2013

The Consumer Financial Protection Bureau: The Solution or the Problem?

Brenden Soucy

Florida State University College of Law, 90@90.poop

Follow this and additional works at: <https://ir.law.fsu.edu/lr>

Part of the [Law Commons](#)

Recommended Citation

Brenden Soucy, *The Consumer Financial Protection Bureau: The Solution or the Problem?*, 40 Fla. St. U. L. Rev. 691 (2013) .

<https://ir.law.fsu.edu/lr/vol40/iss3/6>

This Note is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

FLORIDA STATE UNIVERSITY LAW REVIEW

THE CONSUMER FINANCIAL PROTECTION BUREAU: THE SOLUTION OR THE PROBLEM?

Brenden Soucy

VOLUME 40

SPRING 2013

NUMBER 3

Recommended citation: Brenden Soucy, *The Consumer Financial Protection Bureau: The Solution or the Problem?*, 40 FLA. ST. U. L. REV. 691 (2013).

THE CONSUMER FINANCIAL PROTECTION BUREAU: THE SOLUTION OR THE PROBLEM?

BRENDEN D. SOUCY*

I. INTRODUCTION.....	691
A. <i>The Creation of the CFPB and the Appointment of Its First Director</i>	693
II. REPEATING THE MISTAKES OF THE PAST: THE STRUCTURAL DEFECTS OF THE CFPB	696
A. <i>Why Past Independent Regulatory Agencies Failed</i>	696
B. <i>The Structure of the CFPB Ignores These Lessons From History</i>	700
III. DESPITE ITS BROAD POWER, THE CFPB CANNOT PREVENT ANOTHER CRISIS	704
A. <i>Causes of the Financial Crisis</i>	704
B. <i>The CFPB Cannot Prevent Another Crisis</i>	708
IV. HOW TO FIX THE CFPB.....	709
A. <i>The CFPB Should be Subject to Congressional Oversight</i>	709
B. <i>The CFPB Should be Headed by a Multimember Commission</i>	711
C. <i>The CFPB Should be Subject to OIRA Review</i>	715
D. <i>The FSOC Should Be Given Enhanced Veto Power over the CFPB's Regulations</i>	716
V. CONCLUSION	718

I. INTRODUCTION

In 2010, President Barack Obama signed the Consumer Financial Protection Act into law¹ as a part of the Dodd-Frank Act.² This Act created the Bureau of Consumer Financial Protection (hereinafter “CFPB”), which is an “independent bureau” that is “in the Federal Reserve System,” but is to “be considered an Executive agency.”³ While the CFPB is a part of the Federal Reserve System, it is subject to very little oversight from the Federal Reserve. The CFPB does not report to the Board of Governors of the Federal Reserve, the Board has no power to override decisions of the CFPB,⁴ and the Board does not have appropriations authority over the CFPB.⁵

The Dodd-Frank Act was signed into law in the wake of the financial crisis, and the CFPB was meant to “protect consumers from unfair, deceptive, and abusive acts that so often trap them in unafford-

* J.D. 2013, *summa cum laude*, Florida State University College of Law.

1. Helene Cooper, *Obama Signs Overhaul of Financial System*, N.Y. TIMES (July 21, 2010), http://www.nytimes.com/2010/07/22/business/22regulate.html?_r=0.

2. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376 (codified in scattered sections of the U.S.C. (2012)).

3. *Id.* § 1011(a) (codified at 12 U.S.C. § 5491(a) (2012)).

4. See *infra* notes 94-98 and accompanying text (discussing how the only body with the power to override CFPB policy initiatives is the Financial Stability Oversight Council, which can only defeat CFPB regulations with a supermajority vote of its members).

5. See *infra* notes 78-82 and accompanying text (discussing how the Federal Reserve is bound by statute to provide a specified percentage of its budget to the CFPB, at the discretion of the CFPB Director).

able financial products.”⁶ According to the Senate report, “it was the failure by the prudential regulators to give sufficient consideration to consumer protection that helped bring the financial system down.”⁷ The report goes on to assert that “it was the organizations that promote consumer protection that were urging that underwriting standards be tightened for both consumer protection and safety and soundness reasons, and it was the prudential regulators who ignored these calls.”⁸

To be sure, the prudential regulators’ focus on encouraging home ownership—a goal which it pursued with blind zealotry while utterly failing to give sufficient consideration to consumer protection—contributed to the financial crisis. Predatory lending, and other abusive practices that could have been curtailed had sufficient consumer protection been in place, certainly enhanced the magnitude of the crisis,⁹ but so did consumers that decided to strategically default on their mortgages.¹⁰ Ultimately, as discussed in Part III.A, inadequate consumer protection was just one of many causes of the financial crisis, and it is unlikely that increased consumer protection alone would have significantly reduced the scale of the financial crisis.

That said, it is clear that prior to the creation of the CFPB consumers were not adequately protected, and the system designed to protect them was in need of substantial reform. Thus, at first glance, it appears that the creation of the CFPB is a positive development, and that with its creation consumers will finally have adequate protection. Unfortunately, the CFPB suffers from serious structural deficiencies that, if not reformed, may ultimately result in the CFPB harming the consumers it is meant to protect.

This Note begins with a discussion of the creation of the CFPB and its brief history in Part I.A, and then in Part II it assesses the structural deficiencies of the CFPB, comparing it to past regulatory agencies that failed. Part III provides an overview of the causes of the financial crisis and finds that the CFPB cannot prevent another crisis. As explained in Part IV, in order for the CFPB to avoid suffering from the same type of tunnel vision that made past regulatory agencies that were similarly structured fail, the CFPB must be reformed. Most importantly, the CFPB should be: (1) made subject to congressional oversight,¹¹ (2) reformed to be led by a multimember commission instead of a single director,¹² (3) made subject to review

6. S. REP. NO. 111-176, at 11 (2010).

7. *Id.* at 166.

8. *Id.*

9. See *infra* notes 119-22 and accompanying text (discussing the failures of the prudential regulators and abusive practices).

10. See *infra* notes 124-25 and accompanying text (discussing strategic defaults).

11. See *infra* Part IV.A.

12. See *infra* Part IV.B.

by the Office of Information and Regulatory Affairs,¹³ and (4) made subject to more meaningful review from the Financial Stability Oversight Council by reducing the vote needed to veto a CFPB action from two-thirds to one-half.¹⁴

A. *The Creation of the CFPB and the Appointment of Its First Director*

The architect of the CFPB, Elizabeth Warren, first proposed creating a new consumer financial protection agency in a short article published in 2007.¹⁵ Warren proposed basing this new agency on the Consumer Product Safety Commission (hereinafter “CPSC”), which regulates the safety of consumer products, saying that “[f]inancial products should be subject to the same routine safety screening that now governs the sale of every toaster, washing machine, and child’s car seat sold on the American market.”¹⁶ Despite the logical fallacies in basing an agency designed to protect consumers in credit markets off of one designed to protect them from dangerous appliances,¹⁷ the Obama Administration published a “White Paper” in 2009 on financial regulatory reform which embraced Warren’s idea and advocated for financial reform legislation including a new consumer financial protection agency modeled on the CPSC.¹⁸ This paper provided the framework for the original version of the financial reform legislation,¹⁹ which was introduced by Representative Barney Frank in July of 2009.²⁰

In the originally introduced version, the new agency was to be led by a multimember commission²¹ and funded by appropriations.²² But in the modified version of the bill, which was enacted by the House of Representatives in December of 2009, the new agency was designed to be free from appropriations oversight, instead receiving ten percent

13. See *infra* Part IV.C.

14. See *infra* Part IV.D.

15. See Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J. 8, 16 (Summer 2007), available at <http://www.democracyjournal.org/article.php?ID=6528>.

16. *Id.* at 16.

17. See Todd J. Zywicki & Stefanie Haeffele-Balch, *Loans Are Not Toasters: The Problems with a Consumer Financial Protection Agency*, MERCATUS ON POLY 1-2 (Oct. 2009), available at http://mercatus.org/sites/default/files/MOP_-_60_Loans_are_not_Toasters_web.pdf (pointing out that while a dangerous product such as an exploding toaster is not useful to any consumer, virtually all consumer credit products, from payday loans to mortgages, are suitable and useful to some consumers in some situations).

18. DEPT OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 55-63 (2009), available at <http://online.wsj.com/public/resources/documents/finregfinal06172009.pdf>.

19. See Todd J. Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 860 (2013).

20. H.R. 3126, 111th Cong. § 112 (2009), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr3126ih/pdf/BILLS-111hr3126ih.pdf>.

