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Fighting Yesterday's Battles: Proposed Changes to the Consumer Financial Protection Bureau

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I. INTRODUCTION

“Congressman, you are causing problems,” Ms. Warren said. “We had an agreement.” “You’re making this up,” Mr. McHenry replied, eliciting gasps from the audience. “This is not the case.” As Mr. McHenry and Ms. Warren traded accusations, a senior Democrat, Representative Elijah Cummings of Maryland, tried to smooth things over. “Mr. Chairman,” he said, “I’m trying to be cordial here — you just accused the lady of lying.”

The partisan exchange has sunk to unfortunate lows as the Consumer Financial Protection Bureau (CFPB) has materialized. Although the CFPB was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which was enacted on July 21, 2010, and it officially opened for business on July 21, 2011, some members of Congress continue to insist that its structure needs revisiting. They say that the CFPB’s powers go beyond making financial products digestible for consumers because not only would it burden consumer credit providers with unnecessary regulations, but it could also prevent them from creating new products. Others believe that the CFPB is American consumers’ only administrative counterweight to the prudential regulators who some think have mostly aligned with busi-


3. The term prudential regulator means “in the case of an insured depository institu-
ness interests. These supporters assert that the CFPB will be instrumental in preventing a systemic collapse like the one in 2008. The debate has been nothing if not heated.

The source of the debate traces back to the origins of the recent financial crisis (hereinafter “the 2008 crisis”). Congressional proponents of the CFPB tend to place more blame for the 2008 crisis on the financial institutions’ risky practices. The CFPB’s detractors point the finger at government interference in the mortgage industry and believe that government is not equipped to solve the problem. These detractors have proposed a number of bills to adjust the CFPB to reflect their position.

This Note will analyze the proposed changes to the CFPB. Although it is difficult to say exactly what the implications of such adjustments would be, they almost certainly would subordinate consumer interests to nearly the same level at which they stood prior to the passage of Dodd-Frank. This Note will explain why some of the proposed changes go beyond mere structural tweaks to the CFPB and instead serve to undermine the CFPB before it even has a chance to prove its worth.


6. Id.

7. New Consumer Watchdog, supra note 2; see also Bill Thomas et al., What Caused the Financial Crisis? Congress’s Inquiry Commission Is Offering a Simplistic Narrative that Could Lead to the Wrong Policy Reforms, WALL ST. J., Jan. 27, 2011 [hereinafter What Caused the Financial Crisis?], available at http://online.wsj.com/article/SB10001424052748704698004576104500524998280.html (noting that the risky practices included: providing nontraditional mortgages that were deceptive, confusing, and often unaffordable for borrowers; midsize to large financial firms amassing vast concentrations of highly correlated housing risk; holding insufficient capital relative to the risks and using short term debt to fund them).

8. New Consumer Watchdog, supra note 2; see also What Caused the Financial Crisis?, supra note 7 (describing the government’s ineffective regulation of the primary mortgage market as a major factor in causing the 2008 financial crisis).

Part II will briefly summarize the consumer-oriented factors that contributed to the 2008 crisis and how these factors revealed a need for reform.\textsuperscript{10} It will review the beginnings of the CFPB and its current structure.\textsuperscript{11}

Part III describes the Congressional proposals to change the review of CFPB rulemaking, the CFPB's leadership structure, and the CFPB's funding.\textsuperscript{12} This section will explain the reasons for these proposals and their implications.\textsuperscript{13}

Finally, Part IV will elaborate on why the CFPB should mostly remain as it stands today, reviewing the problems that existed before consumer protection became a priority and comparing the CFPB to its administrative peers.\textsuperscript{14}

II. THE CFPB'S ROUGH ROAD TO EXISTENCE

A. The 2008 Financial Crisis

There were many causes to the 2008 crisis, but some of the primary causes were unscrupulous business practices in investment banking and structured finance, inflated credit ratings, high risk lending in the mortgage market, and regulatory inaction.\textsuperscript{15} However, these factors did not operate in a vacuum, but instead tended to enable and magnify the impact of one another. Shortsighted lending practices grew in the 1990s as subprime lenders placed consumers into homes that those consumers could not afford.\textsuperscript{16} Federal regulators, like the Federal Reserve Board (FRB), that were charged with tracking these abusive practices failed to intervene or enact appropriate regulations to ensure that home

\textsuperscript{10}See infra Part II.
\textsuperscript{11}See infra Part II.
\textsuperscript{12}See infra Part III.
\textsuperscript{13}See infra Part III.
\textsuperscript{14}See infra Part IV.
\textsuperscript{16}Enhanced, supra note 5, at 1 (statement of Mike Calhoun, President, Center for Responsible Lending).
owners could afford their mortgages.\textsuperscript{17} In so failing, the regulators perpetuated this downward spiral, leaving mortgagors, shareholders, taxpayers, and many others floundering in a broken system.\textsuperscript{18}

\textbf{B. A New Agency for Consumers}

Following the 2008 crisis and the failures of the various offending parties, Congress enacted Dodd-Frank, which created the CFPB.\textsuperscript{19} The CFPB’s mission is to ensure that:

\begin{enumerate}
\item Consumers are provided with timely and understandable information to make responsible decisions about financial transactions;
\item consumers are protected from unfair, deceptive, or abusive acts or practices, and from discrimination;
\item outdated, unnecessary, or overly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens;
\item Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and
\item markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.\textsuperscript{20}
\end{enumerate}

