Capturing This Watchdog? The Consumer Financial Protection Bureau Keeping the Special Interests Out of Its House

Michael C. Nissim-Sabat

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Michael C. Nissim-Sabat*

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"Banks are overregulated, businesses are overregulated, the only thing we really need to regulate are the people that are going to be regulating."¹
—Jon Stewart

I. INTRODUCTION

Although the causes of the 2008 financial collapse showed illegitimate securitization, an unsustainable housing bubble littered with predatory lending, and unfettered risk-taking, critical analyses of the collapse focus on the United States banking industry running amok without appropriate regulation.² After the Dodd-Frank

* West Virginia University College of Law, J.D. Candidate, May 2013; Marshall University, M.S., Sport Administration; University of Mary Washington, B.A., Political Science. The author would like to thank Professor Matthew Titolo for his thoughtful insight and inspiration, and Professors andre douglas pond cummings and Jena Martin-Amerson for their help, support, and mentorship. A special thanks to my parents and my wife, Brooke, for their continued support, love, and patience.

¹. The Daily Show with Jon Stewart (Comedy Central television broadcast Dec. 8, 2011) (sarcastically responding to Ed Gillespie, former Republican National Committee Chair, who was arguing that the Consumer Financial Protection Bureau and its single director position had too much power. Stewart commented, "The person that would make maybe perhaps compliance easier got shot down" because the Bureau's opposition wants to pursue a way to influence the CFPB. Id.).

Wall Street Reform and Consumer Protection Act of 2010 became law, it is the contention of this Note that with the Consumer Financial Protection Bureau’s (hereinafter “CFPB” or “Bureau”) budget structure, transparent design, and leadership framework, regulators in the Bureau will not be able to surrender to the special interests through “regulatory capture.” A regulatory agency’s duty is to oversee its respective industry; however, once the agency becomes too intertwined with the industry, it not only fails its regulatory role, but also essentially promotes the industry’s policy, and therefore, “regulatory capture” ensues. Unfortunately then, the regulatory agency neither will be able nor will be inspired to fulfill its obligations, rendering it ineffective in protecting the public.

This Note analyzes the Bureau’s structure and its ability to be an effective regulator, despite the threat of regulatory capture lurking in the shadows. After reviewing regulatory capture’s role in agency administration, this Note considers that the CFPB has the ability to remain true to its mission—helping consumers—because the Bureau was founded upon keeping this influential capture pressure away. Ultimately, this Note analyzes whether the structure and design of the Bureau allows it to be a powerful weapon for a majority of Americans while withstanding the industries’ attempts to capture the agency. Having learned from the mistakes leading up to the financial crisis, including the Federal Reserve’s ("Fed") lack of oversight, Dodd-Frank and the Bureau’s subsequent actions have measures that will protect consumers from an overly-aggressive financial services sector, and thus disengage the special interests of this sector from influencing (and harming) American consumers.

Part II of the Note outlines the problems that led to the 2008 financial crisis, and subsequently led to the creation of the Bureau. Without much regulation, bankers pushed loans that far exceeded their value, allowing many consumers to take on extraordinary amounts of debt. Meanwhile, U.S. and global investors were supporting the credit market through credit derivatives—credit default swaps and collateralized debt obligations—whose value was derived from mortgages. When the United States housing market began floundering, these investments became worthless, sending the United States, the global economy, and ultimately consumers, spiraling into an abyss. The collapse left a huge void to regulate the financial services industry, and the Dodd-Frank Act created a new regulatory agency: the CFPB. This Part concludes by arguing that the creation of the CFPB was the necessary step for overseeing products coming

3. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 11-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank Act]. This Act will be also referred to as either the “Dodd-Frank Act” or “Dodd-Frank” throughout the note.
4. See id. §§ 1001-1100H (2010) (Title X of the Dodd-Frank Act created the Bureau of Consumer Financial Protection, as part of the “Consumer Financial Protection Act of 2010.” Id. § 1001). The Bureau is now commonly known as the Consumer Financial Protection Bureau.
5. See THE STRUCTURE OF FINANCIAL REGULATION 238 (David G. Mayes & Geoffrey E. Wood eds., 2007).
6. Id.
out of the financial sector, and in turn, providing the protection that was needed for American consumers.

Considering the lack of oversight of other regulatory agencies in the financial services sector, Part III begins by focusing on the prospect of regulatory capture in an agency. In particular, it identifies the ever-present issue of regulatory capture, and the role of it effectively working its way into an agency. In light of the CFPB’s single director position, this Part then asks whether the agency’s central power strata has an effect on regulatory capture. This part examines governance by both a single, central administrator and a board of commissioners.

