

**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

**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 Civil Rule LCvR 7(h), and this Court's Scheduling and Procedure Order [Docket No. 8], hereby move for summary judgment against Defendant Consumer Financial Protection Bureau ("CFPB") that Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. §§ 5481 *et seq.*) be declared unconstitutional for violating the Constitution's separation of powers.

Plaintiffs file herewith a Statement of Undisputed Material Facts, a Memorandum of Supporting Points and Authorities, and a Proposed Order.

WHEREFORE, Plaintiffs respectfully request that their motion be granted.

Respectfully submitted,

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**CONSUMER FINANCIAL
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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,

Dated: August 7, 2013

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

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

Plaintiff,

v.

**CONSUMER FINANCIAL
PROTECTION BUREAU,**

Defendant.

Civil Action No. 13-01112 (CKK)

**EXPEDITED BRIEFING
SCHEDULE**

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

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PRELIMINARY STATEMENT

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

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

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

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

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

**SUMMARY OF PROCEDURAL
BACKGROUND AND ACCELERATED SCHEDULE**

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

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

ARGUMENT

LEGAL STANDARD

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

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

THE COURT HAS AUTHORITY TO CONSIDER THIS MATTER

A. PLAINTIFFS HAVE STANDING

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

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

1. Morgan Drexen Is Subject to Enforcement

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

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

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

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

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

2. Morgan Drexen Faces an Immediate Threat of Further Injury

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

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

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

4. CFPB Demanded Privileged Information

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

B. PLAINTIFFS' CLAIMS ARE RIPE

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

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

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

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

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

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

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

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

CFPB'S STRUCTURE IS UNCONSTITUTIONAL

A. APPLICABLE LEGAL PRINCIPLES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. CFPB DOES NOT HAVE CONSTITUTIONALLY-REQUIRED POLITICAL ACCOUNTABILITY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹ 12 U.S.C. §§ 5491, 5493(a).

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

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

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

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

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

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

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

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

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

G. CFPB'S UNCONSTITUTIONAL STRUCTURE HAS HARMED PLAINTIFFS

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

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

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

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

RELIEF REQUESTED

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

CONCLUSION

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

Dated: August 7, 2013

Respectfully submitted,

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/s/

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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

**PROPOSED ORDER GRANTING
MOTION FOR SUMMARY
JUDGMENT**

It is hereby ORDERED that the motion for summary judgment filed by Plaintiffs Kimberly A. Pisinski ("Pisinski") and Morgan Drexen, Inc. ("Morgan Drexen") (together, "Plaintiffs"), pursuant to Federal Rule of Civil Procedure 56, Local Civil Rule LCvR 7(h), and this Court's Scheduling and Procedure Order [Docket No. 8] is GRANTED.

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. §§ 5481 *et seq.*) ("Dodd-Frank Act") establishing Defendant Consumer Financial Protection Bureau ("CFPB") is declared unconstitutional for violating the Constitution's separation of powers. CFPB is hereby enjoined from taking any further action against Plaintiffs.

SO ORDERED

Date: _____, 2013

COLLEEN KOLLAR-KOTELLY
United States District Judge