21. *Id.*

22. *Id.* § 118.

of the Federal Reserve System's total expense budget as guaranteed funds each year.²³ And by the time the legislation that ultimately became the Dodd-Frank Act was introduced in the Senate by Senator Christopher Dodd in April of 2010, the agency had been changed from a standalone agency to a bureau of the Federal Reserve, which instead of being led by a multimember commission was to have a single director.²⁴ Three months later, the Dodd-Frank financial reform legislation passed Congress over near uniform Republican opposition and was signed into law.²⁵

The creation of the CFPB was met with considerable criticism before the Dodd-Frank Act was even passed,²⁶ and it has been surrounded in controversy since its creation, including over the selection of its inaugural director.²⁷ Originally, it was expected that the first proponent of a new consumer protection agency, Elizabeth Warren, would become the CFPB's first director, but it eventually became clear that Warren would not be able to get Senate confirmation.²⁸ Consequently, Warren was never even nominated. President Obama ultimately nominated former Ohio Attorney General Richard Cordray to serve as the inaugural director of the CFPB.²⁹ Senate Republicans quickly announced their intention to filibuster any vote on confirmation of Cordray as director until structural reforms were made to the CFPB.³⁰ Most importantly, the Republicans advocated having the agency run by a multimember commission, making it subject to congressional appropriations authority, and giving the other financial regulatory agencies more oversight power over the CFPB.³¹

23. H.R. 4173, 111th Cong. § 4109 (2009) (enacted), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr4173ih/pdf/BILLS-111hr4173ih.pdf>.

24. See Sewell Chan, *Dodd to Unveil a Broad Financial Overhaul Bill*, N.Y. TIMES (Mar. 14, 2010), <http://www.nytimes.com/2010/03/14/business/14bank.html?pagewanted=all&r=0>.

25. See Cooper, *supra* note 1.

26. See, e.g., Jessica Holzer, *Republicans Criticize Agency for Consumers*, WALL ST. J. (July 15, 2009), <http://online.wsj.com/article/SB124758746553939621.html?KEYWORDS=consumer+financial+protection+bureau>; Richard A. Posner, Op-Ed., *Treating Financial Consumers as Consenting Adults*, WALL ST. J. (July 22, 2009), <http://online.wsj.com/article/SB10001424052970203946904574302213213148166.html?KEYWORDS=consumer+financial+protection+bureau> (expressing concern that the agency has the power to "design 'standard' consumer financial products that will contain whatever 'features or terms [are] defined by the Agency for the product or service'").

27. Damian Paletta, *Fight Over Consumer Agency Looms as Overhaul is Signed*, WALL ST. J. (July 22, 2010), <http://online.wsj.com/article/SB10001424052748704746804575367502836650966.html?KEYWORDS=consumer+financial+protection+bureau+elizabeth+warren+director>.

28. See Binyamin Appelbaum, *Warren's Candidacy Raises a Partisan Debate*, N.Y. TIMES (July 25, 2010), http://www.nytimes.com/2010/07/26/business/26warren.html?_r=0; Paletta, *supra* note 27.

29. See Binyamin Appelbaum, *Former Ohio Attorney General to Head New Consumer Agency*, N.Y. TIMES (July 17, 2011), <http://www.nytimes.com/2011/07/18/business/former-ohio-attorney-general-picked-to-lead-consumer-agency.html?pagewanted=all>.

30. See John H. Cushman Jr., *Senate Stops Consumer Nominee*, N.Y. TIMES (Dec. 8, 2011), <http://www.nytimes.com/2011/12/09/business/senate-blocks-obama-choice-for-consumer-panel.html>.

31. See *id.*

The Obama Administration was unwilling to agree to make any of these reforms, and the director position consequently remained empty until January 4, 2012, when President Obama named Cordray as CFPB Director, stating that he had the authority to do so under his power to make recess appointments, despite the fact that the Senate had gone less than three days without meeting.³² This was the first recess appointment made during a break of fewer than ten days since a 1993 opinion of the Justice Department which suggested that breaks of just a few days would not be sufficient.³³ House Speaker John Boehner referred to the action as “an extraordinary and entirely unprecedented power grab by President Obama that defies centuries of practice and the legal advice of his own Justice Department.”³⁴ Senate Minority Leader Mitch McConnell stated that “[t]his recess appointment represents a sharp departure from a long-standing precedent that has limited the president to recess appointments only when the Senate is in a recess of 10 days or longer.”³⁵ Senator McConnell expressed concern that “[b]reaking from this precedent lands this appointee in uncertain legal territory, threatens the confirmation process and fundamentally endangers the Congress’ role in providing a check on the excesses of the executive branch.”³⁶

Even if the appointment is constitutionally valid, it may have been statutorily deficient, as the CFPB statute specifies that “the Director shall be appointed by the President, by and with the advice and consent of the Senate.”³⁷ Thus, Cordray’s status as Director remains unclear, but the CFPB has nonetheless begun exercising its authority, announcing its first enforcement action on July 18, 2012.³⁸ The constitutionality of Cordray’s appointment has no bearing on the problems with the structure of the CFPB, but the issue does bring into sharp focus how unusual the structure of the CFPB is.

The Senators who blocked Cordray’s Senate appointment did not do so because they did not think he was fit for the job—in fact, many of them praised Cordray’s qualifications for the job.³⁹ But they

32. See Jim Puzzanghera & Lisa Mascaro, *Obama Bypassing Senate to Appoint Richard Cordray Consumer Chief*, L.A. TIMES (Jan. 4, 2012), <http://articles.latimes.com/2012/jan/04/business/la-fi-obama-cordray-20120104>.

33. See *id.*

34. Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES (Jan. 4, 2012), <http://www.nytimes.com/2012/01/05/us/politics/richard-cordray-named-consumer-chief-in-recess-appointment.html?pagewanted=all>.

35. Puzzanghera & Mascaro, *supra* note 32.

36. See *id.*

37. 12 U.S.C. § 5491(b)(2) (2012).

38. See Halah Touryalai, *Obama’s Consumer Protection Agency Strikes: \$210M Fine for Capital One*, FORBES (July 18, 2012), <http://www.forbes.com/sites/halahtouryalai/2012/07/18/obamas-consumer-protection-agency-strikes-210m-fine-for-capital-one/>.

39. See Ylan Q. Mui, *Senate Blocks Richard Cordray Confirmation to Head Consumer Watchdog Agency*, WASH. POST (Dec. 8, 2011), <http://www.washingtonpost.com/blogs/>

pledged to prevent any candidate from being confirmed unless the CFPB was reformed, including changing its leadership from having a single director to a multimember commission.⁴⁰ The CFPB is unique in that, unlike other regulatory agencies, it is headed by a single director who is only removable for cause;⁴¹ this anomaly and other structural deficiencies of the CFPB were daunting enough to convince forty-five percent of the Senate to block the appointment of a highly qualified candidate and to refuse to appoint any candidate until the deficiencies could be addressed,⁴² prompting the President to make the disputed recess appointment of Cordray.⁴³

II. REPEATING THE MISTAKES OF THE PAST: THE STRUCTURAL DEFECTS OF THE CFPB

A. *Why Past Independent Regulatory Agencies Failed*

In the history of the United States, numerous regulatory agencies have been put into place, many of which were structurally designed to be independent so that they could be insulated from market and political pressures and freely pursue the “public interest.”⁴⁴ The theory behind such agencies seems to be that insulating regulatory agencies from congressional oversight is the best way to ensure that policies are made absent any outside pressure and instead are made based on what is best for the public.⁴⁵ In the abstract, this view seems to make logical sense, but as became clear in the decades following the creation of agencies structured to be highly independent, having a government agency insulated from other government sectors can lead to disastrous regulatory policies.⁴⁶ While such insulation provides independence, it also results in isolation.

Insulation from outside pressures can be a good thing, but isolation from other agencies and the rest of the government is not, as it

2chambers/post/senate-republicans-block-cordray-as-obama-consumer-watchdog-nominee/2011/12/08/gIQA6j9BfO_blog.html.

40. *See id.*

41. *See infra* notes 84-91 and accompanying text (discussing how other federal regulatory agencies are headed by multimember commissions or boards).

42. *See* Mui, *supra* note 39.

43. *See* Puzzanghera & Mascaro, *supra* note 32.

44. *See* MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 44-46 (2009) (discussing the role of the “public interest” theory of regulation).

45. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 42-44 (2010) (expressing concern that any agency subject to congressional appropriations authority will have its decisions improperly influenced by partisan considerations).

46. *See infra* notes 60-72 and accompanying text (discussing how the Civil Aeronautics Board and the Interstate Commerce Commission created policies conflicting with other sectors and having results counterproductive to their purposes, leading ultimately to both agencies being abolished).

can lead to a conflicting and irrational regulatory scheme.⁴⁷ An isolated agency trying to achieve a desired result in one sector might unwittingly cause a disproportionately negative effect in another sector.⁴⁸ It was these types of concerns that led to the creation of the Office of Information and Regulatory Affairs (hereinafter “OIRA”), which was designed to create coherence among the often-conflicting directives of the various regulatory agencies and to try to balance the efforts of each agency so as to preserve broader interests—such as economic growth and national security.⁴⁹ When the OIRA discovers a position that is inconsistent with the overarching regulatory scheme, it can coordinate with the agency taking the outlier position to ensure that the overall regulatory scheme remains consistent and coherent.⁵⁰ Thus, the OIRA largely solved the problem of conflicting directives and helped to make the regulatory process more collaborative, in the process somewhat reducing the independence of the agencies subject to its jurisdiction.