Part IV then associates the role of regulatory capture to the Bureau’s developed structure. This Part examines the tools that the Bureau has developed to manage (or eliminate) capture in its agency. Because the Bureau has a loosely held association with the Fed, this Part describes the relationship between the two agencies, and identifies how the previous weaknesses in the Fed’s structure provide insight on managing capture in the Bureau. This Part then examines how the Bureau’s budgetary structure limits capture capability because the manner in which the budget is channeled insulates the CFPB from industry influence. The CFPB’s transparency is another tool that avoids the industry’s tentacles. A particularized agenda that promotes openness in the Bureau reveals its ability to limit its exposure to the special interest influence. This Part analyzes the leadership structure of the Bureau, and how its implementation best fits the need to resist industry capture. After comparing the Bureau to the Fed, and then examining the Bureau’s budget, transparency, and leadership structure, this Part describes how that these safeguards help in eliminating capture in the new agency.

This Note concludes that the CFPB can avoid regulatory capture and provide the effective regulatory reform that was desperately needed after the 2008 financial crisis. Through its financial resources, its independent transparent character, and its leadership structure, the CFPB has the design to keep special interest industry groups from compromising part of Dodd-Frank Act’s mission: “to protect consumers from abusive financial services practices.”

II. THE FINANCIAL CRISIS

The financial crisis of 2008 left an indelible mark on America’s landscape. The crisis caused great destruction from Main Street to Wall Street, as well as

8. Dodd-Frank Act §§ 1001-1100H.
affecting the global economy.\textsuperscript{10} As Wall Street imploded, it was Main Street that ultimately took the hit;\textsuperscript{11} it was everyday citizens who were hurt. Lenders were pushing loans to those “borrowers who took on mortgages when they never should have owned homes in the first place.”\textsuperscript{12} In a prepared statement before the Senate Banking Committee, Scott Stern, CEO of Lenders One, said,

The truth is that many of us in the industry were deeply distressed by the growing practice of pushing high risk loans on borrowers who had no reasonable expectation of being able to repay the mortgage. Disclosures were often less than adequate, and faced with a bewildering array of loan terms, borrowers tended to trust their mortgage banker or broker. The broken trust that resulted has damaged borrower confidence in the mortgage industry.\textsuperscript{13}

With consumers trusting the banking industry—and inherently Wall Street—it was the consumers who felt the crunch when the system failed, and it was these types of failures in the financial services sector that eventually brought the U.S. economy to a halt, necessitating the formation of the CFPB.

A. The Collapse

Leading up to the financial crisis in 2008, there was an epic failure of the market, the financial sector, as well as the government. Deregulation, a housing market bubble with its mortgage loan securitization, and unfettered risk-taking all played a role in breaking America’s back.\textsuperscript{14}

Starting in the 1970s, the Fed reduced its role in ensuring that the “safety and soundness” of the banks was properly regulated; instead, the Fed gave its “implicit

\begin{itemize}
\item \textsuperscript{10}See supra note 9.
\item \textsuperscript{11}See generally Jennifer M. Smith, Mortgage Foreclosures, Mortgage Morality, and Main Street: What’s Really Happening?, 25 J. Civ. RTS. & Econ. Dev. 525, 544 & 547 (2011) (highlighting that Wall Street knew its scheme was sacrificing America’s families and Main Street and that the “blame game” should not fall on Main Street, but on Wall Street, the “real culprit”).
\item \textsuperscript{13}Cummings, supra note 9, at 156-57 (for a discussion about some of the undeniable truths that caused the crisis).
\item \textsuperscript{14}See cummings, supra note 9, at 156-57 (for a discussion about some of the undeniable truths that caused the crisis).
\end{itemize}
blessing” for the banks to regulate themselves and approved products that the banks perceived to be safe. Before long, these roots of insufficient regulation and weak supervision led to the financial crisis.

In addition, the housing bubble began to develop when favorable interest rates, easy access to credit, and little regulation permitted many consumers to chase the American dream of home ownership. Unscrupulous lenders and mortgage brokers seized this opportunity and destroyed the lives of millions of American consumers with their predatory lending practices. During this time, when so many Americans were lured into home ownership with enticing mortgage interest rates on home loans, homeowners hoped to capitalize on the rising housing market, and the American housing market was on its way to one of the greatest housing booms in American history.

The bubble soon burst. Many of these loans were subprime, which allowed borrowers with poor credit to obtain cheap credit. The banks found that they could tempt consumers with these low “teaser” rates for the initial loan; then, through no fault of their own, the fate of consumers changed dramatically as these subprime mortgages were replaced as “higher, market-based rates kicked in.” The opportunity to get a loan was so promising at first; yet, after a few years, borrowers began defaulting in large numbers. With property valuation based on mere speculation, borrowers had no out when the bubble burst. Subprime mortgages (and predatory lending) had boomed: when the home market peaked in 2005, $625 billion in mortgages was made to low-credit scoring borrowers, compared to just $4 billion of the same loans made after the crisis.