Leading up to the 2008 crisis, many of the prudential regulators who were supposed to ensure the safety and soundness\textsuperscript{21} of financial institutions and overall market stability, focused almost exclusively on the former.\textsuperscript{22} By protecting the profitability of the banks to the exclusion of

\begin{footnotes}
\item[17.] Id.
\item[18.] Id. at 2.
\item[20.] Id. § 5511.
\item[21.] Safety and soundness has been defined by “[s]ection 39 of the Federal Deposit Insurance Act (FDI Act), [which] requires each Federal banking agency (collectively, the agencies) to establish certain safety and soundness standards by regulation or by guideline for all insured depository institutions. Under section 39, the agencies must establish three types of standards: (1) Operational and managerial standards; (2) compensation standards; and (3) such standards relating to asset quality, earnings, and stock valuation as they determine to be appropriate.” 12 C.F.R. pt. 30, app. A (2011).
\item[22.] Enhanced, supra note 5, at 2 (statement of Mike Calhoun, President, Center for Responsible Lending).
\end{footnotes}
the consumer interests, these agencies failed to appreciate the symbiotic relationship between the two.\textsuperscript{23} The CFPB’s existence is recognition of that failure because, by creating it, Congress shifted the responsibilities for consumer protection away from the regulators whose focus had been safety and soundness to an agency whose mission is to represent the interests of the consumer.\textsuperscript{24}

Fair practices regulations play a fundamental role in protecting the economy.\textsuperscript{25} In the broadest sense, the CFPB’s means to that end is enabling consumers to make informed decisions.\textsuperscript{26} For markets to function properly, consumers must have the information they need to make appropriate financial decisions.\textsuperscript{27} Producers will then respond to a demand that is attuned to the modern consumer.\textsuperscript{28} Today, these fundamental components of marketplace exchange are lacking.\textsuperscript{29} Both borrowers and lenders have attested that many of the industry-wide agreements are confusing and time-consuming.\textsuperscript{30} There are improvements to be made on all sides, and the CFPB will analyze feedback from consumers and financial services providers to assist in that effort.\textsuperscript{31} Although consumers should be held accountable for their decisions, they cannot be held accountable for uninformed guesses.\textsuperscript{32} When an individual takes on financial obligations under certain premises only to be ambushed by hidden snags, the marketplace suffers.\textsuperscript{33}

\begin{itemize}
\item \textsuperscript{23} Id.
\item \textsuperscript{26} See Creating the Consumer Bureau, supra note 24.
\item \textsuperscript{27} Who’s Watching, supra note 25, at 4 (statement of Elizabeth Warren, Special Advisor to the Secretary of the Treasury for the Consumer Financial Protection Bureau).
\item \textsuperscript{28} Id. at 3-4.
\item \textsuperscript{29} See id. at 3.
\item \textsuperscript{30} See id. at 4.
\item \textsuperscript{31} Learn About the Bureau, Consumer Financial Protection Bureau, http://www.consumerfinance.gov/the-bureau/ (last visited Dec. 27, 2011).
\item \textsuperscript{32} See Who’s Watching, supra note 25, at 4 (statement of Elizabeth Warren, Special Advisor to the Secretary of the Treasury for the Consumer Financial Protection Bureau).
\item \textsuperscript{33} See id.
To address these issues, the CFPB has been working to produce concise and transparent forms\textsuperscript{34} for common credit products.\textsuperscript{35} As for the providers of consumer financial products and services, the CFPB hopes to ease the regulatory burden—especially for smaller firms, which often lack the resources to deal with the complex requirements and paperwork.\textsuperscript{36}

1. Structure of the CFPB

Dodd-Frank stipulates that the CFPB will be able to regulate any entity that “engages in offering or providing a consumer financial product or service,”\textsuperscript{37} excluding only a few types of businesses like merchants, retailers, and others who sell nonfinancial goods or services.\textsuperscript{38} The CFPB will have rulemaking power for existing consumer protection laws\textsuperscript{39} and will be able to file civil claims against any party who violates a duly enacted law.\textsuperscript{40} The CFPB will also have exclusive supervisory and enforcement powers over “large” financial institutions,\textsuperscript{41} defined as those with assets greater than $10 billion.\textsuperscript{42} Smaller institutions will still answer to their traditional safety and soundness regulators for compliance issues.\textsuperscript{43}

Before the CFPB may propose a rule, it is required to consult with the prudential regulators, and it will have to publicize\textsuperscript{44} any objections they might raise.\textsuperscript{45} Once finalized, all rules that “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” will be subject to

\begin{itemize}
  \item \textsuperscript{34} See \emph{Know Before You Owe}, \textsc{Consumer Financial Protection Bureau}, http://www.consumerfinance.gov/knowbeforeyouowe/ (last visited Dec. 27, 2011).
  \item \textsuperscript{35} \emph{Who’s Watching}, supra note 25, at 4-5 (statement of Elizabeth Warren, Special Advisor to the Secretary of the Treasury for the Consumer Financial Protection Bureau).
  \item \textsuperscript{36} See \emph{id.} at 5.
  \item \textsuperscript{37} 12 U.S.C. § 5481 (Supp. IV 2010).
  \item \textsuperscript{38} \emph{id.} § 5517.
  \item \textsuperscript{39} \emph{id.} § 5512.
  \item \textsuperscript{40} \emph{id.} § 5564.
  \item \textsuperscript{41} \emph{id.} § 5514.
  \item \textsuperscript{42} Mike Ferullo, \emph{Prudential Regulators, Consumer Bureau Clarify Supervision, Enforcement Duties, Banking Daily} (BNA), Nov. 22, 2011 [hereinafter \emph{Prudential Regulators, Consumer Bureau Clarify Supervision}].
  \item \textsuperscript{43} \emph{id.}
  \item \textsuperscript{44} “[T]he Bureau shall include in the [rule] adopting release a description of the objection and the basis for the Bureau decision.” 12 U.S.C. § 5512 (Supp. IV 2010).
  \item \textsuperscript{45} \emph{id.} § 5512.
\end{itemize}
a veto by two-thirds\textsuperscript{46} of the Financial Stability Oversight Council (FSOC), another new entity created by Dodd-Frank.\textsuperscript{47} Finally, the CFPB will be required to provide semi-annual reports to the President and Congressional committees.\textsuperscript{48}

