." *Modernizing Bank Supervision and Regulation-Part II, Hearing Before the S. Comm. On Banking, Housing, and Urban Affairs*, S. Hrg. 111-137 (2009) (statement of Richard Christopher Whalen, Senior Vice President and Managing Director, Institutional Risk Analytics).

II. CREATION OF CFPB AS A SUPER AGENCY OF UNPRECEDENTED POWER AND INDEPENDENCE

13. On July 21, 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), as "a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008." S. Rep. No. 111-176, at 2 (2010).

A. Title X Severely Limits Executive Oversight of CFPB By Vesting All Power In A Single Director With Tenure Protection

14. Title X of the Dodd-Frank Act created CFPB. 12 U.S.C. §§ 5491.

15. Title X established CFPB as a new "Executive Agency" that is an "independent bureau" "established in the Federal Reserve System." 12 U.S.C. § 5491(a).

16. The Director of CFPB must be appointed by the President. 12 U.S.C. § 5491(b)(2).

17. The Director of CFPB receives a five-year term in office and may be removed by the President for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(b)(2) and (c).

18. The Director of CFPB is authorized to appoint his own deputy. 12 U.S.C. § 5491(b)(5).

B. Title X Eliminates Congressional Oversight of CFPB Because There Is No Power of the Purse

19. The Dodd-Frank Act authorizes CFPB to fund itself by unilaterally claiming funds from the Federal Reserve Board. 12 U.S.C. § 5497(a)(1).

20. The Dodd-Frank Act authorizes CFPB to claim an increasing percentage of the Federal Reserve System's 2009 operating expenses, beginning in fiscal year 2011 at up to 10 percent of those expenses, and reaching up to 12 percent in fiscal year 2013 and thereafter, adjusted for inflation. 12 U.S.C. § 5497(a)(2)(A).

21. This structure will permit CFPB's Director to unilaterally requisition up to \$597,600,000 in 2013, and thereafter, adjusted for inflation. *See* Consumer Financial Protection Bureau, Fiscal Year 2013 Congressional Budget Justification, at 7 (available at <http://files.consumerfinance.gov/f/2012/02/budget-justification.pdf>) (last visited Aug. 2, 2013).

22. CFPB's automatic budget authority is nearly double the FTC's budget request to Congress for fiscal year 2013. *See* Federal Trade Commission, Fiscal Year 2013 Congressional Budget Justification (requesting \$300,000,000) (available at http://www.ftc.gov/ftc/oed/fmo/2013_CBJ.pdf) (last visited Aug. 2, 2013).

23. The Dodd-Frank Act prohibits the House and Senate Appropriations Committees from reviewing CFPB's self-funded budget. 12 U.S.C. § 5497(a)(2)(C) ("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 Representatives and the Senate.").

C. Title X Limits Judicial Oversight of CFPB by Limiting Judicial Review of CFPB's Interpretation of Consumer Financial Laws

24. Section 1022(b)(4)(B) of the Dodd-Frank Act requires courts to grant the same deference to CFPB's interpretation of federal consumer financial laws that they would "if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law." 12 U.S.C. § 5512(b)(4)(B).

D. Title X Delegates Broad Authority and Discretion to CFPB

25. The Dodd-Frank Act established CFPB to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a).

26. CFPB's power includes the ability to promulgate rules "necessary or appropriate to enable [CFPB] to administer and carry out the purposes and objectives of the Federal Consumer financial laws, and to prevent evasions thereof." 12 U.S.C. § 5512(b)(1).

27. CFPB's regulations can be overturned by the Financial Stability Oversight Council ("FSOC") only if "the 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." 12 U.S.C. § 5513(a).

28. CFPB's regulations can be overturned by FSOC only if two thirds of FSOC so vote. 12 U.S.C. § 5513(c)(3)(A).

29. Congress established FSOC through Title I of the Dodd-Frank Act. 12 U.S.C. § 5321(a).

30. FSOC has ten members. 12 U.S.C. § 5321(b).

31. One of the members of FSOC is the Director of CFPB. 12 U.S.C. § 5321(b)(1)(D).

32. Thus, seven of the remaining nine members of FSOC would have to vote to overturn any CFPB regulation. 12 U.S.C. § 5513(c)(3)(A).