Nonetheless, these loans seemed to provide the protection for potentially distressed homeowners because a borrower could always refinance or sell to recoup

17. cummings, supra note 9, at 177–78. cummings explicates that predatory lending is the practice of giving mortgages that invoke inherently unfair and abusive terms or that lack the systematic ability to resolve unfair terms. Id. at 178.
20. CSI: Credit Crunch, supra note 18.
the mortgage price. However, when the housing market began to flatten in 2006 and the low interests crept up, the "music stopped."

At the same time when these subprime mortgages were being promoted, these risky mortgages were also "packaged, repackaged, and sold to investors around the world." Lenders were knowingly making loans to consumers who could not withstand adverse market fluctuations; meanwhile lenders remained reckless, despite the realization that the failure of the underlying loans would spiral the global economy into catastrophe. "Too many of these institutions acted recklessly, taking on too much risk, with too little capital, and with too much dependence on short-term funding." When the homeowners with their subprime loans began to default at a rapid rate, these mortgage-backed securities became toxic.

The Financial Crisis Inquiry Commission concluded, among other reasons, that the financial crisis hinged on several key components: widespread failures in regulating the financial sector; lack of control over the industry’s extreme risk-taking, including excessive borrowing, investing, and lack of transparency; and insufficient government interference and response to the panic.

The United States, and the world, had plunged into a financial "Armageddon."

Although it was too late to salvage the harm done by the financial industry’s practices that led to the 2008 meltdown, the government responded with legislation in 2010 to avert a future crisis and provide protection for the American consumer.

23. Id.
24. THE FINANCIAL CRISIS INQUIRY COMMISSION, supra note 9, at xvi; see President Barack Obama, Remarks by the President at Osawatomie High School (Dec. 6, 2011), http://www.whitehouse.gov/the-press-office/2011/12/06/remarks-president-economy-osawatomie-kansas. President Obama stated:

We all know the story by now: Mortgages sold to people who couldn’t afford them, or even sometimes understand them. Banks and investors allowed to keep packaging the risk and selling it off. Huge bets – and huge bonuses – made with other people’s money on the line. Regulators who were supposed to warn us about the dangers of all this, but looked the other way or didn’t have the authority to look at all.

President Barack Obama, supra.
25. THE FINANCIAL CRISIS INQUIRY COMMISSION, supra note 9, at xxii.
26. Id. at xviii.
27. Id. at xv–xxviii.
28. MORGENSON & ROSNER, supra note 9, at 136 (explaining how the ease of capital requirements on banks facilitated the “race to mortgage Armageddon” and culminating with the peak of the financial crisis); see generally Eamonn K. Moran, Wall Street Meets Main Street: Understanding the Financial Crisis, 13 N.C. BANKING INST. 5 (2009). The housing boom created excessive demand, underwriters relaxed their standards to provide more loans to more borrowers, and despite thinking that the loans were well-secured, lenders were not looking at homeowners’ ability to repay. Moran, supra. “[The] increased homeownership has come at a very substantial personal and financial cost to already financially strapped consumers as it allowed too many individuals and families to become overextended and hold mortgages they simply could not afford.” Moran, supra; see Ben Steverman & David Bogoслав, The Financial Crisis Blame Game, BLOOMBERG BUSINESSWEEK, (Oct. 18, 2008), http://www.businessweek.com/stories/2008-10-18/the-financial-crisis-blame-game/businessweek-business-news-stock-market-and-financial-advice (painting the blame game).
B. The Legislative Response to the Crisis: Enacting the CFPB

The collapse prompted necessary and obligatory reform. With consumer protection law “scattered through a maze of agencies and other enforcers,” consumers had difficulty accessing any recourse for assistance, guidance, or protection. Unfortunately, some regulators who had the authority to protect consumers—for instance, the Fed, the Federal Trade Commission, and the Office of the Comptroller of the Currency ("OCC")—botched their duties. Regulators disregarded their responsibilities; more oversight by the regulators was necessary to prevent future crises. Congress, in response to the Fed’s lack of action, overhauled oversight of the financial sector, and passed some of the most essential financial measures since the Great Depression.

On July 21, 2010, President Barack Obama signed into law the Dodd-Frank Act. As a result, Wall Street and the national financial services industry faced major changes under the Dodd-Frank Act. This legislation was the “response to Americans’ call for help.”

Congress passed this legislation with the dual aim of both providing some remedy for the harm done by the crisis and preventing another 2008 financial crisis.