Despite these various oversight mechanisms, the CFPB still has a great deal of autonomy. The agency's leadership will be a single director serving a five-year term who may only be removed for cause.\textsuperscript{49} Furthermore, as an agency within the FRB, the CFPB will have a great deal of discretion in its budget.\textsuperscript{50} The CFPB Director will request an amount of funds up to a statutory cap, and the FRB will be required to comply.\textsuperscript{51}

III. CONGRESSIONAL PROPOSALS FOR CHANGE

The Congress that passed Dodd-Frank in July of 2010 changed in composition during the November 2010 elections.\textsuperscript{52} With new lines drawn, the Congressional response has been colorful and partisan.\textsuperscript{53} Even with the July 21, 2011 finish line in sight,\textsuperscript{54} Republicans kept up efforts to fetter the CFPB. On May 4, 2011, House and Senate Republi-

\textsuperscript{46} Id. § 5513.

\textsuperscript{47} The FSOC is composed of nine voting members from federal agencies, many of which are prudential regulators (e.g., the Office of the Comptroller of the Currency, the Federal Trade Commission, the Federal Reserve Board, the Securities and Exchange Commission). See Financial Stability Oversight Council Created Under the Dodd-Frank Wall Street Reform and Consumer Protection Act: Frequently Asked Questions, U.S. DEP'T. OF TREASURY, http://www.treasury.gov/initiatives/FSOC/Pages/default.aspx (last visited Jan. 24, 2012).

\textsuperscript{48} The CFPB shall submit “to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services and the Committee on Energy and Commerce of the House of Representatives, a report, beginning with the session following the designated transfer date. The Bureau may also submit such report to the Committee on Commerce, Science, and Transportation of the Senate.” 12 U.S.C. § 5496.

\textsuperscript{49} Id. § 5491.

\textsuperscript{50} Who's Watching, supra note 25, at 5 (statement of the U.S. Chamber of Commerce).

\textsuperscript{51} 12 U.S.C. § 5497.


\textsuperscript{53} See Mike Ferullo, GOP Lawmakers Take First Legislative Steps To Restructure New Consumer Bureau, BANKING DAILY (BNA), May 10, 2011 [hereinafter GOP Lawmakers].

\textsuperscript{54} Designated Transfer Date Notice, 75 Fed. Reg. 57,252 (Sept. 20, 2010).
cans initiated legislation that would confine the CFPB’s reach.\textsuperscript{55} There are three primary efforts underway.\textsuperscript{56}

\textbf{A. Proposed Changes to the Review of CFPB Rulemakings}

The proposed changes to the process of reviewing CFPB rulemakings include adjusting the standard for the FSOC to veto CFPB rulemakings.\textsuperscript{57} The new veto standard would be rules that are “inconsistent with the safe and sound operations of United States financial institutions,” at which point the FSOC would be \textit{required}, as opposed to authorized, to act.\textsuperscript{58} Additionally, the changes would lower the requirement to overrule CFPB regulations from two-thirds of the FSOC members to simply a majority of the FSOC.\textsuperscript{59} The vote of the CFPB Director, who sits on the FSOC, would not count, so the veto threshold to overrule the CFPB would go from seven out of nine votes to just five.\textsuperscript{60} Finally, the FSOC would be required to take a vote if any FSOC member objected to a CFPB rule.\textsuperscript{61}

1. Purpose for Adjusting the Review of CFPB Rulemakings

Most Republicans in Congress suggest that the CFPB does not have sufficient input from those who appreciate the need for safety and soundness protection.\textsuperscript{62} Businesses of all types, from credit unions to small businesses, have supported this proposal.\textsuperscript{63} If it passes, the FSOC,

\begin{itemize}
\item \textsuperscript{55} GOP Lawmakers, supra note 53.
\item \textsuperscript{56} Id.
\item \textsuperscript{57} Consumer Financial Protection Safety and Soundness Improvement Act of 2011, H.R. 1315, 112th Cong. § 103 (2011); see also The Communities First Act of 2011, H.R. 1697, 112th Cong. (2011).
\item \textsuperscript{58} H.R. 1315 § 103; see also H.R. 1697.
\item \textsuperscript{59} H.R. 1315 § 102.
\item \textsuperscript{60} Id.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Who’s Watching, supra note 25, at 3 (statement of Todd Zywicki, George Mason Univ. Found. Professor of Law) (“Ideally, the entire bureau would be liquidated and sent to the dust bin of history, and all of its responsibilities sent to the Federal Trade Commission (FTC), where they belong.”).
\end{itemize}
which is composed of many prudential regulators, would be able to exert its influence in the rulemaking process more easily because only a simple majority of its members would be required to veto CFPB laws. 64 Also the standard for a veto would be lowered to any CFPB rulemaking that is "inconsistent with the safe and sound operations of United States financial institutions."65 This is to be compared with the current standard, which is any rulemaking that "would put the safety and soundness of the United States banking system . . . at risk," which the CFPB's critics believe will allow the CFPB to make rules that threaten individual financial institutions.66

For example, the American Bankers Association67 believes that the systemic risk threshold will invalidate small businesses' risks.68 Regulations that have a disproportionate effect on small community banks might not put the overall financial system at risk, but they could still harm the small banks.69 Should the concerns of small businesses go unnoticed, subsets of the overall market could begin to diminish, which could impact other parts of the economy.70 Accordingly, the overall purpose of these changes is to require more careful consideration for the effect of CFPB rulemakings on smaller institutions.71