33. This FSOC oversight applies to CFPB regulations, not enforcement activity. 12 U.S.C. § 5513.

34. The "Federal consumer financial laws" that CFPB is authorized to regulate include: (1) the Alternative Mortgage Transaction Parity Act, of 1982, 12 U.S.C. § 3801; (2) the Consumer Leasing Act of 1976, 15 U.S.C. § 1667; (3) the Electronic Funds Transfer Act, 15 U.S.C. § 1693 (except with respect to section 920); (4) the Equal Credit Opportunity Act, 15 U.S.C. § 1691, (5) the Fair Credit Billing Act, 15 U.S.C. § 1666; (6) the Fair Credit Report Act, 15 U.S.C. § 1681 (except with respect to sections 615(e) and 628); (7) the Home Owners Protection Act of 1998, 12 U.S.C. § 4901; (8) the Fair Debt Collections Practices Act, 15 U.S.C. § 1692; (9) subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831t(c)-(f); (10) sections 502 through 509 of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6802-6809 (except section 505 as it applies to section 501(b)); (11) the Home Mortgage Disclosure Act of 1975, 12 U.S.C. § 2801; (12) the Homeownership and Equity Protection Act of 1994, 15 U.S.C. § 1601; (13) the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601; (14) the S.A.F.E. Mortgage Licensing Act of 2008, 12 U.S.C. § 5101; (15) the Truth in Lending Act, 15 U.S.C. § 1601; (16) the Truth in Savings Act, 12 U.S.C. § 4301; (17) section 626 of the Omnibus Appropriations Act, 2009 (Public Law 111-8); and (18) the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701. 12 U.S.C. § 5481(12)-(14).

35. The Dodd-Frank Act transferred to CFPB authority from seven different agencies. *See* 12 U.S.C. § 5581(a)(2)(A) ("Board of Governors (and any Federal reserve bank . . . , the Federal Deposit Insurance Corporation, the Federal Trade Commission, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Department of Housing and Urban Development").

36. In addition to enforcing other laws, Section 1031(a) of the Dodd-Frank Act empowers CFPB to take any of several enumerated actions, including direct enforcement action, to prevent a covered person from engaging in "unfair," "deceptive," or "abusive act[s] or practice[s]" ("UDAAP" authority). 12 U.S.C. § 5531(a).

37. The Dodd-Frank Act authorizes CFPB to prescribe rules identifying such practices under Federal law. 12 U.S.C. § 5531(b).

38. Section 1031(d) leaves the term "abusive" to be defined by CFPB, subject only to the limitations that the act or practice "(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; (2) takes unreasonable advantage of (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." 12 U.S.C. § 5531(d).

39. During a January 24, 2012 hearing before a subcommittee of the U.S. House Committee on Oversight and Government Reform, Director Cordray stated that the Act's use of the term "abusive" is "a little bit of a puzzle because it is a new term"; CFPB has "been looking at it, trying to understand it, and we have determined that that is going to have to be a fact and

circumstances issue; it is not something we are likely to be able to define in the abstract.

Probably not useful to try to define a term like that in the abstract; we are going to have to see what kind of situations may arise where that would seem to fit the bill under the prongs." *How Will the CFPB Function Under Richard Cordray, Hearing Before the Subcomm. on TARP, Financial Services, and Bailouts of Public and Private Programs, 112th Cong., 112-107, at 69 (2012).*

40. CFPB has discretion under Section 1022(b)(3) to exempt any class of covered person, service providers, or consumer financial products or services from the scope of any rule promulgated under Title X. 12 U.S.C. § 5512(b)(3).

41. CFPB is empowered to engage in investigations, issue subpoenas, civil investigative demands, and commence judicial proceedings. 12 U.S.C. § 5562.

42. CFPB is empowered to conduct hearings and adjudicative proceedings to ensure or enforce compliance with the Dodd-Frank Act, any rules promulgated thereunder, or any other Federal law that CFPB is authorized to enforce. 12 U.S.C. § 5563.

43. CFPB is empowered to commence a civil action against any person whom it deems to have violated a Federal consumer financial law, and to seek all legal and equitable relief. 12 U.S.C. § 5564.

E. CFPB Asserts Power to Regulate Lawyers Practicing Law Despite a Statutory Exception for Lawyers

44. Section 1027(e) of the Dodd-Frank Act contains an exception from the authority of CFPB for attorneys engaged in the practice of law. 12 U.S.C. § 5517(e).