President Obama hailed the Dodd-Frank Act, and the CFPB, created by Title X of the

30. Dodd-Frank Act, Pub. L. 11-203, § 1061(a)(2), 124 Stat. 1376, 2036 (2010). The Bureau was transferred the responsibilities of the Federal Reserve Board of Governors (and any Federal reserve bank), the Federal Deposit Insurance Corporation, the Federal Trade Commission, the National Credit Union Administration, OCC, OTS, and the Department of Housing and Urban Development, and the heads of those agencies. Id.
31. SKEEL, supra note 29, at 100 ("The problem wasn’t that too many cooks spoiled the broth; it was that none of the cooks seemed to be in the kitchen."); MORGENSON & ROSNER, supra note 9, at 42–45 (explaining how the regulatory agencies, which once had been strict on banks, loosened up its control leading up to the millennium).
34. Dodd-Frank Act § 1.
35. Id.
36. SKEEL, supra note 29, at 2. Dodd-Frank had two objectives: 1) minimize the risk of the “shadow banking system,” and 2) reduce the collateral damage from the destruction of large financial institutions. Id. at 4.
37. President Barack Obama, Remarks by the President at the Consumer Financial Protection Bureau (Jan. 6, 2012), http://www.whitehouse.gov/the-press-office/2012/01/06/remarks-president-consumer-financial-protection-bureau ("We're not going to let up ... [W]e have a responsibility to do even more than just try to recover from this devastating recession and financial crisis. ... And what we want to do is make sure not just that we're getting back to the status quo, we want to make sure that we're dealing with those underlining problems ... And that's where [the CFPB] come[s] in. Every one [in the CFPB] here has a critical role to play in making sure that everybody plays by the same rules. To make sure that the big banks on Wall Street play by the same rules as community banks on Main Street. To make sure that the rules of the road are enforced, and that a few bad actors in the financial sector can't break the law, can't cheat working families, can't threaten our entire economy all over again. That's your mission—to make sure that the American people have somebody in their corner.")
"as protections [that] will be enforced by a new consumer watchdog with just one job: looking out for people—not big banks, not lenders, not investment houses—looking out for people as they interact with the financial system."39

Dodd-Frank empowered the CFPB as an agency that would single-handedly encompass the entire consumer financial market, by regulating the industry,40 and "promote the financial stability of the United States by improving accountability and transparency in the financial system . . . , [and] protect consumers from abusive financial services practices . . . ."41 Prior to Dodd-Frank, consumers did not have the ability to protect themselves from predatory lenders. Because "[a]ny effort to increase or reform statutory regulation of financial products is met by a powerful industry lobby on one side that is not balanced by an equally effective consumer lobby on the other[,]" consumer rights were not advanced adequately prior to the 2008 market crisis.42 For example, the mortgage industry had destroyed potential regulations that would hammer fraudulent and deceptive practices.43

It was Elizabeth Warren in 2007 who initially called for this agency. Warren, a long-time consumer advocate and policy expert, issued a stern wake-up call to the financial sector, and she called for the implementation of the "Financial Product Safety Commission."44 Warren questioned how every consumer product had to pass some regulations, but financial products only passed through spotty procedures, which left consumers powerless.45 Warren challenged that "[f]inancial products should be subject to the same routine safety screening that now governs the sale of every toaster . . . ."46

38. Dodd-Frank Act §§ 1001—1100H.
40. CONSUMER FINANCIAL PROTECTION BUREAU, Creating the Consumer Bureau, http://www.consumerfinance.gov/the-bureau/creatingthebureau/ (last visited Sept. 4, 2012) (explaining that the CFPB "would heighten government accountability by consolidating in one place responsibilities that had been scattered across government").
41. Dodd-Frank Act §§ 1001—1100H.
43. Id. (explaining that the heavy lobbying of industry groups effectively did not allow the bills to even make it out of legislative committees).
44. See generally id. For a brief account on Warren’s rise to prominence, see SKEEL, supra note 29, at 102-06 (highlighting that Warren began her scholarly work in empirical analysis, and then, in addition, fiercely advocated against those in the consumer financial services sector).
45. See also Warren, supra note 42, at 16. (Warren queried the difference in consumer products and financial products:

Nearly every product sold in America has passed basic safety regulations well in advance of reaching store shelves. Credit products, by comparison, are regulated by a tattered patchwork of federal and state laws that have failed to adapt to changing markets. Moreover, thanks to effective regulation, innovation in the market for physical products has led to more safety and cutting-edge features. By comparison, innovation in financial products has produced incomprehensible terms and sharp practices that have left families at the mercy of those who write the contracts.

Id. at 9; see generally SKEEL, supra note 29, at 105–06.
Warren’s vision for regulating the financial services sector was similar to the Consumer Product Safety Commission model, which assures safety for physical products in the marketplace. Warren demanded that similar measures be extended to financial products. Warren’s vision manifested itself in the Dodd-Frank Act with the creation of the “Bureau of Consumer Financial Protection,” and the CFPB’s role “focused primarily on consumer safety rather than corporate profitability.” The industry was so powerful that it “publicly kneecapped” Warren; she was not able to survive the nomination process. However, despite another setback, President Obama finally appointed Richard Cordray as the Bureau’s Director in early January 2012.

Although the industry had finally met its match in the CFPB, the financial services sector will still look to advance its own interests behind this regulatory agency’s walls and attempt to capture the agency. However, the CFPB has measures in place to combat its agency from being captured.