The problems prompting the creation of the OIRA demonstrate why having agencies be completely independent is not ideal, but the OIRA cannot completely solve these problems, in part because independent regulatory agencies, including the CFPB, are exempt from OIRA oversight.⁵¹ It is also important to note that while an agency can be free from direct political oversight, no amount of statutory independence can prevent the bureaucrats running the agency from pursuing their own ideological and political objectives.⁵² Nor can it prevent special interest groups from exerting influence over the bureaucrats, some of whom will inevitably leave the agency to pursue careers in private practice in the fields that they were previously regulating.⁵³ Of course, this is not a problem limited to bureaucrats.

As subscribers to the public choice theory have long recognized, all actors in political life—including voters, legislators, bureaucrats, and

47. See STEARNS & ZYWICKI, *supra* note 44, at 363 (noting that a “potential problem for bureaucratic actors is a tendency toward ‘tunnel vision,’ meaning too narrow a focus on their particular regulatory agenda at the expense of alternative policy goals”).

48. See *id.* (“[B]ureaucratic tunnel vision might create or exacerbate risks in one sector while seeking to eliminate or to reduce it in another.”).

49. See *id.* at 366-67 (discussing the formation of the OIRA and its purpose); Barkow, *supra* note 45, at 30-31.

50. See Barkow, *supra* note 45, at 30-31.

51. See *infra* Part IV.C (arguing that the CFPB and other independent regulatory agencies should be subject to OIRA review).

52. See STEARNS & ZYWICKI, *supra* note 44, at 364-65.

53. See, e.g., Dan Gallagher, *Deputy Director of Trading and Markets, to Leave SEC and Return to Private Practice*, U.S. SECURITIES AND EXCHANGE COMMISSION (Jan. 25, 2010), <http://www.sec.gov/news/press/2010/2010-11.htm> (announcing that SEC Deputy Director Gallagher was leaving the SEC to return to private practice); *FTC Bureau of Competition Deputy Director Barry Nigro Returns to Private Practice*, FEDERAL TRADE COMMISSION (Nov. 16, 2005), <http://www.ftc.gov/opa/2005/11/nigro.shtm> (announcing that FTC Deputy Director Nigro was leaving the FTC to return to private practice).

even judges—“behave rationally to maximize or optimize some objective function (wealth, status, power).”⁵⁴ In regards to elected officials, the voters can, in theory, remove from office those that are acting contrary to the beliefs and views of the voters, thus providing an incentive for those officials to act at least to some degree with the interests of their constituents in mind.⁵⁵ This is one of the hallmarks of a representative democracy.⁵⁶ The same logic applies to unelected bureaucrats—when subject to congressional or executive oversight they would, in theory, act with some regard to input and concerns from the overseers, if only out of self-interest in maintaining their positions. That said, whether the possibility of removal actually results in the preferences of the person holding the power to remove significantly influencing the official’s actions is questionable.⁵⁷ But the risk of self-interested behavior is especially great in the case of an agency that is structurally highly independent. As recognized by the public choice theory, an agency could never truly be independent because of the biases and preferences of the bureaucrats running it, and without any type of oversight there is little to stop such an agency from acting in accordance with those biases and preferences—favoring particular sets of ideological and political beliefs without giving due consideration to other views. This type of structure and the potential for decisions to be made in pursuit of a particular set of ideological beliefs without any substantive input from anyone with a different view⁵⁸ makes the agency much more likely to suffer the type of narrow-minded “tunnel vision” that results in conflicting policies and unintended consequences.⁵⁹

Prior to the creation of the OIRA, there existed a number of agencies structured to be highly independent. The Interstate Commerce Commission (hereinafter “ICC”) and the Civil Aeronautics Board (hereinafter “CAB”) are classic examples of “independent” agencies gone wrong.⁶⁰ Both of those agencies were, like the CFPB, designed to

54. Jerry Louis Mashaw, *Public Law and Public Choice: Critique and Rapprochement*, in RESEARCH HANDBOOK ON LAW AND PUBLIC CHOICE 19, 20 (Daniel A. Farber & Ann Joseph eds., 2010).

55. See *id.* at 21 (discussing how in an “idealist account” the problem of representatives acting contrary to the desires of a majority of the voters is cured by the dynamics of the system because “[o]ver time the voters can replace legislators whose preferences do not reflect those of their constituents”).

56. See Richard Bellamy, *The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy*, 44 POL. STUD. 436, 445 (1996), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1531367.

57. See Mashaw, *supra* note 54, at 21 (“The notion that voters’ preferences control legislative action or that legislative action controls bureaucratic decision making is, [under the public choice theory,] a fundamental misdescription of U.S. government.”).

58. See *infra* Part IV.B (discussing how no meaningful restraints exist on the CFPB’s ability to make decisions without input from outsiders with different views and interests).

59. See STEARNS & ZYWICKI, *supra* note 44, at 363.

60. See *id.* at 326.

be highly independent, and both of those agencies were ultimately abolished in a bipartisan effort to restructure or abolish government agencies which had, as a consequence of their extreme independence, created policies conflicting with other sectors and had created results counterproductive to their purpose.⁶¹

The ICC was created in 1887, making it the nation's very first independent regulatory agency.⁶² The agency was originally put into place to regulate interstate rates charged by railroads, but its power was gradually increased by Congress to include numerous other aspects of interstate rail travel, including safety and racial discrimination.⁶³ Then, in the late 1970s through early 1980s, the Executive Branch began using its appointment power to fill the Board of Commissioners that ran the ICC with individuals "fervently dedicated to deregulation."⁶⁴ The ICC pursued deregulation with such narrow-mindedness and zeal that "courts . . . found it necessary to remind the ICC that Congress' decision to enter into comprehensive regulation contravenes the ICC's apparent belief that national policy unqualifiedly favors competition."⁶⁵ The United States Court of Appeals for the Sixth Circuit accused the ICC of "disregarding congressional intent by making decisions solely for the purpose of increasing competition."⁶⁶ Congress ultimately abolished the ICC in 1995.⁶⁷

In 1938, Congress created the Civil Aeronautics Authority, which it then reorganized the subsequent year as the CAB, to regulate the airline industry, much as the ICC regulated the railroads.⁶⁸ The CAB was based off of the ICC; in fact, President Roosevelt had initially wanted to give the ICC the power to regulate the airlines rather than create a new agency, but that was avoided out of a concern that the ICC would protect railroad interests over aviation interests.⁶⁹ Like the ICC, the CAB began to suffer from narrow-minded tunnel vision in the 1970s, focusing on deregulation as the answer to all the airline industry's problems.⁷⁰ Congress ultimately abolished the CAB in legislation passed in 1978, though the CAB continued operating until it

61. *See id.* (discussing the abolishment of the CAB and the ICC).

62. *See* Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L.J. 235, 265 (2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793331.

63. *See id.* at 265, 267-69, 315-16.

64. *See id.* at 347.

65. *See id.* at 349.

66. *See id.* (citing *Argo-Collier Truck Lines v. United States*, 611 F.2d 149, 155 (6th Cir. 1979)).

67. *See id.* at 350.

68. *See id.* at 289-90.

69. *See id.* at 290.

70. *See id.* at 333-36.

winded down in 1984.⁷¹ The legislation passed with “overwhelming bipartisan support.”⁷²

Other agencies suffering from similar independence-related problems, such as the Federal Trade Commission (hereinafter “FTC”), were dramatically reformed to significantly increase congressional oversight.⁷³ Originally created in 1914, the FTC is charged with protecting consumers from fraud in the marketplace and “preventing anticompetitive business practices.”⁷⁴ As it exists today, the FTC is run by “five Presidentially-appointed, Senate-confirmed commissioners,” who each serve in seven-year terms.⁷⁵ At any given time, a maximum of three of the five commissioners may be members of the President’s political party.⁷⁶ This type of structure, with a multimember commission as opposed to a single director, reduces the risk of narrow-minded behavior and inconsistent policies, but perhaps not enough. Even adding congressional budgetary authority may not be enough; one of the most independent modern regulatory agencies is the Federal Reserve itself, which—while run by a multimember commission and subject to congressional budgetary authority, unlike the CFPB—has been guilty of focusing too narrowly on a particular goal, not taking into account the effect on the other government sectors and on the economy as a whole.⁷⁷ This highlights why, as discussed in Part IV, the CFPB should not only be subject to congressional budgetary authority and run by a multimember commission, but should also be made subject to review by the OIRA and subject to more meaningful review from the Financial Stability Oversight Council.

B. The Structure of the CFPB Ignores These Lessons From History

The CFPB is structured in a way that completely ignores the lessons learned from the failures of past agencies. First, the CFPB is completely exempt from the congressional appropriations process, instead receiving guaranteed funds from the Federal Reserve, equal to “the amount determined by the [CFPB] Director to be reasonably

71. *Id.* at 336.

72. *Id.*

73. See Zywicki, *supra* note 19, at 871-72.

74. Spencer Weber Waller, Jillian G. Brady & R.J. Acosta, *Consumer Protection in the United States: An Overview*, EUR. J. CONSUMER L. 803, 805-07 (2011) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1000226.