45. Section 1027(e) states, under "exclusion for the practice of law":

Except as provided under paragraph (2), the Bureau 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. . . . Paragraph (1) shall not be construed so as to limit the exercise by the Bureau of any supervisory, enforcement, or other authority regarding the offering or provision of a consumer financial product or service described in any subparagraph of section 5481(5) of this title (A) that is not offered or provided as part of, or incidental to, the practice of law, occurring exclusively within the scope of the attorney-client relationship; or (B) that is otherwise offered or provided by the attorney in question with respect to any consumer who is not receiving legal advice or services from the attorney in connection with such financial product or service. . . . Paragraph (1) shall not be construed so as to limit the authority of the Bureau with respect to any attorney, to the extent such attorney is otherwise subject to any of the enumerated consumer laws or authorities transferred under subtitle F or H.

12 U.S.C. § 5517(e).

46. However, Sections 1061 to 1067 of the Dodd-Frank Act give CFPB the authority to enforce certain business practices transferred to it by other administrative agencies. 12 U.S.C. §§ 5581-5587.

47. On August 10, 2010, the Federal Trade Commission ("FTC"), in exercising its rulemaking authority amended the TSR to extend its reach to "debt relief services." The amendments of the TSR have been codified as 16 C.F.R. § 310 *et seq.* Telemarketing Sales Rule, 75 Fed. Reg. 48458 (Aug. 10, 2010).

48. The FTC explained that the purpose of the amendments was to "protect consumers from deceptive or abusive practices in the telemarketing of debt relief service." *Id.*

49. The FTC amended the TSR to accomplish the following:

define debt relief services, prohibit debt relief providers from collecting fees until after services have been provided, require specific disclosures of material information about offered debt relief services, prohibit specific misrepresentations about material aspects of debt relief services, and extend the TSR's coverage to include inbound calls made to debt relief companies in response to general media advertisements.

Id.

50. Under the amended TSR, the term "debt relief services" was defined to include "any program or service represented, directly or by implication to negotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector." 16 C.F.R. § 310.2(m).

51. The FTC explained that "an exemption from the amended rule for attorneys engaged in the telemarketing of debt relief services is not warranted." Telemarketing Sales Rule, 75 Fed. Reg. at 48468.

52. The FTC based its findings on the following:

53. First, the FTC assumed that attorneys "who provide bona fide legal services," do not engage in "interstate telephonic communications in order to solicit potential clients to purchase debt relief services." *Id.*

54. Second, the FTC assumed that attorneys generally meet their prospective clients in person before agreeing to represent them. *Id.*

55. Third, the FTC assumed that "attorneys acting in compliance with state bar rules and providing bona fide legal services already fall outside of the TSR's coverage in most instances." *Id.*

56. Fourth, the FTC assumed that attorneys, and "those partnering with attorneys, who principally rely on telemarketing to obtain debt relief service clients . . . engaged in the same types of deceptive and abusive practices as those committed by non-attorneys." *Id.*

57. Fifth, the FTC stated that the scope of the TSR and several other statutes and FTC rules designed to curb deception, abuse, and fraud also did not exempt attorneys from their regulations. *Id.* at 48469.

58. On July 21, 2011, the Federal Trade Commission ("FTC") transferred to CFPB its authority to regulate "debt relief services" under the TSR. Designated Transfer Date, 75 Fed. Reg. 57252, 57253 (Sept. 20, 2010).

III. APPOINTMENT AND CONFIRMATION OF RICHARD CORDRAY AS DIRECTOR

59. On January 4, 2012, President Obama appointed Richard Cordray as a "recess appointment." Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 4, 2012 (available at http://www.nytimes.com/2012/01/05/us/politics/richard-cordray-named-consumer-chief-in-recess-appointment.html?pagewanted=all&_r=0) (last visited Aug. 5, 2013).

60. The legitimacy of Mr. Cordray's appointment was called into question by *Noel Canning v. NLRB*, 705 F.3d 490, 514 (D.C. Cir. Jan. 25, 2013), *cert. granted*, 133 S. Ct. 2861 (Jun. 24, 2013) (holding constitutionally infirm other appointments the President made on January 4, 2012 to NLRB because the Senate was not in recess).

61. On July 16, 2013, the Senate confirmed Mr. Cordray's appointment. United States Senate Periodical Press Gallery, Senate Floor Log (available at <http://www.senate.gov/galleries/pdcl/>) (last visited Aug. 5, 2013).

IV. CFPB'S INVESTIGATION OF MORGAN DREXEN AND THREAT OF IMMINENT LITIGATION TO PUT MORGAN DREXEN OUT OF BUSINESS

62. Morgan Drexen is in the business of licensing its proprietary software to law firms and providing these firms with live paraprofessional and support services. Declaration of Walter Ledda [Docket No. 3-2] ("Ledda Decl.") ¶ 2.