2. Implications of Adjusting the Process of Reviewing CFPB Rulemakings

Opponents to this change believe that if the standard for vetoing a rule proposed by the CFPB was lowered from a rule that puts the banking system at risk to any rule that is inconsistent with the safety and

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64. H.R. 1315 § 102-103; see also H.R. 1697.
65. H.R. 1315 § 102-103; see also H.R. 1697 (emphasis added).
66. Legislative Proposals, supra note 63, at 3 (statement of Noah Wilcox, Executive Committee, Independent Community Bankers of America) (emphasis added).
68. Legislative Proposals, supra note 63, at 6 (statement of Leslie R. Andersen, American Banker Association).
69. Id. at 7.
70. Id. at 6.
71. See generally Prudential Regulators, supra note 42 (noting that the proposed changes to the standard of review for CFPB rulemakings should allow for closer consideration of the interests of smaller financial institutions).
soundness of financial institutions, the CFPB would be less capable to act as a counterweight to the federal bank regulators. In the past, federal bank regulators have interpreted safety and soundness to mean protecting profitability for the financial institutions, but that has proven to be detrimental to consumers and, ultimately, financial institutions because they rely on the consumer.

It is self-evident that a financial institution that is not profitable is not safe and sound. Consumer protection though, for better or worse, will often be at odds with certain profitable practices. For instance, predatory lending was a profitable practice for many financial institutions, but it was at odds with consumer interests, and eventually the financial institutions suffered as well. Still, the prudential regulators that oversaw the financial institutions leading up to the 2008 crisis approved these types of practices in the name of protecting safety and soundness.

Since regulators interpreted safety and soundness to mean profitability, the proposal to adjust the standard for the FSOC to veto CFPB rulemakings to those that are “inconsistent with the safe and sound operations” of financial institutions leaves the CFPB’s rulemaking discretion subject to veto if the rule burdens the profitability of U.S. financial institutions. Under that kind of scrutiny and a simple majority veto threshold, the CFPB would be fairly exposed to the prudential regulators and the interests they protect.

For example, in 2008, the Office of the Comptroller of the Currency (OCC) asked that the FRB add exceptions to Regulation AA, which sought to restrict the ability of credit card issuers to adjust the rates of their customers. The Comptroller asserted that such regula-

72. Enhanced, supra note 5, at 12 (statement of Adam Levitin, Professor of Law at Georgetown University Law Center).
73. See id. at 11.
74. Id.
75. Id.
76. Id.
77. Who’s Watching, supra note 25, at 3 (statement of Elizabeth Warren, Special Advisor to the Secretary of the Treasury for the Consumer Financial Protection Bureau).
78. See Enhanced, supra note 5, at 11 (statement of Adam Levitin, Professor of Law at Georgetown University Law Center) (emphasis added).
79. See id.
81. Enhanced, supra note 5, at 13 (statement of Adam Levitin, Professor of Law at Georgetown University Law Center).
tion would “raise safety and soundness concerns.”\textsuperscript{82} Congress disagreed, so it passed legislation\textsuperscript{83} curbing issuers’ discretion even further than the proposed amendments to Regulation AA would have.\textsuperscript{84} Under the proposed standard of review, had the OCC raised this same concern, it could have prevented the CFPB from finalizing regulations along these lines, even though they have since been deemed fit by Congress.\textsuperscript{85}

Allowing the FSOC to veto CFPB rulemakings more easily is a step towards allowing profitability interests to subsume consumer interests, but not necessarily a large one. There is wide recognition that the safety and soundness mandate of prudential regulators sitting on the FSOC has been at odds with consumer protection goals.\textsuperscript{86} However, the CFPB and the prudential regulators must work together, so there must be a mutual appreciation for the needs of both consumers and financial institutions. That balance, far more than the process for reviewing CFPB rulemakings, will determine whether the CFPB functions properly.

\textit{B. Proposed Changes to the CFPB’s Leadership Structure}

Another proposed change would reshape the leadership structure of the CFPB to provide for a five-person commission as opposed to a single director.\textsuperscript{87} The President would consult the Senate and, with its consent, name commissioners as well as a principal officer.\textsuperscript{88} Each commissioner would serve staggered terms, and only three of them could align with a particular political party.\textsuperscript{89}

\begin{itemize}
\item \textsuperscript{82}Letter from John C. Dugan, Comptroller of the Currency, to Jennifer Johnson, Sec’y, Bd. of Governors of the Fed. Reserve Bd. 1 (Aug. 18, 2008).
\item \textsuperscript{84}Enhanced, supra note 5, at 13 (statement of Adam Levitin, Professor of Law at Georgetown University Law Center).
\item \textsuperscript{85}See \textit{id.} at 13-14.
\item \textsuperscript{86}See \textit{Who’s Watching}, supra note 25, at 10 (statement of the U.S. Chamber of Commerce).
\item \textsuperscript{87}See Responsible Consumer Financial Protection Regulations Act of 2011, H.R. 1121, 112th Cong. § 2 (2011).
\item \textsuperscript{88}H.R. 1121 § 2(c).
\item \textsuperscript{89}Id.
\end{itemize}
1. Purpose of Changing the CFPB's Leadership Structure

Support for this proposal has been divided along partisan lines. Republicans in Congress take issue with the structure of the CFPB and support changing its leadership format to match that of other independent federal agencies. Indeed, there are many agencies that have three or five person commissions. In fact, as originally envisioned, the CFPB was to adopt the commission model, but the Senate introduced the single director model in the final stages of the Bill's implementation. The commission model has been credited with encouraging impartial decision-making, and since the CFPB will have control over technical matters, collaborative consideration will be important to ensure that a variety of viewpoints make their way into the deliberations leading up to agency action.