75. *Id.*

76. *Id.*

77. See Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 548-50 (2000). Shortly after President Reagan’s election, Congress enacted and the President approved \$540 billion in tax cuts as a part of a fiscal stimulus meant to promote economic growth. *Id.* The Federal Reserve responded by allowing short-term interest rates to skyrocket up to 20.5% in pursuit of its desire to have tighter monetary policies; the Federal Reserve’s actions conflicted with the efforts of Congress and contributed to a sharp increase in unemployment, along with a sharp decrease in the gross national product. *Id.*

necessary to carry out the authorities of the [CFPB]”⁷⁸ Thus, the CFPB Director has sole discretion in determining how large the agency’s budget will be, subject to statutory limits. In 2011 the limit was ten percent of the Federal Reserve’s total operating expenses, with the limit increasing to eleven percent in 2012, and twelve percent in 2013, with the twelve percent rate applying to each year thereafter.⁷⁹ This resulted in the CFPB receiving \$162 million in mandatory appropriations in 2011⁸⁰ and \$344 million in 2012,⁸¹ with a total of \$522 million appropriated for the 2013 fiscal year.⁸² Thus, during the 2013 fiscal year, the CFPB will be receiving more than half a billion dollars in mandatory appropriations with no budgetary oversight from Congress, the Federal Reserve, or anyone else outside of the CFPB. While this may be a reasonable cost to run an agency of the CFPB’s size and magnitude, the concern is not just the amount of money but the fact that by having its appropriations guaranteed the CFPB is exempt from congressional appropriations authority, which leaves Congress without any meaningful way to oversee the actions of the CFPB.⁸³

Second, the CFPB is led by a single director who is appointed for a fixed term of five years and can only be removed for “cause,” meaning “inefficiency, neglect of duty, or malfeasance in office.”⁸⁴ This differentiates the CFPB from most other federal regulatory agencies, which are led by multimember commissions or boards, including the CPSC,⁸⁵ which was “the inspiration for the [CFPB’s] creation”;⁸⁶ the FTC;⁸⁷ the Commodities Futures Exchange Commission;⁸⁸ the Federal

78. 12 U.S.C. § 5497(a)(1) (2012).

79. *Id.* § 5497(a)(2)(A).

80. OFFICE OF MGMT. & BUDGET, THE BUDGET FOR FISCAL YEAR 2013: OTHER INDEPENDENT AGENCIES 1295, *available at* <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/oia.pdf>.

81. OFFICE OF MGMT. & BUDGET, THE BUDGET FOR FISCAL YEAR 2014: OTHER INDEPENDENT AGENCIES 1205-06, *available at* <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/oia.pdf>.

82. *Id.*

83. *See infra* Part IV.A (arguing that the CFPB should be subject to some degree of congressional oversight).

84. 12 U.S.C. § 5491(c)(1)-(3) (2012).

85. *U.S. Consumer Product Safety Commission Organizational Chart*, U.S. CONSUMER PROD. SAFETY COMM’N, <http://www.cpsc.gov/PageFiles/128975/orgchart.pdf> (last visited May 10, 2013) (showing that the Commission is headed by a group of five Commissioners).

86. Barkow, *supra* note 45, at 72.

87. *Commissioners*, FED. TRADE COMM’N, <http://www.ftc.gov/commissioners/index.shtml> (last modified Mar. 21, 2013) (“The Commission is headed by five Commissioners, nominated by the President and confirmed by the Senate, each serving a seven-year term.”).

88. *Commissioners*, U.S. COMMODITY FUTURES TRADING COMM’N, <http://www.cftc.gov/About/Commissioners/index.htm> (last visited May 10, 2013) (“The Commission consists of five commissioners appointed by the President, with the advice and consent of the Senate, to serve staggered five-year terms. . . . No more than three commissioners at any one time may be from the same political party.”).

Deposit Insurance Corporation;⁸⁹ the Federal Reserve;⁹⁰ and the Securities and Exchange Commission (hereinafter “SEC”).⁹¹ To be sure, many agencies are headed by a single director, but unlike the director of the CFPB these directors are almost always removable at the pleasure of the President or another specified official, and they generally do not hold any significant policymaking responsibilities.⁹² An example is the Food and Drug Administration, which is led by a single commissioner who serves at the pleasure of the Secretary of the Department of Health and does not wield any significant policymaking authority.⁹³

Third, the CFPB is not subject to OIRA review,⁹⁴ and thus the safeguard against the historical problem of independent agencies creating policies conflicting with other government sectors or not coherently fitting into the overall regulatory scheme does not apply to the CFPB. The only body that can override decisions of the CFPB is the Financial Stability Oversight Council (hereinafter “FSOC”), which was created as a part of Dodd-Frank⁹⁵ to be a “collaborative body chaired by the Secretary of the Treasury that brings together the expertise of the federal financial regulators, an independent insurance expert appointed by the President, and state regulators” for the purpose of “identifying risks and responding to emerging threats to financial stability.”⁹⁶ The FSOC has ten voting members, made up of the heads of the nine federal financial regulatory agencies and one independent member appointed by the President, who must have insurance expertise.⁹⁷ The FSOC can only override CFPB decisions by a two-thirds vote, and each member of the FSOC can only vote to set aside a regulation of the CFPB if the agency or department that the member represents has “made an official determination, at a public

89. *Board of Directors & Senior Executives*, FED. DEPOSIT INS. CORP., <http://www.fdic.gov/about/learn/board/index.html> (last updated Mar. 5, 2013) (showing that the Corporation is run by a Board of five Directors).

90. *About the Fed*, FED. RESERVE, <http://www.federalreserve.gov/aboutthefed/default.htm> (last updated Apr. 24, 2013) (showing that the Federal Reserve is headed by a seven-member Board).

91. *Current SEC Commissioners*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/about/commissioner.shtml> (last modified Apr. 11, 2013) (“The Securities and Exchange Commission has five Commissioners who are appointed by the President of the United States with the advice and consent of the Senate. Their terms last five years and are staggered To ensure that the Commission remains non-partisan, no more than three Commissioners may belong to the same political party.”).

92. See Zywicki, *supra* note 19, at 873-74.

93. See JAMES T. O’REILLY, 1 FOOD & DRUG ADMIN. § 2:2 (2012).

94. Hester Peirce, *Economic Analysis by Federal Financial Regulators* 5-6 (Mercatus Ctr., George Mason Univ., Working Paper No. 12-31, 2012), available at http://mercatus.org/sites/default/files/FinancialRegulators_Peirce_v1-0.pdf.

95. See 12 U.S.C. § 5513 (2012).

96. *Financial Stability Oversight Council: About FSOC*, U.S. DEP’T OF THE TREASURY, <http://www.treasury.gov/initiatives/fsoc/about/Pages/default.aspx> (last updated May 10, 2013).

97. 12 U.S.C. § 5321(b)(1) (2012).

meeting where applicable, that the regulation which is the subject of the petition 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.”⁹⁸

The FSOC thus has very limited oversight authority over the CFPB; a regulation passed by the CFPB will still become effective even if a majority of the FSOC’s members—who are some of the most knowledgeable people in the world when it comes to designing effective regulations—vote against it after the department or agency they represent has made an official determination that the regulation 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.”⁹⁹ This is a virtually insurmountable standard, and an unreasonable one, considering that any one of these regulatory experts making such a determination should be enough to at least warrant a second look at the regulation so the dissenter’s concerns can be considered.

Taken collectively, the above provisions may well make the CFPB the most independent agency in United States history,¹⁰⁰ and it is difficult to imagine an agency design more likely to result in the agency acting with the type of tunnel vision focus on its regulatory mission that led to conflicting and incoherent regulatory policies prior to the reforms of the 1970s-80s.¹⁰¹ For example, in an effort to protect consumers the CFPB might overly restrict access to mortgages and other financial products, resulting in otherwise qualified consumers, who would benefit from the financial products, being denied access. In addition to being a bad policy that would likely hurt more consumers than it would help, such a policy might conflict with efforts by other government sectors to help consumers purchase homes. These types of conflicting policies can lead to incoherent and inconsistent results, creating uncertainty for consumers.

The more independent an agency is the more likely it is that it will become isolated and will create policies with only its own goals in mind, not taking into consideration or understanding how the policies will affect other sectors or the financial system as a whole.¹⁰² This risk is further amplified by the CFPB being led by a single director, who has broad authority to engage in rulemaking. The CFPB Director has no multimember commission to answer to, no higher authority to answer to in budgetary appropriations (in fact, the CFPB Director himself sets the agency’s budget, subject to statutory limita-

98. *Id.* § 5513(c)(3).

99. *See id.*

100. *See infra* Part IV (discussing how most other regulatory agencies are subject to congressional appropriations authority and are led by multimember boards or commissions).

101. *See* STEARNS & ZYWICKI, *supra* note 44, at 363.

102. *See id.*

tions),¹⁰³ and any policy initiatives of the director and the agency as a whole are subject to oversight only by the FSOC, which can only defeat CFPB regulations with a supermajority vote of its voting members.¹⁰⁴ Moreover, the members of the FSOC cannot even vote against a CFPB regulation except in the extreme circumstance of a threat so severe that it “put[s] the [very] safety and soundness of the United States banking system or the stability of the [United States] financial system . . . at risk.”¹⁰⁵

The CFPB’s extreme independence is touted as one of its greatest virtues, but history has shown that while independence from political pressure can be a virtue, near total isolation is not. The CFPB must be reformed in order to effectively carry out its mission of protecting consumers, or it may well ultimately inadvertently harm the very consumers it was designed to protect.