63. Specifically, Morgan Drexen provides non-attorney paralegal support services to attorneys in the areas of debt resolution, bankruptcy, personal injury, mass tort litigation, and tax preparation. Ledda Decl. ¶ 3.

64. On March 13, 2012, CFPB issued a Civil Investigative Demand ("CID") to Morgan Drexen. Declaration of Randal M. Shaheen [Docket No. 3-5] ("Shaheen Decl.") at Ex. 1.

65. The CID stated the "[a]ction [r]equired" for Morgan Drexen was to "[p]roduce [d]ocuments and/or [t]angible [t]hings" and to "[p]rovide [w]ritten [r]eports and/or [a]nswers to [q]uestions" by April 13, 2012. Shaheen Decl. Ex. 1.

66. The CID stated: "[t]he delivery of this demand to you by any method prescribed by Section 1052 of the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5562, is legal service and may subject you to a penalty imposed by law for failure to comply." Shaheen Decl. Ex. 1.

67. Section IIB of the instructions accompanying the CID stated that "[y]ou must contact Wendy J. Weinberg . . . to schedule a meeting . . . to be held within 10 calendar days after receipt of this CID" Shaheen Decl. Ex. 1.

68. Instruction G of the instructions accompanying the CID stated that any petition to modify the demand "must be filed . . . within twenty calendar days after service of the CID . . ." Shaheen Decl. Ex. 1.

69. The information requested included communications between Morgan Drexen and Associated Attorneys concerning attorney clients, and various personal financial data (including written notes memorializing communications with clients). Shaheen Decl. Ex. 1 (Request Nos. 10 and 21).

70. Morgan Drexen responded to the CID on April 13, 2012. Shaheen Decl. ¶ 6.

71. Morgan Drexen continued to respond to the CID and engaged in a dialogue concerning compliance. *See generally* Shaheen Decl. Exs. 1-35.

72. CFPB followed up on Morgan Drexen's responses with language requiring further production. *See* Shaheen Decl. Ex. 5.

73. On April 24, 2012, CFPB wrote: "In light of Morgan Drexen's unacceptable failure to provide the materials described above, it is critical that you produce them immediately and in any event by close of business Friday, April 27, 2012." Shaheen Decl. Ex. 5 (p. 4).

74. Over the course of the investigation, Morgan Drexen produced over seventeen thousand pages of documents to CFPB. Shaheen Decl. Ex. 26.

75. Over the course of the investigation, CFPB issued two more CIDs to Morgan Drexen, this time for oral testimony. Shaheen Decl. ¶¶ 34-36.

76. Over the course of the investigation, CFPB requested information concerning the amount of any given "engagement fee under the bankruptcy fee agreement" and any "bankruptcy filing fee" for attorneys. Shaheen Decl. Ex. 34 (p. 2).

77. Over the course of the investigation, CFPB deposed Jeffrey Katz, David Walker, Laura Wiegman, and Walter Ledda, all from Morgan Drexen. Shaheen Decl. ¶¶ 35, 37.

78. Morgan Drexen has "diverted substantial attention and resources, in terms of paying attorney's fees, as well as the company time necessary to provide officers for depositions, collect and review documents, and otherwise respond to CFPB's demands." Declaration of Walter Ledda [Docket No. 3-2] ("Ledda Decl.") ¶ 14(a).

79. The investigation has also significantly increased Morgan Drexen's costs with respect to accessing credit. Ledda Decl. ¶ 14(b).

80. For example, CFPB sent a CID to Morgan Drexen's banking partners, which led to the company's losing its credit facilities. Ledda Decl. ¶ 14(b).

81. CFPB also sent a CID to US Capital which has impacted Morgan Drexen's ability to obtain reasonable financing. Ledda Decl. ¶ 14(b).

82. Morgan Drexen now pays 22% interest where, before the CID, Morgan Drexen was able to obtain financing at 4.5%. Ledda Decl. ¶ 14(b).

83. CFPB also demanded documents directly from certain of Morgan Drexen's attorney business partners, such as Howard Law, P.C. Ledda Decl. ¶ 14(d); Shaheen Decl. Exs. 27-28.

84. CFPB also demanded documents directly from Kovel and Fuller, which partners with Morgan Drexen to provide marketing services to the attorneys supported by Morgan Drexen. Ledda Decl. ¶ 14(e).