Another concern associated with a single-director model is the risk of regulatory capture. Rachel E. Barkow, professor of law at NYU, observed that "having only one person at the apex can . . . mean that the agency is more easily captured." Simply stated, special interests cannot capture the attention of a multimember bipartisan commission as easily as they can capture a single person.

Finally, a single-director's departure could produce a disruptive effect on the CFPB. The leaders for agencies generally acquire the

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90. Many Democrats in Congress believe that this proposal is intended to weaken the CFPB's mission, but their Republican counterparts disagree. GOP Lawmakers, supra note 53.

91. See Legislative Proposals, supra note 63, at 7 (statement of U.S. Chamber of Commerce).

92. E.g., the FTC, SEC, the Consumer Product Safety Commission, the Equal Employment Opportunity Commission, the National Credit Union Administration, the National Transportation Safety Board, etc. Id.

93. Id.


96. Id. at 38.

97. Id.

98. Adler, supra note 94 ("One current example is the FDIC, where the departure of board members - including former Chairman Sheila Blair - have left the board with just three out of five seats filled.").
wherewithal and knowledge to fulfill their duties over the course of a few years.\textsuperscript{99} If left in the hands of a single director, the CFPB and the institutions it regulates could be left in a period of uncertainty while a new director obtains the knowledge and skills necessary to effectively govern.\textsuperscript{100} By contrast, a bipartisan panel with staggered terms ensures a constant presence of commissioners with experience and diverse backgrounds.\textsuperscript{101} The potential for disruptive departures and political overhaul is thus undermined.\textsuperscript{102}

2. Implications of Changing the CFPB’s Leadership Structure

There are important reasons to leave the commission under a unitary directorship. It is not clear, from an academic standpoint, which leadership model is most effective in federal agencies.\textsuperscript{103} There are trade-offs involved, but in the context of consumer protection, the merits of a single-director structure are more persuasive than those associated with multimember commissions.\textsuperscript{104} Although commissions do more readily lend themselves to collaboration and intellectual diversity, those values come at a cost.\textsuperscript{105}

For instance, there is little accountability or efficiency under the multimember commission structure, and to the extent that there is bipartisanship, it is often only in name as the majority’s views nearly always eclipse those of the minority.\textsuperscript{106} The CFPB’s structure should promote action because regulatory lethargy played a significant role in the 2008

\begin{flushright}
\textsuperscript{99} Legislative Proposals, supra note 63, at 9 (statement of the U.S. Chamber of Commerce).
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 10.
\textsuperscript{102} Id.
\textsuperscript{103} Adler, supra note 94 ("There’s no proven form of governmental organization that transcends either history or human frailty..... We’ve seen powerful, potent boards, and completely incompetent ones.") (quoting Karen Shaw Petrou, managing partner at Federal Financial Analytics).
\textsuperscript{104} Enhanced, supra note 5, at 9-10 (statement of Adam Levitin, Professor of Law at Georgetown University Law Center).
\textsuperscript{105} Adler, supra note 94 (stating that some agencies have struggled with infighting between board members, such as "the Federal Housing Finance Board, which was eliminated in 2008 after years of sometimes openly hostile conflicts between the chairman and other board members.").
\textsuperscript{106} Enhanced, supra note 5, at 10 (statement of Adam Levitin, Professor of Law at Georgetown University Law Center).
\end{flushright}
crisis. If the CFPB is to help prevent the need for hundreds of billions of dollars in taxpayer bailouts, its structure needs to facilitate efficient and accountable decision-making. The single director structure is the best means to that end.

Regulatory capture is a real concern, but more so with respect to the large financial institutions, which have gained so much influence that regulation appears to have become slanted heavily in their favor, and less so with respect to consumer advocates, who have not been as effective. Capture is a problem for agencies regardless of their leadership structure. The system requires that agencies rely on frequent and deep interaction with the interests they protect, and it is unrealistic to think that a change in leadership structure alone would curb that influence. More effective measures include: enabling participation in the regulatory process from a broader group of interests; reducing the scale of larger interest groups; and relying more heavily on independent consultative and review bodies.

One of the downsides to the commission structure is the political haggling that will inevitably occur when addressing issues. Under the single-director design, an issue may rise and fall on its own, without incorporating peripheral issues promoted by various commissioners looking to make a deal. The single directorship curbs that bargaining and allows agencies to tackle issues on their individual merits.

Further complicating the commission model is the adversarial Senate confirmation process. The CFPB directorship was vacant for months due to opposition from Senate Republicans, more than forty

107. Id.
108. Id.
110. See id.
111. See id.
112. See id.
113. Enhanced, supra note 5, at 10 (statement of Adam Levitin, Professor of Law at Georgetown University Law Center).
114. Id.
115. Id.
116. Id.
of whom had vowed to block Richard Cordray’s nomination without questioning his qualifications. 118 This process not only blocks nominations, but it also dampens potential nominations. 119 The political deadlock associated with the confirmation process 120 poses a serious threat to the modern administrative state because the process has become so dysfunctional that federal agencies are left without directors, commissioners, or even quorums. 121 In the last few years, the Federal Trade Commission (FTC), the Consumer Product Safety Commission, and the National Labor Relations Board have all gone through periods of paralysis due to the absence of a quorum. 122 Since five confirmations are harder to attain than one, the CFPB would be more exposed to a process that is flawed and destabilizing under the proposed leadership changes. 123

Those who support changing the CFPB leadership structure have referred to lists of other agencies with multiple-person commissions, 124 but one of the federal financial regulators is notably absent from those lists: the OCC. 125 The OCC is the most powerful of the prudential regulators, and it has a single director as well as independent funding. 126 This structure has enabled the OCC to be an effective advocate for the national banks. 127 It has eschewed all of the inefficiencies

118. Cheryl Bolen & Mike Ferullo, Consumer Protection: White House Intensifies Effort to Confirm Cordray to CFPB Post; GOP Opposition Strong, BANKING DAILY (BNA), Dec. 6, 2011.

