



**United States House of Representatives
Financial Services Committee
Oversight and Investigations Subcommittee
March 21, 2017**

Americans for Financial Reform (AFR)¹ appreciates the opportunity to provide this statement for the record of the Oversight and Investigations Subcommittee hearing on the constitutionality of the structure of the Consumer Financial Protection Bureau (CFPB).

The first five-and-a-half years of the CFPB's history has vindicated the decisions that Congress made in 2010 to create a strong, independent agency to protect consumers from fraud and abuse in the financial marketplace. When Congress created the CFPB, it gave it "the authority and accountability to ensure that existing consumer protection laws and regulations are comprehensive, fair, and vigorously enforced."² Through its rulemaking, supervision, enforcement, consumer education, and consumer complaint system, the CFPB has made major strides in making the financial marketplace fairer to consumers. Its actions have begun to reform the industry by making banks and other financial services companies more attentive to consumers' rights.

A few examples of the CFPB's enforcement efforts illustrate the tangible importance of its work:

- Securing \$1.8 billion in refunds for the credit card customers of Citibank,³ Bank of America,⁴ and JP Morgan Chase⁵ for worthless add-on products like fraud monitoring services and deceptively-marketed insurance.
- Entering into a \$2.1 billion settlement with Ocwen for systematically overcharging homeowners by misapplying their payments and adding unauthorized fees, and by misleading homeowners and courts in the foreclosure process.⁶

¹ AFR is a coalition of more than 200 national, state, and local groups who have come together to reform the financial industry. Members of our coalition include consumer, civil rights, investor, retiree, community, labor, faith based, and business groups. A list of AFR member groups is available at <http://ourfinancialsecurity.org/about/our-coalition/>.

² Joint Explanatory Statement of the [Dodd-Frank] Committee of Conference at 874 (June 29, 2010), <http://www.illsdc.org/assets/DoddFrankdocs/dodd-frank-act-jt-expl-statement.pdf>

³ <http://www.consumerfinance.gov/newsroom/cfpb-orders-citibank-to-pay-700-million-in-consumer-relief-for-illegal-credit-card-practices/>

⁴ <http://www.consumerfinance.gov/newsroom/cfpb-orders-bank-of-america-to-pay-727-million-in-consumer-relief-for-illegal-credit-card-practices/>

⁵ <http://www.consumerfinance.gov/newsroom/cfpb-orders-chase-and-jpmorgan-chase-to-pay-309-million-refund-for-illegal-credit-card-practices/>

⁶ <http://www.consumerfinance.gov/newsroom/cfpb-state-authorities-order-ocwen-to-provide-2-billion-in-relief-to-homeowners-for-servicing-wrongs/>

- Securing a \$530 million default judgment against Corinthian,⁷ a for-profit school that swindled students into paying for worthless degrees and then engaged in illegal debt collection in its private student loan program, along with \$480 million in debt relief for affected students.⁸
- Stopping Wells Fargo’s practice of routinely opening fraudulent accounts without customer authorization.⁹
- Putting an end to the unfair practices of dozens of other companies. For example, in December 2015, the CFPB stopped CarHop from continuing to convey inaccurate information to credit reporting agencies; CarHop also agreed to pay a \$6,465,000 civil penalty in recognition of the 84,000 customers already been harmed by its false reports.¹⁰

The CFPB has successfully resolved more than 100 cases and secured \$11.8 billion in relief for consumers - more than four times what the agency has spent on all functions over the course of its existence. This relief is often mislabeled by the agency’s detractors as “fines”; in fact, the \$11.8 billion only includes funds directly returned to 29 million consumers who suffered a financial loss due to a defendant’s lawbreaking.¹¹ The agency has also issued more than \$589 million in civil money penalties to deter future lawbreaking, money which is available to remedy consumer losses in instances when the wrongdoer is insolvent.¹²

These successes vindicate the structure that Congress put in place to give the CFPB and its director the independence and authority needed to take on powerful industry interests.

Agency Independence Under A Single Director

Congress vested the CFPB’s leadership in a single director.¹³ Making a single director responsible for the agency’s functioning facilitates effective decision-making and ensures a clear point of responsibility for the CFPB’s actions and performance. Perhaps for that reason, the vast majority of federal agencies are headed by single individuals.