III. DESPITE ITS BROAD POWER, THE CFPB CANNOT PREVENT ANOTHER CRISIS

The CFPB was put into place not just to protect consumers but also as a safeguard against a future crisis. According to the Senate report on the Dodd-Frank Act, “it was the failure by the prudential regulators to give sufficient consideration to consumer protection that helped bring the financial system down.”¹⁰⁶ However, as discussed in the subsequent section, while a lack of sufficient consumer protection did contribute to the financial crisis, it was just one of a great many factors, and a fairly minor one at that. Thus, even assuming that the CFPB can succeed where other regulators have failed and provide for the optimum level of consumer protection without cutting potential borrowers off from the credit markets unnecessarily, the CFPB still would not be able to prevent another crisis.

A. *Causes of the Financial Crisis*

An in-depth analysis of what caused the financial crisis is outside the scope of this Note, but a general overview is needed in order to put into context the issue of consumer protection. A good place to start is the findings of the Financial Crisis Inquiry Commission (hereinafter “FCIC”), which was created as a part of the Fraud Enforcement and Recovery Act of 2009 to “examine the causes, domestic and global, of the current financial and economic crisis in the United

103. See 12 U.S.C. § 5497(a)(1) (2012).

104. See *id.* § 5513(c)(3)(A).

105. See *id.* § 5513(c)(3)(B).

106. S. REP. NO. 111-176, at 166 (2010).

States.”¹⁰⁷ The FCIC was composed of a ten-member panel, six of which were appointed by the Democratic leadership of Congress and four by the Republican leadership.¹⁰⁸ The majority’s report is over four hundred pages long,¹⁰⁹ which is an indication of the complexity of the issue and the difficulty in determining what the root causes of the crisis were.

The FCIC found that “widespread failures in financial regulation and supervision proved devastating to the stability of the nation’s financial markets,” noting that while regulators had the power to protect the financial system, that power was not adequately exercised.¹¹⁰ The government as a whole was not prepared for the crisis, and the various regulatory agencies did not respond in a consistent manner, which contributed to the crisis by creating uncertainty and panic.¹¹¹ This finding underscores the importance of a coherent and consistent regulatory scheme and the need for the regulatory agencies to be interconnected with each other and the rest of the government. A powerful independent agency such as the CFPB is even more likely to cause confusion and panic than the other regulatory agencies because it has a narrow focus, broad power, and it is nearly completely independent from the other agencies and the rest of the government.¹¹²

The FCIC next identified as a “key cause” of the crisis “dramatic failures of corporate governance and risk management at many systemically important financial institutions.”¹¹³ Many of these institutions either drastically misjudged the risk of mortgage-related securities built with subprime mortgages or were so focused on short-term gains that they ignored these risks.¹¹⁴ Normally we would expect institutions that take such big bets and lose to simply fail and be swallowed up, but because these institutions are so intrinsic to the financial system as a whole they were considered too big to fail.¹¹⁵ This

107. *About the Commission: History of the Commission*, FIN. CRISIS INQUIRY COMM’N, <http://cybercemetery.unt.edu/archive/fcic/20110310173617/http://www.fcic.gov/about> (last visited May 10, 2013).

108. *Id.*

109. NAT’L COMM’N ON THE CAUSES OF THE FIN. & ECON. CRISIS IN THE U.S., FIN. CRISIS INQUIRY COMM’N, *THE FINANCIAL CRISIS INQUIRY REPORT* vi (2011), available at http://cybercemetery.unt.edu/archive/fcic/20110310173545/http://c0182732.cdn1.cloudfiles.rackspacecloud.com/fcic_final_report_full.pdf.

110. *Id.* at xviii.

111. *See id.* at xxi.

112. *See Zywicki, supra* note 19, at 872 (“[T]he institutional structure of the CFPB . . . [makes it] a virtual poster child for an agency design that eventually will be likely to manifest the bureaucratic pathologies that led to the disastrous regulatory policies that were abandoned in the 1970s.”).

113. NAT’L COMM’N ON THE CAUSES OF THE FIN. & ECON. CRISIS IN THE U.S., *supra* note 109, at xviii-xix.

114. *See id.*

115. *See id.* at 37.

resulted in many of the financial institutions being “bailed out.”¹¹⁶ A related factor was executive compensation, which was often focused on short-term gain without proper regard for long-term consequences.¹¹⁷ The compensation systems greatly incentivized taking highly risky actions because of the potential for huge profits on the upside and limited downside.¹¹⁸ In fact, acting in a prudent, risk-adverse manner was highly discouraged by such compensation systems.

Another cause identified by the FCIC was a race to the bottom in mortgage-lending standards prompted by an ever-increasing demand for mortgage-backed securities.¹¹⁹ Many lenders “simply took eager borrowers’ qualifications on faith, often with a willful disregard for a borrower’s ability to pay.”¹²⁰ These subprime mortgages often included an “option ARM” and other terms that made the payments back-loaded, so that the payments would start out at an affordable level but gradually rise, sometimes by large percentages.¹²¹ Some lenders and third parties went even further, engaging in predatory practices, with some of the more unscrupulous “openly stalking desperate families looking for a financial lifeline.”¹²² When the housing bubble popped and housing prices fell, many borrowers found themselves owing significantly more than the property was worth.¹²³ This was not limited to subprime borrowers; as the crisis deepened, even buyers who were well-qualified at the time they bought their home and who had put down reasonable down payments found themselves underwater on their mortgage, resulting in some middle class and even “rich” borrowers strategically defaulting.¹²⁴ Strategic defaults are themselves a contributory factor to the depth of the crisis; they did not cause the crisis, but they did widen its scope and slow the economic recovery.¹²⁵

116. *See id.* at xxv.

117. *Id.* at xix.

118. *Id.*

119. *See id.* at xxiii-xxiv (“We conclude collapsing mortgage-lending standards and the mortgage securitization pipeline lit and spread the flame of contagion and crisis.”).

120. *Id.*

121. *See id.*

122. Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1360 (2010).

123. *Id.* at 1359-60.

124. *See* Curtis Bridgeman, *The Morality of Jingle Mail: Moral Myths About Strategic Default*, 46 WAKE FOREST L. REV. 123, 123-24 (2011) (“The decision to default even when one can afford to make the payments may make financial sense if the homeowner bought or refinanced at the height of the market and now owes much more than the house is currently worth.”).

125. *See id.* at 153 (“Those who engage in strategic default not only threaten the stability of the banking system and slow down the economic recovery; they also fail to live up to their obligations to each of us, leaving us to pay for the money they borrowed, and for no better reason than because they find it in their best interests to do so.”).

The credit-rating agencies also share in the blame; in the years leading up to the crisis, Moody's alone rated nearly 45,000 mortgage-backed securities with its coveted triple A rating, without which they would not have been nearly as marketable.¹²⁶ Eighty-three percent of these mortgage-backed securities were ultimately downgraded, but the damage was already done.¹²⁷ This leads to the question of how they could have been so wrong, and a large part of the answer is that they had little incentive to get it right. The credit-rating agencies compete with each other for business, and because of the relatively limited field of potential clients, with the major financial institutions constituting the majority of their business, the credit-rating agencies have a strong incentive to give the institutions the ratings they want.¹²⁸ The institutions and the credit-rating agencies knew that the marketability of the mortgage-backed securities depended on them receiving triple A ratings, and if a credit-rating agency did not give the securities the needed rating then the institution issuing them would likely have turned to one of the other agencies.

This list of causes is far from exhaustive but is sufficient to show that numerous factors contributed to the financial crisis, with the lack of sufficient consumer protection being but one small piece of the problem. But even if a lack of sufficient consumer protection was the root cause of the financial crisis, the CFPB still would likely fail in preventing a future crisis. The FCIC did not find that the failure of the regulators to adequately protect consumers and the financial system as a whole stemmed from it lacking the power to act; rather, it found that the regulators failed to effectively use their power.¹²⁹ Consequently, the creation of a new highly independent regulator with broad authority is not the answer. As discussed further in the subsequent section, no amount of regulatory power invested in a wholly independent consumer protection agency can prevent a financial crisis. It can reduce the effects of a financial crisis, but it could just as easily worsen the effects, or even trigger a financial crisis itself by overly restricting access to credit.

In order to avoid such a result, the CFPB must not be isolated from other parts of the government and free from any significant oversight. Effective regulation can greatly help to reduce the risk of a financial crisis, but only when the regulatory scheme as a whole is coherent. Without a multimember commission, budgetary oversight,

126. See NAT'L COMM'N ON THE CAUSES OF THE FIN. & ECON. CRISIS IN THE U.S., *supra* note 109, at xxv ("Investors relied on [the credit ratings], often blindly[, and i]n some cases . . . were obligated to use them, or regulatory capital standards were hinged on them.").

127. See *id.*

128. See John C. Coffee, Jr., *Ratings Reform: The Good, the Bad, and the Ugly*, 1 HARV. BUS. L. REV. 231, 232-34 (2011).