85. CFPB also demanded that Morgan Drexen produce documents that are in the files of Morgan Drexen's attorney business partners. Ledda Decl. ¶ 7; Shaheen Decl. Ex. 1 (Request Nos. 10 and 21).

86. CFPB's demands for attorney client files have placed Morgan Drexen in a difficult position because Morgan Drexen's attorney business partners have not authorized disclosure. *See* Declaration of Kimberly Pisinski [Docket No. 3-3] ("Pisinski Decl.") ¶ 5; Shaheen Decl. Exs. 27-28.

87. CFPB's investigation has been stigmatizing to Morgan Drexen. Ledda Decl. ¶ 14(f).

88. CFPB has threatened to send subpoenas to all of Morgan Drexen's attorney customers. Ledda Decl. ¶ 14(g).

89. CFPB informed counsel to Morgan Drexen that the attorneys supported by Morgan Drexen are in violation of the Telemarketing Sales Rule, 16 C.F.R. §§ 310.1 *et seq.*, because the attorneys charge their clients hourly fees for the preparation of bankruptcy pleadings. Shaheen Decl. ¶ 43.

90. Violations of the Telemarketing Sales Rule are punishable by a permanent or temporary injunction, rescission or reformation of contracts, the refund of moneys paid, restitution, disgorgement or compensation for unjust enrichment, and monetary relief, including but not limited to significant civil money penalties. *See* 15 U.S.C. § 6102(c) (stating that violations of the rule shall be treated as a violation of section 1031 of the Consumer Financial Protection Act, subjecting offenders to the penalties available under 12 U.S.C. § 5565).

91. CFPB has initiated suits against other entities accused of violating the Telemarketing Sales Rule, seeking permanent injunctions, restitution, disgorgement, civil money penalties, and attorneys' fees. *See Consumer Financial Protection Bureau v. Mission Settlement Agency*, No. 13-CV-3064, 2013 WL 1891278 (S.D.N.Y. May 7, 2013); *Consumer Financial Protection Bureau v. Jalan*, No. SACV12-02088, 2012 WL 6584110 (C.D. Cal. Dec. 3, 2012).

92. On April 22, 2013, CFPB wrote counsel to Morgan Drexen and stated that CFPB was proceeding:

in accordance with [CFPB]'s discretionary Notice and Opportunity to Respond and Advise (NORA) process. During our telephone conversation, I notified you that [CFPB]'s Office of Enforcement is considering recommending that the Bureau take legal action against your clients Morgan Drexen, Inc. and Walter Ledda, and I offered your clients the opportunity to make NORA submissions. As we discussed, the staff expects to allege that your clients violated Sections 1031 and 1036 of the Consumer Financial Protection Act, 12 U.S.C. § 5536 and the Telemarketing Sales Rule, 16 CFR § 310. In connection with the contemplated action, the staff may seek injunctive and monetary relief against your clients.

Shaheen Decl. Ex. 32.

93. CFPB informed counsel to Morgan Drexen that it would not accept any resolution of its concerns short of Morgan Drexen refusing to support attorneys engaged by clients for both bankruptcy counseling and debt settlement. Shaheen Decl. ¶ 43.

94. These "engagements comprise a large percentage of Morgan Drexen's total business, and any requirement that Morgan Drexen stop providing these services to attorneys would threaten the viability of Morgan Drexen's business." Ledda Decl. ¶ 13.

V. PISINSKI'S RIGHT TO PRACTICE LAW WITHOUT CFPB REGULATION AND INTERFERENCE

95. Pisinski is a lawyer practicing law in Connecticut. Pisinski Decl. ¶ 1.

96. Pisinski has spent a large portion of her career doing volunteer work serving underprivileged and at-risk women and children, including those in financial distress. *See* Pisinski Biography (Pisinski worked as a legislative advocate in both New York and South Carolina for various women's and children's issues and assisted in South Carolina with starting up one of the first homeless daycare centers in the country. [Pisinski] is an active member of the Canton Juvenile Review Board, the Council for Exceptional Children, and Learning Disability Association, among others) (available at <http://www.zoominfo.com/p/Kimberly-Pisinski/456795667>) (last visited Aug. 5, 2013).

97. Pisinski contracts with Morgan Drexen to provide non-attorney/paralegal services that support her law practice. Pisinski Decl. ¶ 3; Ledda Decl. ¶ 4.

98. Ms. Pisinski "depend[s] on Morgan Drexen to assist [her] in providing [her] clients with high quality and relatively low cost legal services." Pisinski Decl. ¶ 10.