⁷ <http://www.consumerfinance.gov/newsroom/cfpb-wins-default-judgment-against-corinthian-colleges-for-engaging-in-a-predatory-lending-scheme/>

⁸ <http://www.consumerfinance.gov/newsroom/cfpb-secures-480-million-in-debt-relief-for-current-and-former-corinthian-students/>

⁹ <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/>

¹⁰ <http://www.consumerfinance.gov/newsroom/cfpb-orders-carhop-to-pay-6-4-million-penalty-for-jeopardizing-consumers-credit/>

¹¹ http://files.consumerfinance.gov/f/documents/201701_cfpb_CFPB-By-the-Numbers-Factsheet.pdf

¹² 12 U.S.C. § 5497(d).

¹³ 12 U.S.C. § 5491(b)(1).

Congress also made the CFPB an independent agency, just like all other federal financial regulators.¹⁴ By statute, the president may remove the CFPB Director only for “inefficiency, neglect of duty, or malfeasance in office.”¹⁵ This statutory language is identical to the statute the Supreme Court blessed when it decided *Humphrey’s Executor* more than 80 years ago, holding that those statutory restrictions on the removal of Federal Trade Commission (FTC) commissioners, and by extension the heads of other administrative agencies, were constitutional.¹⁶ That decision has been upheld repeatedly by the Supreme Court,¹⁷ and applied by two federal district courts to uphold the constitutionality of the CFPB’s structure.¹⁸

Nevertheless, a divided panel of the D.C. Circuit recently issued a novel opinion, authored by the federal judiciary’s most outspoken critic of *Humphrey’s Executor*,¹⁹ holding that Congress could not protect the head of a single-director agency from arbitrary removal.²⁰ The D.C. Circuit has since vacated that unprecedented decision, and it will be reargued before the court sitting *en banc* in May.

Contrary to the panel opinion, the Supreme Court has held that whether the Constitution requires the president to enjoy unfettered authority to remove the head of an agency “depend[s] upon the character of the office.”²¹ The CFPB is characteristic of the administrative agencies for which the Supreme Court has upheld for-cause removal. In upholding such removal protections restrictions for the FTC, the Supreme Court explained that “[i]n administering the [prohibition] of ‘unfair methods of competition’ — that is to say in filling in and administering the details embodied by that general standard — the [FTC] acts in part quasi-legislatively and in part quasi-judicially.” The CFPB has the same quasi-legislative and quasi-judicial responsibilities to define and enforce the prohibition of “unfair, deceptive, or abusive act[s] or practice[s]” in consumer finance, as well as to make rules and enforce for the consumer finance statutes.²²

¹⁴ Congressional Research Service, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* (Feb. 28, 2017), available at <https://fas.org/sgp/crs/misc/R43391.pdf>.

¹⁵ 12 U.S.C. § 549(c)(3).

¹⁶ *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

¹⁷ *Wiener v. United States*, 357 U.S. 349 (1958); *Morrison v. Olson*, 487 U.S. 654 (1988).

¹⁸ *CFPB v. Morgan Drexen*, 60 F. Supp. 3d 1082 (C.D. Cal. 2014); *CFPB v. ITT Educational Servs., Inc.*, No. 1:14-cv-00292-SEB-TAB (S.D. Ind. Mar. 6, 2015).

¹⁹ See *In re Aiken County*, 645 F. 3d 428, 438 (D.C. Cir. 2011) (Kavanaugh, J., concurring) ; *Securities & Exchange Comm’n v. Federal Labor Relations Authority*, 568 F. 3d 990, 996-98 (D.C. Cir. 2009) (Kavanaugh, J., concurring); *Free Enterprise Fund v. PCAOB*, 537 F.3d 667, 685 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

²⁰ *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Oct. 11, 2016).

²¹ *Humphrey’s Executor*, 295 U.S. at 631; accord *Wiener*, 357 U.S. at 353 (“the most reliable factor for drawing an inference regarding the president’s power of removal . . . is the nature of the function that Congress vested”).

²² 12 U.S.C. §§ 5481(12), 5531.