129. See NAT'L COMM'N ON THE CAUSES OF THE FIN. & ECON. CRISIS IN THE U.S., *supra* note 109, at xviii.

or any meaningful oversight on its policy making, the CFPB will likely become overly isolated and make policies without duly considering interests outside of its own narrow focus. In order to successfully protect consumers and protect against another crisis, the CFPB must act as a part of a whole, not as a completely independent entity with broad power and a narrow focus.

B. The CFPB Cannot Prevent Another Crisis

The CFPB has broad authority over transactions with consumers, including the authority to take action against a covered person or service provider who engages in “unfair, deceptive, or abusive act[s] or practice[s] under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.”¹³⁰ The CFPB also has the power to prescribe rules relating to any such conduct, including requirements imposed for the purpose of preventing such acts or practices from occurring.¹³¹ The CFPB was granted this authority to further its purpose, which is to “ensure[] that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.”¹³²

The CFPB’s broad authority over transactions with consumers cannot address many of the causes of the crisis, and inadequate consumer protection was not a significant enough cause on its own for improvements in that area to prevent another crisis.¹³³ The CFPB has a role to play in preventing a future crisis, but only if it acts in conjunction with the other regulatory agencies so that the overall regulatory scheme is coherent. The statute creating the CFPB purports to require that it coordinate with the other agencies, saying that “[t]he Bureau shall coordinate with the Commission, the Commodity Futures Trading Commission, the Federal Trade Commission, and other Federal agencies and State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services.”¹³⁴ However, because of the lack of any meaningful oversight of the CFPB’s actions, this purported requirement has no force.

130. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, § 1031(a), 124 Stat. 1376, 2005 (codified at 12 U.S.C. § 5531(a) (2012)).

131. *Id.* § 1031(b) (codified at 12 U.S.C. § 5531(b) (2012)).

132. *Id.* § 1021(a) (codified at 12 U.S.C. § 5511(a) (2012)).

133. NAT’L COMM’N ON THE CAUSES OF THE FIN. & ECON. CRISIS IN THE U.S., *supra* note 109 (identifying numerous causes of the financial crisis in a majority report spanning more than 400 pages, with inadequate consumer protection just being one factor of many).

134. Dodd-Frank § 1015 (codified at 12 U.S.C. § 5495 (2012)).

IV. HOW TO FIX THE CFPB

The CFPB must undergo significant reform in order to avoid it acting with the same type of tunnel vision that led to the abolishment of the CAB and ICC.¹³⁵ An agency should not act inside a vacuum; in fact, an agency should not be *allowed* to act with such a degree of independence that it could take actions in conflict with other government actors without Congress or anyone else having any meaningful way to prevent the action. The risks associated with the level of independence possessed by the CFPB far outweigh any corresponding benefits, and there is no legitimate reason why the CFPB should be structured so differently from the other regulatory agencies.

That is not to say that having an agency possess some level of independence is in no way beneficial. Some degree of political and financial independence can be valuable for an agency like the CFPB because such independence insulates it from outside pressures, potentially allowing it to take action when other sectors of the government fail to do so. A balance must therefore be struck between having enough autonomy to operate effectively and being subject to enough oversight to ensure that the overall regulatory scheme is consistent and that decisions are not made in an overly narrow-minded fashion. The CFPB's current structure gives it far too much independence, making the risk of it creating narrow-minded policies, potentially conflicting with the actions of other government sectors and thus making the overall regulatory scheme inconsistent and incoherent, far greater than any potential benefits of such a high level of independence. With some prudent reforms, the CFPB can maintain a useful level of autonomy while being subject to enough oversight to negate the risks posed by its current structure.

A. *The CFPB Should be Subject to Congressional Oversight*

As it is currently structured, the CFPB is virtually completely insulated from congressional oversight, with the only notable exception being the Senate's power to confirm the Director. However, this exception has not yet had much significance other than potentially delaying the appointment of the CFPB's inaugural director and dissuading President Obama from nominating Elizabeth Warren, since the CFPB's inaugural director has not actually been confirmed by the Senate.¹³⁶ In any event, the CFPB is free from congressional appropriations authority, or even appropriations authority from the Federal

135. See *supra* notes 62-72 and accompanying text (discussing the history and ultimate abolishment of the CAB and ICC).

136. See *supra* Part I.A (discussing the appointment of CFPB Director Richard Cordray).

Reserve, and appropriations authority is one of the most effective means of congressional oversight.¹³⁷

Those against giving Congress appropriations authority argue that doing so would make the CFPB vulnerable to political influence.¹³⁸ To the extent that Congress is made up of individual members, each of whom holds his or her own political beliefs, subjecting the CFPB to congressional appropriations authority will subject the CFPB to some degree of political influence. But the same can be said for virtually every other expense of the government, including the budgets of all the agencies that are subject to the congressional appropriations process, which includes two of the other federal financial regulators: the SEC¹³⁹ and the Commodities Futures Exchange Commission.¹⁴⁰

By giving Congress appropriations authority over the CFPB, Congress will at least have some mechanism of oversight over the CFPB, which could serve as a means of ensuring that the CFPB considers various different viewpoints and interests. And even if the balance between restricting autonomy and reducing the risks created by the CFPB's high level of independence was found, in the case of congressional appropriates authority, to weigh against granting that authority, the CFPB's current structure should not be retained. A less intrusive alternative to giving Congress direct appropriations authority would be to instead make the CFPB subject to appropriations authority from the Federal Reserve. Under this scenario, instead of the CFPB Director setting the agency's budget himself,¹⁴¹ the seven-member Board of Governors of the Federal Reserve¹⁴² would set the CFPB's budget based on its needs and the needs of the CFPB. This would at least subject the CFPB to some oversight authority, and would make it less removed from the congressional appropriations process since the CFPB budget would then be a part of the Federal Reserve's budget that could be changed by the Federal Reserve based on congressional input.

137. See Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 767-69 (1983).

138. See Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881, 951 (2012).

139. *Id.*

140. *Id.*

141. 12 U.S.C. § 5497(a)(1) (2012) ("Each year . . . the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the [CFPB] Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law . . .").

142. See *About the Fed*, *supra* note 90.

*B. The CFPB Should be Headed by a
Multimember Commission*

The CFPB is unusual in that it is both an independent agency with rulemaking authority and it is led by a single director. This is made even more unusual by that single director being insulated from removal except for “cause,” meaning “inefficiency, neglect of duty, or malfeasance in office.”¹⁴³ Most other regulatory agencies are headed by a multimember commission or Board,¹⁴⁴ and agencies that are led by only a single director usually do not have any significant rulemaking authority and are removable at the pleasure of the President or another delegated official.¹⁴⁵ Combining near total independence with broad rulemaking authority and a single director that cannot be removed except for cause is a recipe for disaster; any possible benefits that could result from such a structure are far outweighed by the corresponding risks.

Notably, some scholars disagree with the above assertion and argue that the single director structure should be retained. Professor Arthur E. Wilmarth, Jr., Executive Director of the Center for Law, Economics and Finance at George Washington University School of Law,¹⁴⁶ laid out his arguments against changing the current leadership structure of the CFPB in a recent article.¹⁴⁷ The crux of Professor Wilmarth’s argument is that “the factors of efficiency, stability, decisiveness and accountability argue in favor of retaining CFPB’s single-Director model of governance.”¹⁴⁸ Modifying the agency to be led by a five-member commission would, according to Professor Wilmarth, “likely produce more delay and less consistency in CFPB’s decision-making . . . [and] would expose CFPB to the risk of leadership deadlock whenever a commissioner left office.”¹⁴⁹ The problem with that line of argument is that it applies to literally every agency headed by a multimember commission that has any decisionmaking authority. Indeed, Professor Wilmarth seems to advocate for doing away with multimember commissions altogether.¹⁵⁰

Having a single director as opposed to a multimember commission does, admittedly, streamline the decisionmaking process making it easier for the agency to operate, much like having a dictatorship

143. 12 U.S.C. § 5491(c)(3) (2012).

144. See *supra* notes 85-91 and accompanying text.

145. See Zywicki, *supra* note 19, at 873-74.

146. *Faculty Directory: Arthur E. Wilmarth, Jr.*, GEO. WASH. U. L. SCH., <http://www.law.gwu.edu/Faculty/profile.aspx?id=1732> (last visited May 10, 2013).

147. See Wilmarth, *supra* note 138, at 919-24.

148. *Id.* at 921.

149. *Id.*

150. See *id.* at 922 (“[T]he lengthy vetting process for Presidential nominees and prolonged Senate confirmation battles have frequently resulted in persistent vacancies and policy deadlocks at agencies with multimember commissions.”).

would make the government much more efficient compared to our current government with its checks and balances. If a single individual controlled all aspects of the government, then policies could be created and implemented in much less time and that individual would be able to ensure that the government acts as a unified whole. An extreme analogy, but it illustrates the point that efficiency concerns should not be the key factor in determining the optimum agency structure. The value of discourse should not be understated; having a multimember commission of individuals with different ideological views could drastically improve the decisionmaking process.¹⁵¹

When a group of people with different ideological views must come to a decision, it forces the proponents of each course of action to articulate reasoned arguments supporting their view, which allows both sides to see the strengths and weaknesses of their positions, thus allowing them to reach an informed decision.¹⁵² Of course, this may be a somewhat optimistic view. In some cases, views and positions are so divergent that no real middle ground can be found. But even in those instances, where the majority does not alter its position and takes action irrespective of strong objections by the minority, the existence of the minority still serves a valuable function as it can serve as a whistleblower to actions taken by the majority which have potentially serious ramifications.