99. CFPB's investigation of Morgan Drexen has been disruptive to Ms. Pisinski's law practice and to her clients. Pisinski Decl. ¶ 4.

100. Ms. Pisinski offers her clients bankruptcy services. Pisinski Decl. ¶ 2.

101. As part of any bankruptcy engagement, clients may elect for Ms. Pisinski to first amicably resolve their debts with creditors prior to filing the bankruptcy petition. Pisinski Decl. ¶ 2.

102. Ms. Pisinski's clients provide her with their "most private financial information" that she receives as part of the confidential attorney-client relationship. Pisinski Decl. ¶ 5.

103. Clients have verbalized to Ms. Pisinski that they "worry about the government accessing their information and if they are not completely sure of the security of their information then they will not give [Ms. Pisinski] the information that [she] need[s] to properly counsel them." Pisinski Decl. ¶ 7.

VI. CFPB HAS GREATER POWER AND LESS CHECKS AND BALANCES THAN ANY COMPARABLE AGENCY

104. Congress has used a multimember commission structure for independent regulatory agencies for more than 125 years since the creation of the Interstate Commerce Commission ("ICC"). The ICC's five commissioners were appointed by the President with the consent of the Senate: "An uneven number of commissioners (5) appointed to staggered terms of a fixed period extending beyond the term of the President (6 years)." Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 379, 383.

105. More than a century after Congress created the ICC, Congress created the Federal Election Commission ("FEC"). Congress provided for a multimember commission for FEC: "There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3

members of the Commission appointed under this paragraph may be affiliated with the same political party." 2 U.S.C. § 437c-(a)(1).

106. In the intervening years, Congress used the multimember commission structure for other agencies, including the FTC (15 U.S.C. § 41); SEC (15 U.S.C. § 78d(a)); Commodity Futures Trading Commission (7 U.S.C.A. § 2); Federal Communications Commission (47 U.S.C. § 154); FERC (42 U.S.C. § 7171(b)(a)(5)); and the Consumer Products Safety Commission ("CPSC") (15 U.S.C. § 2053(a)).

107. The Federal Reserve is overseen by a seven member board. 12 U.S.C. § 241.

108. Each new President has the opportunity to appoint at least two board members. *See* 12 U.S.C. § 242 (providing for fourteen-year staggered terms).

109. The Office of the Comptroller of the Currency ("OCC") has a head (the Comptroller) who serves a five year term. 12 U.S.C. §§ 1-2.

110. The Comptroller can be removed by the President at will, upon reasons to be communicated by him to the Senate. 12 U.S.C. § 2 ("The Comptroller of the Currency shall be appointed by the President . . . and shall hold his office for a term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate").

111. The now defunct Office of Thrift Supervision ("OTS") was headed by a single director who served a five year term. 12 C.F.R. § 500.10.

112. The Office of Legal Counsel takes the position that the OTS Director serves 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 under the statute here") (available at <http://www.justice.gov/olc/2001/otspost2.pdf>) (last visited Aug. 5, 2013).

113. The Federal Deposit Insurance Corporation is run by a five person Board of Directors. 12 U.S.C. § 1812(a)(1).

114. No more than three FDIC Directors may be members of the same political party. 12 U.S.C. § 1812(a)(2).

115. The FTC is governed by a five person Commission that serves staggered seven year terms. 15 U.S.C. § 41.

116. The President has the power to designate the Chairperson from among the five FTC Commissioners. *Id.*

117. The FTC is subject to the congressional appropriations process. 15 U.S.C. § 57c.

118. The Department of Housing and Urban Development is a cabinet-level agency. 42 U.S.C. § 3532(a).

119. The HUD is headed by a Secretary who serves without restrictions on the President's power to remove. *Id.*

120. The HUD is subject to the congressional appropriations process. 42 U.S.C. § 3535(s).

121. The SEC is composed of five Commissioners. 15 U.S.C. § 78d(a).

122. The SEC commissioners are appointed by the President with the advice and consent of the Senate. *Id.*

123. No more than three Commissioners may be members of the same political party. *Id.*

124. The SEC is subject to the congressional appropriations process. 15 U.S.C. § 78kk.

125. The CPSC is composed of "five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate." 15 U.S.C. § 2053(a).

126. The CPSC Commissioners serve seven-year terms, during which time they may only be removed for cause. 15 U.S.C. § 2053(a).