Thus, because the CFPB's functions permit it to be an independent agency, whether it is headed by a single director or otherwise. And a single-director structure for an independent financial regulator is nothing new: the Office of the Comptroller of the Currency (OCC), the regulator of national banks, has been headed by a single official since it was established in 1863.²³ By statute, the Comptroller is independent,²⁴ and the President has recognized that independence by excluding the OCC from coverage in its regulatory executive orders.²⁵ Furthermore, there is a strong argument that – like other financial regulators without clear statutory protections against removal²⁶ – the Comptroller is removable only for cause.²⁷ And since Congress established the Federal Housing Finance Agency in 2008 that agency has also been headed by a single director who can be removed only for cause.²⁸

Despite the CFPB's independence, it nevertheless faces many structural checks on its authority. Its rulemakings are subject to notice-and-comment procedures that provide opportunity for input by the affected industries, the public, and elected officials, and its rules may be challenged in court under the Administrative Procedures Act. Similarly, enforcement actions may be appealed to the courts. Unlike other bank regulators, the CFPB's decisions are also subject to veto by the members of the Financial Stability Oversight Council,²⁹ and CFPB rulemakings that impact small businesses are initially reviewed by a panel of affected small businesses. The CFPB is also subject to extensive oversight through semi-annual testimony before each house of Congress's committee of jurisdiction, annual Government Accountability Office audits, and frequent reports by the Inspector General.

In summary, independent agencies are the well-established norm for consumer and financial regulation, and there is no constitutional prohibition on an independent agency being led by a single director. These issues are addressed in greater depth by the attached amicus brief that we, with nine other organizations, submitted to the D.C. Circuit in *PHH Corporation v. CFPB*.

²³ 12 U.S.C. § 1(b)(1).

²⁴ *E.g.*, 12 U.S.C. §§ 1, 250.

²⁵ *E.g.*, Executive Order 12866 (incorporating the definition of “independent regulatory agency” in 44 U.S.C. § 3502(5), which lists the Federal Housing Finance Agency, the Bureau of Consumer Financial Protection, and the Office of the Comptroller of the Currency by name).

²⁶ *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3148-49 (2010) (SEC Commissioners enjoy removal protections despite statutory silence); *Swan v. Clinton*, 100 F.3d 973, 981-88 (D.C. Cir. 1986) (assuming same for NCUA). *See also Wiener v. United States*, 357 U.S. 349, 356 (1958) (same for defunct War Claims Commission); *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993) (same for FEC).

²⁷ Brief of Americans for Financial Reform, et al., *PHH Corporation v. CFPB*, No. 15-1177 (D.C. Cir. Nov. 29, 2016), at 12, *available at* <http://ourfinancialsecurity.org/wp-content/uploads/2016/11/PHH-DC-Cir-amicus-final.pdf>.

²⁸ 12 U.S.C. § 5491(b).

²⁹ 12 U.S.C. § 5513(a).

Independent Funding

All federal regulators of banks and credit unions are funded outside the Congressional appropriations process. In fact, those agencies – other than the CFPB – effectively set their own funding levels.³⁰ The OCC sets its own fee schedule, while the Federal Deposit Insurance Corporation and National Credit Union Administration fund their operations through deposit insurance assessments that they each set.³¹ Similarly, the Federal Reserve Board (FRB) is funded by investment returns, with the FRB retaining discretion regarding the amount of its operating expenses.³² By contrast, the CFPB's independent funding is capped by statute.³³

Given this well-established practice of funding regulatory agencies without appropriations, it is no surprise that the courts have summarily rejected arguments that the CFPB's funding is unconstitutional.³⁴ There is simply no constitutional requirement that any agency be funded from the U.S. Treasury through the appropriations process rather than other means.³⁵

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Thank you for the opportunity to express AFR's views on the constitutionality of the CFPB's governance and funding structure. If you have additional questions on these issues, please contact Brian Simmonds Marshall, AFR's Policy Counsel, at brian@ourfinancialsecurity.org or 202-684-2974.

Sincerely,

Americans for Financial Reform

³⁰ See Arthur E. Wilmarth Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 Rev. Banking & Fin. L. 881, 906 (2012), available at http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2171&context=faculty_publications.

³¹ Congressional Research Service, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* (Feb. 28, 2017), at 27, available at <https://fas.org/sgp/crs/misc/R43391.pdf>.

³² *Id.*

³³ 12 U.S.C. § 5497(d).

³⁴ *CFPB v. Morgan Drexen*, 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014); *CFPB v. IIT Educational Servs., Inc.*, No. 1:14-cv-00292-SEB-TAB (S.D. Ind. Mar. 6, 2015).

³⁵ See *AINS, Inc. v. United States*, 56 Fed. Cl. 522, 539 (Fed. Cl. 2003), *aff'd*, 365 F.3d 1333 (Fed. Cir. 2004); *Am. Fed'n of Gov't Employees, AFL-CIO, Local 1647 v. Fed. Labor Relations Auth.*, 388 F.3d 405, 409 (3d Cir. 2004)