Professor Wilmarth warns of a “threat of institutional paralysis” if the CFPB is headed by a multimember commission; a threat he argues will be heightened if any such commission is limited to only having three of the five members affiliated with the same political party.¹⁵³ However, other regulatory agencies have exactly that structure, including the FTC,¹⁵⁴ the Commodities Futures Exchange Commission,¹⁵⁵ and the SEC.¹⁵⁶ These agencies have been creating policies and making decisions for decades without suffering from “institutional

151. See Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 12 (2002) (“[N]umerous studies have found that group decisions are not only superior to those of the average member, but also to those made by the very best individual decisionmakers within the group.”).

152. See *id.* at 29 (“Although individuals may well be better at devising a brilliant plan, individuals often become wedded to their plans and fail to see flaws that others might identify.”).

153. See Wilmarth, *supra* note 138, at 921.

154. 15 U.S.C. § 41 (2012) (stating that the FTC “shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate” and that no “more than three of the Commissioners shall be members of the same political party”).

155. 7 U.S.C. 2(a)(2)(A) (2012) (“The Commission shall be composed of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. . . . Not more than three of the members of the Commission shall be members of the same political party.”).

156. 15 U.S.C. § 78d(a) (2012) (stating that the SEC shall “be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate” and that no “more than three of such commissioners shall be members of the same political party”).

paralysis.” There is no reason to expect that the typical structure of a five-member commission with a maximum of three members being from the same political party would not work for the CFPB when it has for so many other agencies, and having a multimember commission ensures that meaningful discourse will take place in reaching decisions.

As Professor Wilmarth points out, the director of the CFPB is currently statutorily required to consult with others before making major policy decisions.¹⁵⁷ While technically true, these requirements unfortunately ring hollow. Professor Wilmarth’s first example is that the director must seek advice from the CFPB’s Consumer Advisory Board.¹⁵⁸ The Dodd-Frank Act specifies that “[t]he Director shall establish a Consumer Advisory Board to advise and consult with the [CFPB] in the exercise of its functions under the Federal consumer financial laws, and to provide information on emerging practices in the consumer financial products or services industry”¹⁵⁹ Other than stating that appointments to the Board should be made “without regard to party affiliation” and that at least six of the members (the total number of which is not specified) must be appointed based on the recommendation of the regional Federal Reserve Bank Presidents, there is no constraint on the Director’s power of appointment.¹⁶⁰ Nothing prevents the Director from simply filling the Board with individuals sharing the same ideological beliefs as himself, which would greatly limit how effectively it could meaningfully contribute useful feedback on proposed policies. Moreover, even if the Director did not have sole discretion in appointing the Board members, the Board would still have little effectiveness because the Director is under no obligation to actually listen to anything the Board has to say. The Board is supposed to “advise and consult” with the CFPB, but it has no power whatsoever; the Director is free to simply disregard everything that the Board members say.¹⁶¹

Professor Wilmarth points to the small business advisory panel as another example of how the Director must consider outside interests.¹⁶² Unfortunately, the small business advisory panel is even more ineffective than the Consumer Advisory Board. The panel only plays any role at all when the proposed regulation would have an impact on the cost of credit for small businesses,¹⁶³ and even then it plays

157. See Wilmarth, *supra* note 138, at 923.

158. See *id.*

159. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, § 1014(a), 124 Stat. 1376, 1974 (codified at 12 U.S.C. § 5495(a) (2012)).

160. *Id.* § 1014(b) (codified at 12 U.S.C. § 5494(b) (2012)).

161. See *id.* § 1014(a) (codified at 12 U.S.C. § 5494(a) (2012)).

162. See Wilmarth, *supra* note 138, at 923-24.

163. See Dodd-Frank § 1100G(b) (codified as amended at 5 U.S.C. § 609 (2012)).

only a minor advisory role.¹⁶⁴ As with the Consumer Advisory Board, the panel has no authority whatsoever over the CFPB; the CFPB Director is free to form a panel filled with individuals sharing his ideological views, and free to completely ignore any input provided from the panel.¹⁶⁵ Thus, neither the Consumer Advisory Board nor the small business advisory panel adequately compensate for the lack of a multimember commission.

Finally, Professor Wilmarth points to how the CFPB is required to consult with the other federal financial regulators before adopting major policies.¹⁶⁶ The Dodd-Frank Act specifies that the CFPB “shall consult with the appropriate prudential regulators or other Federal agencies prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agencies.”¹⁶⁷ If the consulted regulator formally objects to the CFPB’s proposed rule and provides the CFPB with a written objection, then the CFPB must respond to that objection in its release of the rule and provide the basis for the CFPB’s decision.¹⁶⁸ This is Professor Wilmarth’s most compelling point, because the CFPB does at least have to respond to the objection and provide some basis for its decision to proceed irrespective of the objection, but in the end the CFPB is still free to proceed as it pleases regardless of how many objections it receives and how compelling those objections are.

Thus, even taken in the aggregate, these requirements that the CFPB consult with other parties is no substitute for having the agency headed by a multimember commission. None of these other parties has any control over what policies the CFPB puts into place, and the Director is largely free to simply ignore any input received. By contrast, in a multimember commission, each member gets an equal vote, and each member’s concerns and advice must therefore be taken seriously. Even if a majority of the commissioners share a similar ideology and agree on most points, a multimember commission is still far more effective than any of the consultation requirements Professor Wilmarth points to because it better protects against shortsighted or irrational policies. The members of the commission would be much more knowledgeable about the CFPB’s operations and about the goals and intentions behind any particular policy than any outside party, and they would thus be in a better position to raise concerns or objections to the proposed policy. Moreover, because each commissioner would get a vote, the members with the minority viewpoint

164. *See id.* (When applicable, the CFPB shall “identify representatives of small entities in consultation with the Chief Counsel for Advocacy of the Small Business Administration [and] collect advice and recommendations from the representatives . . .”).

165. *See id.*

166. *See Wilmarth, supra* note 138, at 923.

167. Dodd-Frank § 1022(b)(2)(B) (codified at 12 U.S.C. § 5512(b)(2)(B) (2012)).

168. *See id.* § 1022(b)(2)(C) (codified at 12 U.S.C. § 5512(b)(2)(C) (2012)).

would only need to convince one of the three members with the majority viewpoint that a given action is unwise, or that a suggested change would be beneficial, in order for the proposed policy to be rejected or revised. By contrast, with a single director, he does not have to seriously consider any outside advice (or even advice from others inside the CFPB for that matter) before taking action.

What makes the one director structure especially dangerous in the context of the CFPB is that the director cannot even be removed from office by the President except for cause. If the single director structure is retained, the position should at least be modified to subject the director to removal at the discretion of the President. This is an imperfect solution as the CFPB director would still possess the same broad power that he does now and would still be able to act with little regard for concerns raised by other parties, but at least the President would have some mechanism to ensure that the actions taken by the director conform with the overall regulatory scheme and do not conflict with actions taken by other agencies. Presidential removal power would give the Executive Branch a means of constraining a director who acts with too narrow of a focus or otherwise does not act in conformance with the best interests of society as a whole. However, because it would still leave too much power in a single director and would not be enough to ensure that meaningful discourse takes place in the decisionmaking process, reforming the CFPB to be headed by a multimember commission is a far better solution.

C. *The CFPB Should be Subject to OIRA Review*

Since its creation, the OIRA has been relied upon to ensure that the overall regulatory scheme is coherent and that the various agencies coordinate with each other to produce sound policies.¹⁶⁹ Over the course of the last thirty years, the general rule has been that all agencies must submit proposed regulations to the OIRA along with a cost-benefit analysis of the regulation.¹⁷⁰ An exception applies to “independent agencies”; agencies that are listed as such in the Paperwork Reduction Act do not have to submit their regulations to the OIRA for review.¹⁷¹ The CFPB is included in this list, along with other regulatory agencies such as the FCC and the SEC.¹⁷² Thus, the exclusion of the CFPB from OIRA review is not surprising or unusual,

169. See STEARNS & ZYWICKI, *supra* note 44, at 366 (discussing how the OIRA is the primary office tasked with solving the “chronic” issue of creating a coherent regulatory scheme).

170. See *id.* at 366 (“OIRA reviews all economically significant regulations proposed by executive branch agencies, and its central tasks have been supported by Presidents of both parties for the past thirty years.”); Barkow, *supra* note 45, at 31 (“Every president since Ronald Reagan has used OIRA to require agencies under OIRA’s jurisdiction to justify their proposed regulations using cost-benefit analysis.”).