51. Suzanna Andrews, The Woman Who Knew Too Much, VANITY FAIR, Nov. 2011, available at http://www.vanityfair.com/politics/features/2011/11/elizabeth-warren-201111 (providing a riveting account on how Warren had “taken a fair amount of heat” from the powerful lobbying forces in their fight to assure that she did not receive the nomination). One banker stated, “It was like she was the Antichrist.” Id.
52. Jim Puzzanghera, GOP Stalls Confirmation of Consumer Agency Nominee, L.A. TIMES, Sept. 7, 2011, available at http://articles.latimes.com/2011/sep/07/business/la-fi-consumer-bureau-cordray-20110907. (Much debate abounded because some Congress members debated that the specific power of the single CFPB director was too great, and advocated for a board of directors. For example, Republicans expressed dismay in May 2011 when forty-four Republicans vowed to block any person nominated by President Obama unless changes to the Bureau’s structure were made, including vesting authority in a board of directors, rather than a single person. Id.).
53. CONSUMER FINANCIAL PROTECTION BUREAU, About Richard Cordray, available at http://www.consumerfinance.gov/the-bureau/about-rich-cordray/ (last visited Sept. 4, 2012) (identifying that Richard Cordray has been appointed as the first Director of the CFPB in January 2012, more than six months after the Bureau began); contra Phil Kerpen, Op-Ed., Obama’s Cordray Appointment Mocks the Constitution, FOXNEWS.COM, Jan. 4, 2012, http://www.foxnews.com/opinion/2012/01/04/obamas-cordray-appointment-mocks-constitution (in arguing that President Obama’s appointment of Cordray is invalid Kerpen states that because the Senate was in pro forma session during the appointment, Obama did not have the recess appointment power). See also Jeremy Pelofsky, Analysis: Obama Consumer Chief Decision Under a Legal Cloud, REUTERS, Jan. 5, 2012, http://www.reuters.com/article/2012/01/05/us-financial-regulation-cordray-legal-idUSTRE80328G20120105 (explaining the Constitutional argument that, because both the House of Representatives and Senate did not agree on a recess longer than three days, it was not a recess, and thus exposes the appointment and the CFPB to future legal challenges). Also, the “Director shall be appointed by the President, by and with the advice and consent of the Senate.” Dodd-Frank Act § 1011(b) (emphasis added). Opposition opines that Obama’s appointment runs afoul of the plain statutory language because the Senate did not participate in the appointment process. The legitimacy of this appointment is beyond the scope of this Note.
54. See generally CONSUMER FINANCIAL PROTECTION BUREAU, News Room, available at http://www.consumerfinance.gov/newsroom/ (last visited Aug. 30, 2012) (announcing its department’s progress, including inquiries about banks’ overdraft practices, identifying readable mortgage statements, fixing the mortgage industry, examining payday lending, and many other agenda items that address the CFPB’s efforts to combat the financial services industry).
III. REGULATORY CAPTURE

Typically, regulatory agencies, after working with legislative bodies, implement policies intended to produce an efficient industry.\textsuperscript{55} Some argue that an agency’s ability to regulate moves cyclically, and that while it may regulate at the beginning, it will eventually become ineffective. When the regulatory agency slows its progress, “the commission becomes more concerned with the general health of the industry and attempts to prevent changes which adversely affect it. Cut off from the mainstream of political life, the commission’s standards are determined in light of the desires of the industry affected,” effectively being “captured.”\textsuperscript{56} But to “achieve either expert or nonpartisan decision making,” avoiding regulatory capture is a “must.”\textsuperscript{57}

A regulatory agency has the responsibility of overseeing and regulating the parties that fall under its jurisdiction. However, capture occurs when, after the agency begins to work closely with the industry, the agency begins to assume the industry philosophy and is no longer able to regulate the industry effectively; it has essentially surrendered to the industry. That is, “the industry tail wags the regulatory dog.”\textsuperscript{58} Consequently, instead of advancing the best public policy, the agency is more likely to help promote the interests of the industry.\textsuperscript{59}

Regulatory capture is not a recent occurrence: in the 1880s, the railroad industry significantly influenced the work of the Interstate Commerce Commission (“ICC”).\textsuperscript{60} Richard Olney, President Grover Cleveland’s Attorney General, was once approached by Charles Perkins, the president of the Chicago, Burlington & Quincy Railroad Company and Olney’s old friend. Perkins was attempting to get rid of the new ICC, and Olney responded that the Commission was essentially window-dressing:

\begin{quote}
The Commission . . . is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of the railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to be to take the business and railroad view of
\end{quote}