127. The Office of Legal Counsel takes the position that the President has the authority to pick the CPSC Chairman from among the Commissioners, and may replace the Chairman at will. *See* U.S. Department of Justice Office of Legal Counsel Memorandum Opinion, President's Authority to Remove the Chairman of the Consumer Product Safety Commission (July 31, 2001) ("We conclude that the President has the authority to remove the Chairman of the CPSC for any reason.") (available at <http://www.justice.gov/olc/cpscchairmanremoval.htm>) (last visited Aug. 5, 2013).

128. CPSC is subject to the congressional appropriations process. 15 U.S.C. § 2081.

129. The Environmental Protection Agency ("EPA") is headed by an Administrator. Reorganization Plan No. 3 of 1970, 84 Stat. 2086 (1970); 40 C.F.R. § 1.23.

130. There are no restrictions on the President's ability to remove the Administrator. 40 C.F.R. § 1.23.

131. EPA is subject to the congressional appropriations process. Cong. Research Service 7-5700, Environmental Protection Agency (EPA): Appropriations for FYI2013 (available at <http://www.fas.org/sgp/crs/misc/R42520.pdf>) (last visited Aug. 5, 013).

VII. THE STRUCTURE OF CFPB, ITS ACTIONS, AND WHETHER IT VIOLATES THE CONSTITUTION'S SEPARATION OF POWERS HAVE BEEN THE SUBJECT OF SIGNIFICANT DEBATE AMONG MEMBERS OF CONGRESS, ADVOCACY GROUPS, SCHOLARS, AND REGULATED ENTITIES

132. Even after enactment, members of Congress continue to call for a restructuring of CFPB that would require a multimember commission structure for CFPB. *See* News Release,

Senator Jerry Moran, Sen. Moran Introduces Bill to Reform Consumer Financial Protection Bureau (Apr. 6, 2011) (stating "The Responsible Consumer Financial Protection Regulations Act of 2011, S. 737, would replace the single CFPB Director with a Senate-confirmed five-person commission – similar to the leadership structure of the Securities and Exchange Commission (SEC), Commodity Futures Trade Commission (CFTC) and Federal Trade Commission (FTC)") (available at <http://www.moran.senate.gov/public/index.cfm/news-releases?ID=18419a98-8ee4-4b84-80cd-52cf6043368d>) (last visited Aug. 5, 2013).

133. In April 2013, Professor Todd J. Zywicki published an article in the *George Washington Law Review* explaining that CFPB's structure makes it "one of the most powerful and publicly unaccountable agencies in American history." Todd J. Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?* 81 GEO. WASH. L. REV. 856, 875 (Apr. 2013).

134. Professor Neomi Rao goes further and writes that the Supreme Court's decision in *Free Enterprise Fund* suggests that CFPB is unconstitutional because of the "removal restrictions that insulate the director from presidential oversight." Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALABAMA L. REV -- (2014) (forthcoming).

135. On June 21, 2012, two regulated entities and the Competitive Enterprise Institute filed a constitutional challenge against the Dodd-Frank Act (including Title X) in this Court. Complaint at ¶ 1, *State Nat'l Bank of Big Spring v. Geithner*, No. 1:12-cv-01032-ESH (D.D.C. June 21, 2012).

136. The plaintiffs in that case were represented by C. Boyden Gray and Adam J. White of Boyden Gray & Associates P.L.L.C., Gregory Jacob of O'Melveny & Myers LLP, and Sam Kazman and Hans Bader of the Competitive Enterprise Institute. *Id.*

137. Judge Huvelle declined to reach the merits of CFPB's constitutionality and dismissed the case for lack of standing. *State Nat'l Bank of Big Spring v. Lew*, No. 12-1032(ESH), 2013 WL 3945027 (D.D. C. Aug. 1, 2013).

VIII. CFPB'S UNACCOUNTABILITY IS EVIDENCED BY ITS ACTIONS IN COLLECTING PERSONAL DATA FROM U.S. CITIZENS

138. On April 23, 2013, the Senate Committee on Banking, Housing, and Urban Affairs held a hearing on the Semi-Annual Agenda of CFPB. *The Consumer Financial Protection Bureau's Semi-Annual Report to Congress, Hearing Before the S. Committee on Banking, Housing, and Urban Affairs*, 113th Cong. (Apr. 23, 2013) (available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=765a704e-a287-4f96-910e-5866ac0fc352) (last visited Aug. 2, 2013).