119. Enhanced, supra note 5, at 10 (statement of Adam Levitin, Professor of Law at Georgetown University Law Center).

120. The Senate’s confirmation process has become so problematic that a bipartisan group of Senators has introduced a bill that would cut back on the number of executive branch positions that require confirmation by the Senate. See Presidential Appointment Efficiency and Streamlining Act of 2011, S. 679, 112th Cong. (1st Sess. 2011).

121. Enhanced, supra note 5, at 10 (statement of Adam Levitin, Professor of Law at Georgetown University Law Center).

122. Id.

123. Id.

124. Legislative Proposals, supra note 63, at 7 (statement of the U.S. Chamber of Commerce).

125. Adler, supra note 94 (noting that two financial regulators, the Federal Housing Agency and the OCC, are both led by individual directors).

126. Enhanced, supra note 5, at 11 (statement of Adam Levitin, Professor of Law at Georgetown University Law Center).

127. Id.
and haggling associated with multiple-person commissions and operates with an efficiency and conclusiveness that only exists under the unitary directorship model.\textsuperscript{128}

This structure and influence remain intact to this day. For example, even after Dodd-Frank, the OCC has been able to use preemption to stifle states’ efforts to enforce local consumer protection laws against national banks.\textsuperscript{129} It is uncommon for federal agencies to comment on another regulator’s proposal.\textsuperscript{130} Thus, when the Treasury Department objected to the preemption standard proposed by the OCC,\textsuperscript{131} insisting that enactment of Dodd-Frank effectively compelled national banks to comply with more state consumer protection laws, many thought the OCC would take a step back.\textsuperscript{132} Instead, the OCC left its proposal intact, and so far, courts are enforcing this stance.\textsuperscript{133}

The CFPB was intended to be ballast for the OCC to allow consumer protection concerns to run parallel with profitability (i.e., safety and soundness) concerns.\textsuperscript{134} This balance is the best way to prevent the problems linked with subordination of consumer protection to profitability, and it requires that the CFPB have a single director, like the OCC, as opposed to the commission structure proposed.

C. Proposed Changes to the CFPB’s Funding

Another major overhaul would subject the CFPB budget to the Congressional appropriations process.\textsuperscript{135} The FRB would no longer be obligated to comply with the requests of the CFPB.\textsuperscript{136} Instead, the

\begin{itemize}
  \item \textsuperscript{128} Id.
  \item \textsuperscript{130} Id.
  \item \textsuperscript{132} \textit{Post Dodd-Frank, Preemption Fight}, supra note 129.
  \item \textsuperscript{133} Id. ("A federal judge in Iowa ruled that the Dodd-Frank Act did not materially change the standard for federal preemption. It was the second such decision of 2011, following a ruling by a Florida appellate court in May.").
  \item \textsuperscript{134} \textit{Enhanced}, supra note 5, at 11-12 (statement of Adam Levitin, Professor of Law at Georgetown University Law Center).
  \item \textsuperscript{135} Responsible Consumer Financial Protection Regulations Act of 2011, S. 737, 112th Cong. § 3 (2011).
  \item \textsuperscript{136} See S. 737 § 3 (amending 12 U.S.C. § 5497 (Supp. IV 2010)).
\end{itemize}
CFPB would explain its budgetary needs to Congress, which would then make its own determination as to the validity of the CFPB’s budgetary needs.\textsuperscript{137}

1. Purpose of Changing the CFPB’s Funding

The purpose of this proposed change is to use the power of the purse to hold the CFPB accountable to Congress.\textsuperscript{138} Notably, this change would expose the CFPB, but none of the other federal bank regulators, to the Congressional appropriations process for funding.\textsuperscript{139} The federal bank regulators receive funding outside the appropriations process in a variety of ways: the Federal Deposit Insurance Corporation (FDIC) receives its revenue from fees on deposit insurance; the OCC generates funds from bank assessments; the FRB receives funding by creating money in the reserve banks and collecting the interest on resulting reserve balances.\textsuperscript{140} More importantly, unlike the prudential regulators, the CFPB’s budget is already restricted by a statutory cap.\textsuperscript{141}

2. Implications of Changing the CFPB’s Funding

If left in Congress’s hands, the CFPB’s mission would be at the whim of Congressional politics and could be hampered by a minority in either house.\textsuperscript{142} The Congressional appropriations process’s effects on agency discretion have been apparent in a number of contexts.\textsuperscript{143} As an

\textsuperscript{137} See id.
\textsuperscript{139} Mark W. Olson, Expect a CFPB Compromise That Will Please Neither Camp, AM. BANKER, Aug. 11, 2011.
\textsuperscript{140} Id.
\textsuperscript{141} Enhanced, supra note 5, at 7 (statement of Adam Levitin, Professor of Law at Georgetown University Law Center); see also Olson, supra 139 (“The CFPB’s funding, which is paid in quarterly installments, is an initial 10% of the operating budget of the Fed, rising by 12% by 2013.”).
\textsuperscript{142} See Roland E. Brandel, History Shows Why CFPB Needs a Commission, AM. BANKER: BANK THINK, Oct. 19, 2011; Enhanced, supra note 5, at 7 (statement of Adam Levitin, Professor of Law at Georgetown University Law Center) (“[I]f bank regulators’ budgets were subject to the appropriations process, the agencies’ effectiveness and thus the President’s Constitutional obligation to enforce federal laws could be held hostage by a minority in either house of Congress.”).
\textsuperscript{143} See Brandel, supra note 142.
example, in the 1970s Congress refused to provide the funds requested by the FTC for regulating financial services and instead shut down the FTC for days in response to the requests. Afterwards, Congress restricted the FTC's authority to regulate financial services for fourteen years. As noted by former director of the Bureau of Consumer Protection of the FTC, Howard Beales, "[t]hus, chastened, the Commission abandoned most of its rule making initiatives." There is no reason to think the CFPB would not meet a similar fate under the appropriations process.