\textsuperscript{56} MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 87 (1st ed. 1955).
\textsuperscript{58} Jon Hanson & David Yosifon, The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture, 152 U. Pa. L. Rev. 129, 204 (2003); see also MORGENSEN & ROSNER, supra note 9, at 137 (explaining that when regulators work with the industry every day, they become “in sync” with each other).
\textsuperscript{59} See, e.g., Barkow, supra note 57, at 50 (highlighting that the Forest Service, the Atomic Energy Commission, and the Army Corps of Engineers took on economic development instead of the prescribed primary environmental issues); Ian Urbina, Inspector General’s Inquiry Faults Regulators, N.Y. TIMES, May 24, 2010, http://www.nytimes.com/2010/05/25/us/25mms.html (highlighting that one Minerals Management Service regulator, whose agency was responsible for oversight of drilling in the Gulf of Mexico, inspected drilling operations while also being in negotiations for a job with the private company).
\textsuperscript{60} Letter from Richard S. Olney, President Grover Cleveland’s Attorney Gen., to Charles C. Perkins, President of the Chicago, Burlington & Quincy Railroad Company (Dec. 28, 1892) (on file with the Library of Congress and author).
things . . . . The part of wisdom is not to destroy the Commission, but to utilize it.61

In much the same way that typical friendships begin and develop, the regulatory agency begins to develop friendships with those it regulates.62 As time passes, regulators abandon their agency’s principles as they recognize the impact they have on the regulated entities, and assimilate the industry perspectives, and eventually neglect their regulatory responsibilities.63 Woodrow Wilson argued that government was no longer the voice of the majority, but rather small groups of influential men who pressured the system. Wilson stated:

If the government is to tell big business men how to run their business, then don’t you see that big business men have to get closer to the government even than they are now? Don’t you see that they must capture the government, in order not to be restrained too much by it? Must capture the government? They have already captured it. Are you going to invite those inside to stay? They don’t have to get there. They are there.64

It continues today. Senator Sheldon Whitehouse (D-RI), when discussing regulatory capture, stated that corporate influence can eventually supersede public interest.65 He said, “Inch by inch, the tentacles of industry reach further and further into the regulator, until it silently and invisibly comes under industry control, and becomes the industry’s puppet; until it is serving the special interests, and not the public interest.”66 A further investigation reveals how these “tentacles” capture an agency.

61. Id.
65. 156 CONG. REC. 5774, 5776 (2010) (statement of Sen. Whitehouse) (quoting Marver Bernstein more than fifty years ago, who explained that a regulator will favor the “general health of the industry . . . [and] become passive toward the public interest.”).

A regulatory apparatus is a parasite that can grow larger than its host industry and become in turn a host itself, with the industry reduced to parasitism, dependent on the subsidies and protections of the very government body that initially sapped its strength.

A. Regulatory Capture Working Its Way into an Agency

The phenomenon of regulatory capture, while present, is difficult to define. For instance, an agency may make a correct and unbiased policy decision, yet it will appear that it resulted from industry influence. It may appear to an outsider that corruption from an interest group led to this “captured” circumstance. However, the agency’s decision worked irrespective of the industry’s influence, despite the possible underlying premise of capture. Because agencies require cooperation with the industry, which includes “procuring needed information, compliance, political support, and guidance,” regulators must balance this collaboration without only taking on the industry’s positions. Yet regulatory capture can appear through several different avenues, creating an undue amount of stress on the system.

Ultimately, though, it is when the regulatory agency becomes too intimidated by those whom it regulates that it is captured. Jeffery Berry writes that

[the ties between interest groups and [regulatory] agencies can become too close. . . . [A]gencies that regulate businesses are overly sympathetic to the industries they are responsible for regulating. . . . [because] regulators often come from the businesses they regulate and thus naturally see things from an industry point of view. Even if regulators weren’t previously involved in the industry, they have been seen as eager to please powerful clientele groups rather than have them complain to the White House or to the agency’s overseeing committees in Congress.

67. For extensive discourse on minimizing the special interest influence in regulation, see Preventing Capture: Policymaker Engagement Yields Cutting-Edge Research Questions, TOBIN PROJECT, http://www.tobinproject.org/public-policy-engagement/preventing-capture (last visited Sept. 4, 2012). The Tobin Project is led by academic scholars, including Daniel Carpenter, Harvard University; Steven Croley, University of Michigan Law School; and David Moss, Harvard Business School. Id. Through this initiative, the project provides guidance in the latest development of regulatory capture, and offers a way to reform regulatory agencies to limit capture, creating a better channel for public policy. Id.


69. Id. at 177.

70. Id.; see also Douglass C. North, Economic Performance Through Time, 84 AM. ECON. REV. 3, 359, 360–61, (1994), available at: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fclasswebs.spea.indiana.edu%2Fkenricha%2Fclasses%2Fv640%2Fv640%2520readings%2FNorth%25201994.pdf&ei=XeCWULSHMoqJhAptkFFfuHF5vJrkH7w (highlighting that “[i]nstitutions are not necessarily or even usually created to be socially efficient; rather they, or at least the formal rules, are created to serve the interests of those with the bargaining power to create new rules.”).

71. Protecting the Public Interest: Understanding the Threat of Agency Capture: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Committee on the Judiciary, 111th Cong. 6 (2010) [hereinafter Protecting the Public Interest] (statement of Nicholas Bagley, Assistant Professor of Law, University of Michigan Law School).