139. At the April 23, 2013 hearing, United States Senator Mike Crapo (R-Idaho) raised concerns regarding CFPB's data collection efforts. *Id.* (available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Newsroom.MinorityNews&ContentRecord_id=5d06aa95-ba2d-14f0-5491-53fe83bd0be7&Region_id=&Issue_id=) (last visited Aug. 5, 2013).

140. On May 16, 2013, Senator Crapo sent a letter to CFPB Director Richard Cordray requesting that CFPB furnish information concerning its "legal authority to collect consumer lending and credit data for the agency's Big Data initiative." Letter from Senator Mike Crapo to Richard Cordray, Director, Consumer Financial Protection Bureau (May 16, 2013) (available at <http://www.crapo.senate.gov/issues/banking/documents/letter.pdf>) (last visited Aug. 2, 2013).

141. On May 23, 2013, Director Cordray sent a letter to Senator Crapo responding to Senator Crapo's May 16, 2013 letter and disputing that CFPB had a "Big Data initiative." Letter from Richard Cordray, Director, Consumer Financial Protection Bureau to Senator Mike Crapo

(May 23, 2013) at p. 2 (available at <http://www.cfpbmonitor.com/files/2013/06/CFPBdatacollection-esponse.pdf>) (last visited Aug. 2, 2013).

142. On July 2, 2013, Senator Crapo wrote to the Comptroller General of GAO, requesting an investigation into CFPB's data collection practices. Letter from Senator Mike Crapo to Gene Dodaro, Comptroller General, U.S. Government Accountability Office (July 2, 2013) (available at <http://www.crapo.senate.gov/issues/banking/documents/CrapoGAORequestre.CFPBData.pdf>) (last visited Aug. 5, 2013).

143. On July 12, 2013, GAO accepted Senator Crapo's request as within the scope of its authority and stated that it would begin the work (*i.e.*, investigate CFPB's data collection practices) "shortly." Letter from Katherine Siggerud, Managing Director for Congressional Relations, U.S. Government Accountability Office to Senator Mike Crapo (July 12, 2013) (available at <http://www.cfpbmonitor.com/files/2013/07/GAOLetter.pdf>) (last visited Aug. 5, 2013).

144. Judicial Watch President Tom Fitton stated that CFPB's actions were "a more direct assault on American citizens' reasonable [expectation] of privacy than the gathering of general phone records." Bob Unruh, *Now Obama Watching American's Credit Cards*, WND.com (quoting Tom Fitton) (available at <http://www.wnd.com/2013/06/now-obama-watching-americans-credit-cards/>) (last visited July 22, 2013).

145. Mr. Fitton has also stated that CFPB is "an out-of-control government agency that threatens the fundamental privacy and financial security of Americans. This is every bit as serious as the controversy over the NSA's activities." *Id.*

146. David T. Hirschmann, the President and Chief Executive Officer of the U.S. Chamber of Commerce's Center for Capital Markets, wrote in a letter to Director Cordray that CFPB "should not misuse the supervision process to demand huge amounts of data" and expressed concern that CFBP's requests are otherwise improper. Letter from David T. Hirschmann, President and Chief Executive Officer of the U.S. Chamber of Commerce's Center for Capital Markets, to Richard Cordray, Director, Consumer Financial Protection Bureau (Feb. 14, 2013) (available at <http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/2013-2-14-CFPB-supervision-letter.pdf>) (last visited Aug. 2, 2013).

147. John Berlau, a scholar of the Competitive Enterprise Institute, has called CFPB's data collection activities "an NSA-style surveillance program without any serious justification, such as terrorism." Brendan Bordelon, *Consumer Financial Protection Bureau compared to NSA*, THE DAILY CALLER, June 26, 2013 (quoting John Berlau) (available at <http://dailycaller.com/2013/06/26/consumer-financial-protection-bureau-compared-to-nsa/>) (last visited Aug. 5, 2013).

148. Randy E. Barnett, a professor of constitutional law at Georgetown University, wrote in the Wall Street Journal that NSA and CFPB's activities "dangerously violate[] the most fundamental principles of our republican form of government" (the Fourth Amendment's prohibition against unreasonable searches and seizures, and the requirement that no warrants shall issue but upon probable cause). Randy E. Barnett, Editorial, *The NSA's Surveillance is Unconstitutional*, WALL ST. J., Jul. 11, 2013, at A13.

149. Mr. Barnett further wrote that: "[t]he secrecy of these programs makes it impossible to hold elected officials and appointed bureaucrats accountable." *Id.*

Respectfully submitted,

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/s/

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