Additionally, subjecting the CFPB budget to the appropriations process would emasculate the agency because federal budgets are complex and often involve political horse-trading, which would make consumer protection a mere bargaining chip amongst many other considerations in an already-tight federal budget. If that were to be the case, it would be a failure to recognize the need for government to protect consumers the same way it protected financial institutions leading up to the 2008 crisis. Hence, such proposed changes to the CFPB budget should be rejected.

IV. WHY THE CFPB SHOULD NOT BE WEAKENED

Reactions to these proposed changes have been mixed and vociferous, but the implications of weakening the CFPB, the ultimate result if not objective of these proposals, are worth considering.

A. Failures Under the Old System

Although the CFPB has no history, there is reliable data demonstrating the implications of subordinating consumer protection to safety and soundness in the administrative context. In the pre-CFPB regulatory

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144. Id.
145. Id.
146. Id.
147. Enhanced, supra note 5, at 7 (statement of Adam Levitin, Professor of Law at Georgetown University Law Center).
148. Kate Davidson, Cordray Hearing Devolves into Partisan Fight Over CFPB Structure, AM. BANKER, Sept. 7, 2011 ("The misleading claim of no CFPB accountability—drummed up by special interests and put forth by a vocal minority—should be expressed for what it is: an attempt to destroy the bureau’s ability to do its job of protecting American consumers.") (quoting Tim Johnson, Chairman of the Senate Banking, Housing, and Urban Affairs Committee).
climate, consumer protection was essentially where the proposed changes would position it: at the mercy of the prudential regulators' agenda. Ten different federal agencies were supposed to enforce federal consumer financial protection laws, but it was not a primary mission for any of them. Three of those ten agencies proved to be especially ineffective when it came to protecting consumers: the FRB, the OCC, and the Office of Thrift Supervision (OTS), which today is a part of the OCC. Each of these agencies that still exists is a voting member of the FSOC. A review of their records not only demonstrates the effect of subordinating consumer protection in the administrative agenda, but also serves as a good indication of where these agencies' loyalties will lie as FSOC members.

In 1994, the Home Ownership and Equity Protection Act (HOEPA) bestowed on the FRB the authority to police the mortgage market and protect it from unfair and deceptive acts and practices. In 2000, consumer advocates exhorted the FRB to proscribe, among other abusive practices, prepayment penalties on mortgages with above-average interest rates. The FRB did not act until July of 2008, but by that time, it was too late to curtail the foreclosures, which contributed to the 2008 crisis. Had the FRB been more sensitive to the warnings from consumer advocates, many of those foreclosures could have been prevented.

The OCC is another example of an agency that gave little weight to its oversight role. In the late 1990s, many states enacted anti-predatory lending laws, which were supposed to protect homeowners...

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149. See Enhanced, supra note 5, at 1 (statement of Mike Calhoun, President, Center for Responsible Lending).
150. Id. at 2 (statement of Adam Levitin, Professor of Law at Georgetown University Law Center).
151. Id. at 3-5 (statement of Mike Calhoun, President, Center for Responsible Lending).
155. Enhanced supra note 5, at 2 (statement of Mike Calhoun, President, Center for Responsible Lending).
156. Cf. id.
and preserve a sound market. Simultaneously however, the OCC preempted many of these state laws. The result not only was to exempt federally chartered banks from these regulations, but also to occasion the argument from state chartered banks that it would not be fair to subject them to these regulations when their national bank counterparts could preempt their application. Consequently, the state lawmaking effort lost momentum, and banks, both state and national, were left playing by their own rules. The OCC did not believe such anti-predatory regulations were necessary. Even when expressly warned about predatory lending practices, the OCC repeatedly denied that such practices existed amongst the nationally chartered banks. If the OCC had been more responsive to the voice of consumers, it might have exercised its oversight authority and prevented the ruinous practices that it instead refused to acknowledge.

Finally, the OTS’s failure to respond to consumer interests became apparent in a number of contexts. For example, NetBank, a Georgia based company that provided internet banking services, failed under the watch of the OTS, costing shareholders and consumers alike. The OTS had sufficient data indicating that NetBank had un-