This continuing “revolving door” of regulators into industries creates an invasive situation because the industry’s influence “shapes the standards the regulators apply and the way in which these standards are enforced.” The agency’s regulators are either those who have once been subject to the regulations or have had experiences in which they collaborated closely with the industry. Therefore, industry can be proactive by hiring those one-time regulators to “decode” or use “their residual influence” to help the industry against the regulators.

Thus, capture may be difficult to avoid because experts are the agency. It is fairly reasonable for the top officials in the industry to be closely connected to the regulators: when “[s]omeone [is] paid huge sums in the past or likely to receive huge sums in the future by the firms that he/she regulates or sets policy for is likely to make decisions more favorable to that group than someone with no such monetary links.” Regulators who have left the regulated industry understand the industry’s perspective; however, these regulators are apprehensive about adopting their regulator role because they may want to return to the private sector. Since regulators do not want to risk potential employment, they fail to perform the agency’s work.

Finally, capture can also occur when the agency receives lopsided input and representation because the industry has the tools to dominate the agency’s agenda. For example, the banking industry, in the context of the CFPB, has taken advantage of the comment period to influence policy making; since the CFPB must consult the public in its rulemaking, this time period for comment creates the “perfect arena for lobbying shops to work their magic.” And because “[t]he banks clearly realize this

73. Lawrence Baxter, Capture, THE PIERIAN MUSE (May 26, 2010), http://thepierianmuse.wordpress.com/2010/05/26/capture/ (explaining the difficult circumstance of capture and its constant presence). Baxter comments that regulatory restructuring is necessary when the economic conditions change, that incentives need to be a part of recruiting the “best and brightest so that the industry will respect the regulators—creating the firepower and firewall necessary to withstand the pressure from the industry—and keeping these experts in the agency. Id.
74. Id.
75. Id.; Urbina, supra note 59.
76. Freeman, supra note 62, at 709—10 (showing that Alan Greenspan, former Fed Chairman, left that respective post for positions with investment management funds which typically deal with the Fed). Other regulatory leaders include Robert Rubin and Henry Paulson going from Goldman Sachs to the Treasury, or Larry Summers, chief economic advisor to President Obama, receiving money from hedge funds before taking his bureaucratic position. Id.
77. Protecting the Public Interest, supra note 71 (statement of Nicholas Bagley, Assistant Professor of Law, University of Michigan Law School); Urbina, supra note 59 (highlighting that one Minerals Management Service regulator, whose agency was responsible for oversight of drilling in the Gulf of Mexico, inspected drilling operations while also being in negotiations for a job with the private company).
78. Protecting the Public Interest, supra note 71 (statement of Nicholas Bagley, Assistant Professor of Law, University of Michigan Law School).
79. Id. (statement of Sidney Shapiro, Associate Dean for Research and Development, Wake Forest University School of Law).
80. BERRY, supra note 72, at 168—69.
82. Pat Garofalo, Wall Street Spending As Much To Undermine Dodd-Frank Regulations As It Spent Trying To Block Dodd-Frank, THINK PROGRESS (Apr. 22, 2011), http://thinkprogress.org/politics/2011/04/22/160524/banks-spending-2011/?mobile=nc (explaining the millions of dollars that banks
[perfect arena],” they attend many meetings with the regulators, and they “submit[ ] extensive comments on proposed rules.”

On the other hand, consumers have not had success in taking on the affluent banking industry. "The dirty little secret in our community is that once in a while [consumers] succeed in passing laws, but keeping up with the trench warfare of implementation is enormously expensive, and [consumer groups] almost never have the resources to do it right," says Travis Plunkett, legislative director of the Consumer Federation of America. Consumer groups are just unable to keep pace with industry’s knowledge of regulations and procedures.

B. A Single Administrator Versus a Board of Commissioners

In defining the centralized role of the power strata in agencies, two methods have been developed: a central administrator or an independent agency. An independent agency is a multi-member board, and each member serves for a certain period of time, with staggered start dates, whereas a central administrative structure’s power is in a single director.

Historically, Congress has instituted either a board or single director in agency construction. Some traditional single director positions include the OCC, the Office of Thrift Supervision ("OTS"), the Internal Revenue Service, the Social Security Administration, Medicare, and the Environmental Protection Agency. Advocates believe a single director position helps with accountability and produces decisive leadership, as compared to a board.

and others in the financial services industry spent in attempts to “water[ ] down” the Dodd-Frank Act while Congress was debating it).

83. Id.
88. Legislative Proposals, supra note 84, at 1 (written testimony of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center).
89. Id. at 1; see Keith Bradley, The Design of Agency Interactions, 111 COLUM. L. REV. 745, 749 (2011) (“In general, two agencies working on a problem offer twice as many opportunities for capture by regulated industries, earn twice as much congressional oversight, and expose many more bureaucrats to lobbying from individual legislators; Two agencies also contain twice as many officials for the Executive to coordinate.”). Contra Liberto, supra note 87 (Senator Lindsey Graham
A single administrator would be more accessible for a consumer group to confront. The single administrator model "provides better political accountability" because the political pressures placed on that individual may be more evident. On a broader perspective, Heidi Mandanis Schooner, Professor of Law at Catholic University of America, believes that the power seat of the agency, whether it be an individual or a group, is irrelevant if those appointed individuals do not believe in the regulatory scheme.