171. See Barkow, *supra* note 45, at 32.

172. See 44 U.S.C. § 3502(5) (2012).

but as a matter of efficient policy it is puzzling why such an organization would not be subject to OIRA review. Sally Katzen, who served as the Administrator of the OIRA during the Clinton Administration, highlighted how critical the OIRA's role as overseer is:

The agencies focus like a laser, as they should, on their statutory missions—in the case of EPA, protecting the environment. The White House and OIRA take a broader view and consider how, for example, an environmental proposal will affect energy resources, tax revenues, health policy, etc. Stated another way, EPA is pursuing a parochial interest; OIRA is tempering that with the national interest, as it should.¹⁷³

As a policy matter, the reasoning behind subjecting an organization like the EPA to OIRA review seems to apply at least as strongly to an organization like the CFPB. Perhaps the reason independent regulatory agencies have historically been exempt from OIRA review is that they are generally headed by a multimember commission, and this is considered enough of a substitute for OIRA review.¹⁷⁴ If that is the case, then exempting the CFPB makes very little sense considering its current structure,¹⁷⁵ but even if the CFPB is reformed to be headed by a multimember commission it should still be subject to OIRA review. The OIRA is in the best position to ensure that the regulatory scheme as a whole is coherent and consistent, but it cannot fully fulfill its role when agencies such as the CFPB are exempt from having to submit their proposed regulations for OIRA review.

D. The FSOC Should Be Given Enhanced Veto Power over the CFPB's Regulations

With the CFPB's current structure, the FSOC is the only entity that can actually prevent a CFPB regulation from taking effect. It provides some oversight over the CFPB, but it is much too limited, because the standard for the FSOC to override a decision of the CFPB is so high that it is virtually insurmountable. Only a two-thirds vote of the FSOC's ten voting members, consisting of the heads of the nine federal financial regulatory agencies and one independent

173. Sally Katzen, *A Reality Check on an Empirical Study: Comments on "Inside the Administrative State,"* 105 MICH. L. REV. 1497, 1505 (2007).

174. See Zywicki, *supra* note 19, at 892 ("It is not clear why independent agencies have been exempted from OIRA's reach, . . . but one possible pragmatic or policy justification is that independent agencies have alternative mechanisms of ensuring quality control in the production of rules and other outputs, which Executive Branch departments often do not have. . . . For example, independent agencies typically are headed by a multi-member commission, often bipartisan in composition, and the information and debate produced in the resulting deliberative process may provide a partial substitute for OIRA review.").

175. See *supra* discussion in Part IV.B (discussing how the CFPB currently has a single director instead of a multimember commission).

member appointed by the President,¹⁷⁶ can override a decision of the CFPB.¹⁷⁷ The CFPB Director, as a voting member of the FSOC,¹⁷⁸ counts for one of the ten votes on whether or not the CFPB's regulation should be overridden. As a practical matter, it is extremely unlikely that the CFPB Director will ever vote to override a regulation of the CFPB, which could not have been issued in the first place without his approval; thus, in order for the FSOC to override a CFPB regulation, seven of the remaining nine voting members—roughly seventy-eight percent—must vote to override the regulation. As if this weren't daunting enough, a member of the FSOC can only vote to set aside a regulation of the CFPB if the agency or department that the member represents has “made an official determination, at a public meeting where applicable, that the regulation which is the subject of the petition 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.”¹⁷⁹

In order for the FSOC's oversight of the CFPB to be meaningful, the standard for it to set aside a CFPB regulation must be reduced to a more reasonable level. If instead of a two-thirds vote of the voting members the standard was a simple majority of the voting members—excluding the CFPB Director—then the FSOC would be in a much better position to ensure that the CFPB does not pass regulations with harmful effects. This would still be a very high standard; five out of the nine remaining voting members—roughly fifty-six percent—would have to vote to set aside the regulation, and each member would still only be able to vote if their organization had determined the regulation “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.”¹⁸⁰ Thus, any concern that such a change would give the FSOC too much control over the CFPB is misplaced. This reform would simply give the FSOC the power to effectively perform its oversight function, which is to ensure that CFPB regulations do not threaten the United States banking or financial system.¹⁸¹

It is worth noting that there is one other way for a regulation of the CFPB to be invalidated—the courts can intervene when an agency neglects its statutory obligations and have shown a willingness to do so in challenges involving other regulatory agencies.¹⁸² But while

176. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, § 111(b)(1), 124 Stat. 1376, 1985 (codified at 12 U.S.C. § 5321(b)(1) (2012)).

177. *See id.* § 1023(c)(3)(A) (codified at 12 U.S.C. 5513(c)(3)(A) (2012)).

178. *Id.* § 111(b)(1) (codified at 12 U.S.C. § 5321(b)(1) (2012)).

179. *Id.* § 1023(c)(3)(B)(ii) (codified at 12 U.S.C. 5513(c)(3)(B)(ii) (2012)).

180. *See id.*

181. *See id.*

182. *See* *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1144 (D.C. Cir. 2011) (invalidating a rule of the SEC because, as summarized in the Reporter: (1) the agency “neglected its statutory

the courts can, and at times will, invalidate agency regulations that are arbitrary and contrary to the agency's statutory obligation,¹⁸³ this is far too limited and too uncertain of a check on the CFPB's power. Part of the reason that it is an insufficient safeguard is that the Court must wait for a challenge to be brought before it can review an action of the CFPB; thus, it cannot review all actions of the CFPB, nor can it prevent them from taking effect prior to its review. But even more fundamentally, the courts are not a sufficient safeguard because their power to invalidate regulations is too limited. A court cannot invalidate regulations because they are bad policy or conflict with other regulations; the court needs a valid statutory or constitutional reason for invalidating a regulation. Moreover, a court's review does not help in the policy creation stage, because its review generally is not conducted until the policy has already been implemented. A court cannot simply make suggestions on how to improve the policy; it must decide whether it is valid or not.

V. CONCLUSION

The CFPB currently suffers from the same structural deficiencies that led to the incoherent regulatory scheme that plagued the nation prior to the massive reforms put into place in the 1970s-80s.¹⁸⁴ During that time period, agencies with similar structures to the CFPB were either abolished or drastically reformed, yet the CFPB is structured very similarly to those failed agencies, ignoring the lessons from the past. In order to avoid a repeat of the agency failures seen leading up to the reforms of the 1970s-80s, the CFPB must be reformed.¹⁸⁵ While OIRA review largely solved the problem of conflicting and incoherent policies, the CFPB (and other independent regulatory agencies) are currently not subject to it, making it an incomplete solution to the overall problem and no help at all in the context of the CFPB.¹⁸⁶

obligation to assess economic consequences of [the] rule by not making tough choices about which of [the] competing estimates regarding proxy contests was most plausible or to hazard a guess as to which was correct; (2) [the] SEC relied upon insufficient empirical data when it concluded that [the] rule would improve board performance and increase shareholder value by facilitating [the] election of dissident shareholder nominees; (3) [the] SEC acted arbitrarily and capriciously by not conducting [a] serious evaluation of costs that could be imposed upon companies from use of [the] rule by shareholders representing special interests, particularly union and government pension funds; (4) [the] SEC arbitrarily ignored [the] effect of [the] final rule upon [the] total number of election contests; and (5) [the SEC's] discussion of [the] estimated frequency of nomination under [the] rule was internally inconsistent and therefore arbitrary").

183. See, e.g., *id.*

184. See *supra* notes 64-77 and accompanying text.

185. See *supra* Part II.

186. See *supra* Part II.

Moreover, while a lack of consumer protection contributed to the financial crisis, it was a relatively minor cause in comparison to others.¹⁸⁷ The CFPB cannot prevent another crisis on its own; it needs to work in conjunction with the other government sectors, not operate in a vacuum in which the CFPB can do as it sees fit without regard to broader interests. In order to effectively perform its function, do its part in preventing another financial crisis, and avoid suffering from the same type of tunnel vision that made past regulatory agencies that were similarly structured fail, the CFPB must be reformed.

First, the CFPB should be made subject to some degree of congressional oversight. Subjecting the CFPB to the congressional appropriations process would be a prudent way to ensure that the CFPB does not act in a way that is detrimental to the broader interests of the country. Second, the CFPB should be reformed to be led by a multimember commission instead of a single director. A multimember commission is superior to having a single director for a number of reasons, not the least of which is the benefits of having discourse in decisionmaking.

Third, the CFPB should be made subject to review by the OIRA, as should other similar independent agencies. The OIRA serves a valuable function: it ensures that the overall regulatory scheme is coherent and that the various agencies coordinate with each other and other government sectors to produce sound policies. But the OIRA cannot adequately perform this function when agencies like the CFPB are exempt from its review. All agencies, the CFPB included, should be subject to review by the OIRA—only then will the OIRA be able to effectively prevent conflicting and narrow-minded policies from being enacted and ensure that the overall regulatory scheme is consistent and coherent. Lastly, the CFPB should be subject to more meaningful review by the FSOC by reducing the vote needed to veto a CFPB action from two-thirds to one-half. The way the FSOC is structured, a two-thirds vote is a virtually insurmountable standard; by reducing the requirement to a simple majority the FSOC's role as an overseer of the CFPB will actually be fulfilled. Taken in the aggregate, these reforms will ensure that the CFPB adequately performs its function, does not act in an overly narrow-minded fashion, and does not enact policies that are inconsistent with the overall regulatory scheme. The result will be a more effective agency that will not be doomed to fail because of structural defects, but instead should continue to fulfill its mission for generations to come.

187. *See supra* Part III.