158. See id. at 9.
159. Enhanced, supra note 5, at 3 (statement of Mike Calhoun, President, Center for Responsible Lending).
160. Id.
161. Id.
162. The Office of the Comptroller of the Currency’s Rules on National Bank Preemption and Visitorial Powers: Hearing before the S. Comm. on Banking, Housing and Urban Affairs, 108th Cong. 31 (2004), available at http://banking.senate.gov/public/index.cfm?Fuseaction=Hearings.Hearing&Hearing_ID=0a ae2beb-535f-4c3e-9193-c1a632ac16b2 (statement of Martin Eakes, CEO, Self-Help Credit Union and the Center for Responsible Lending) (“Abusive practices may well be profitable in the short term, but are ticking time bombs waiting to explode the safety and soundness of national banks in the years ahead. The OCC has not only done a tremendous disservice to hundreds of thousands of borrowers, but has also sown the seeds for future stress on the banking system.”).
164. Enhanced, supra note 5, at 4 (statement of Mike Calhoun, President, Center for Responsible Lending).
165. See OFFICE OF INSPECTOR GENERAL, OIG-08-032, SAFETY AND SOUNDNESS:
acceptable levels of credit risk, inordinately high general and administrative expenses, as well as a host\textsuperscript{166} of other problems.\textsuperscript{167} Then, when the mortgage market began to recede, NetBank attempted to maintain its loan production levels by loosening its underwriting standards despite indications at the time that this practice was detrimental to both consumers and investors.\textsuperscript{168} The OTS opted to rely on NetBank’s management’s assurances that it could address these problems.\textsuperscript{169} After the OTS had responded too late for it to matter, its management explained why their intervention was so delayed, stating that NetBank management did not seem to be engaging in practices that were unsafe or unsound.\textsuperscript{170}

Each of these agencies was on notice as to practices that were affecting consumers negatively, but all three failed to act for a number of reasons. Foremost, they subordinated consumer protection interests to safety and soundness. Proposals to weaken the CFPB likely would leave the concerns of consumers subsidiary to the safety and soundness concerns of prudential regulators. That scenario is a familiar one, and the results are both recent and apparent. If not for the sake of self-preservation then for the sake of ingenuity, it seems that it is time for a different approach.

B. Inter-Agency Comparison

As discussed, those in favor of weakening the CFPB tend to point to other agency models to demonstrate that the CFPB has far too much discretion. However, a side-by-side comparison of the CFPB with the other financial regulators reveals that it is not markedly more or less accountable than others.\textsuperscript{171}

The FRB, OCC, FDIC, FTC, the Securities and Exchange Commission, and the CFPB all are subject to the Administrative Procedures Act and must adhere to notice-and-comment procedures for rule-

\begin{footnotesize}
\textsuperscript{166} NetBank also had continually changing business plans and budgeting failures that had been noted by OTS. \textit{Id.} at 23.
\textsuperscript{167} \textit{Id.} at 22.
\textsuperscript{168} \textit{Id.} at 24.
\textsuperscript{169} \textit{Id.} at 22.
\textsuperscript{170} \textit{Id.} at 27.
\textsuperscript{171} \textit{Enhanced, supra} note, at 6-8 (statement of Adam Levitin, Professor of Law at Georgetown University Law Center).
\end{footnotesize}
making and adjudication.\textsuperscript{172} Although the Office of Information and Regulatory Affairs reviews economically significant regulations promulgated by the OCC and FTC, it conducts small business impact reviews of only the CFPB.\textsuperscript{173} Furthermore, all of these agencies operate under Congressional oversight.\textsuperscript{174}

There is not much that sets the CFPB apart from the prudential regulators in terms of the checks and balances put in place. The CFPB will be able to restrain and monitor the offering of deleterious financial products, but it will not be able to compel financial institutions to offer any certain type of product.\textsuperscript{175} This kind of oversight is long overdue, and the system of accountability put in place will be sufficient to keep the CFPB from interfering with the safety and soundness of financial institutions.

\section*{V. Conclusion}

The partisan disagreement over how functional consumer protection should take shape has produced a contentious debate that has helped shape the CFPB, but the time for debate is over.\textsuperscript{176} While the proposal to change the review of CFPB rulemakings is of less consequence, the proposed changes to the CFPB’s leadership and budget only delay the progress that many Americans desire.\textsuperscript{177} A compromise is appropriate but may not be possible in the current political climate.

Businesses of all types have agencies and lobbyists representing their interests, but many consumers are disenfranchised by comparison. The consequences of leaving these interests towards the bottom of the regulatory agenda, to be protected by almost a dozen agencies with other priorities, became apparent in the fallout of the 2008 crisis. Today

\textsuperscript{172} Id. at 6.
\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} Id. at 7.
\textsuperscript{177} See Lydia Saad, \textit{Among Recent Bills, Financial Reform a Lone Plus for Congress}, Gallup (Sept. 13, 2010), http://www.gallup.com/poll/142967/Among-Recent-Bills-Financial-Reform-Lone-Plus-Congress.aspx (finding that sixty-one percent of Americans approve of financial reform legislation including the CFPB).
many people still feel their concerns go unnoticed.178

Additionally, financial product pricing structure has become so complicated to the average consumer that comparison-shopping is nearly impossible, and commoditization diminishes as a result.179 Proponents and critics alike recognize that consumer financial services regulation must rely on markets as the primary indicator of the state of consumers' interests, but for these markets to function properly, financial institutions and consumers must both be heard.180 For the CFPB to assist in obtaining this balance, it must have the same toolkit that has enabled the prudential regulators to protect profitability for financial institutions (i.e., a unitary directorship, a discretionary budget, etc.). To dampen the consumer's voice before it has a chance to make an impact would restore the status quo. To do this and expect different results than those witnessed in 2008 would be impractical.

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178. This perceived disenfranchisement has culminated with a group of people, known as Occupy Wall Street, taking to the streets in recent months to voice their sometimes-amorphous grievances. Still, despite their chaotic structure, the protestors have targeted Wall Street because, among other reasons, they feel that there is a disproportionate amount of political capital behind profitability interests. See Mike McCready, What is “Occupy Wall Street” Really About?, THE HUFFINGTON POST (Oct. 27, 2011, 3:48 PM), http://www.huffingtonpost.com/mike-mccready/occupy-wall-street_b_1028155.html.

179. Levitin, supra note 176, at 14.

180. Id. at 2.