On a more practical level, the agency may be subject to instability when it has a director affected by presidential election shifts. A director is appointed by the President and remains in office throughout the President's term and could become wary if a new presidency presents a philosophical change. Because "politics and policy go hand-in-hand" and many appointees remain hopeful of shifting alliances to align closer to the changed administration, the divisive political climate could nevertheless impede the top authority—the Director—from capitalizing on a political agenda. However, to counter the election shift, it is imperative for the agency to balance philosophical differences by recruiting staff members who have very divergent views; the starting point in a board setting may be from the top down.

A board only encourages political gridlock. While the Senate must confirm a director, which is a slow process, the same would be required for each board member. A commission, or board, could reduce the effectiveness of the agency because of potential deadlock voting. If one director's term expires, leaving the commission with four members—not enough for a majority—the Senate could continue to delay appointments until an appointee, who has the desired ideology,
arrives to advocate for a particular interest group.\textsuperscript{98} While a commission structure may encourage more discourse, it becomes inefficient, and produces the bureaucratic red tape that has ensnared other agencies and has led to the typical gridlock.\textsuperscript{99}

Nonetheless, the industry will look to capture the agency, independent of how the power stratum is devised. But having learned from the financial industry’s capture of the regulators leading up to the financial crisis, the CFPB has the ability to weather (and prevent) the storm of regulatory capture.

\textbf{IV. INSIGHT FOR MANAGING (OR ELIMINATING) CAPTURE IN THE CFPB}

The financial crisis of 2008 exposed how special interests and big money wreaked havoc on a majority of Americans.\textsuperscript{100} In developing the CFPB, Congress (and CFPB’s subsequent actions) utilized several measures that would provide the CFPB with significant independence not only from political influence, but also from industry capture. With the Fed in the background, the Bureau is an agency “under”\textsuperscript{101} the Fed, and with the Bureau’s structure, its budget source, transparency, and leadership, the CFPB can fulfill its statutory mandate: to protect American consumers, and not the special interests.\textsuperscript{102}

The problem of capture exists in any agency, Elizabeth Warren highlighted, but having a centralized consumer-focused commission will be “far better than the available alternatives.”\textsuperscript{103} When the Bureau’s focus is to work for the people, it may be unimportant that special interest groups could be influential. It will be the consumers with the power, not the special interest groups. Despite the threat that “with every agency, the fear of regulatory capture is ever-present,” CFPB’s enforcement of its “consumer-oriented regulation of any kind” by “concentrating the review of financial products in a single location,” will limit the dispersion of industry lobbyists throughout multiple agencies.\textsuperscript{104}

Prior to the crisis, the Fed, for example, was firmly entrenched in deregulation, and consequently, allowed the industry—not the regulators—to set its own agenda.\textsuperscript{105}

\begin{itemize}
  \item \textsuperscript{98} \textit{Id.}
  \item \textsuperscript{99} \textit{Legislative Proposals, supra} note 84 at 2–3 (written testimony of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center); see, e.g., Steven Greenhouse, \textit{Republican Might Quit Labor Board}, \textit{N.Y. Times}, Nov. 22, 2011, at B1 (revealing that one NLRB board member is threatening to quit just to deny a quorum vote). The NLRB has typically been a judicial charade, as party politics (on the Board), has interfered with its governance. Greenhouse, \textit{supra}.
  \item \textsuperscript{100} See discussion \textit{supra} Part II.
  \item \textsuperscript{101} See discussion \textit{infra} Part IV.B.
  \item \textsuperscript{102} See Arthur E. Wilmarth, Jr., \textit{The Financial Services Industry’s Misguided Quest to Undermine the Consumer Financial Protection Bureau}, 31 \textit{Rev. Banking & Fin. L.} 881 (2012) (Professor Wilmarth examines the development of the single director, including the Republicans’ efforts to block the appointment process, and then defends the authority of the Director’s position, claiming that opposition is unwarranted. Although this Note identifies the same issues as that Professor Wilmarth, this Note provides a thorough examination of the Fed’s relationship to the CFPB, the Bureau’s budget structure, and its transparency arrangement.).
  \item \textsuperscript{103} Warren, \textit{supra} note 42, at 18.
  \item \textsuperscript{104} \textit{Id.}
  \item \textsuperscript{105} See discussion \textit{supra} Part II; see also discussion \textit{infra} Part IV.A.
\end{itemize}
Although the Bureau is within the auspices of the Fed, it remains an independent agency. Considering the CFPB’s relationship to the Fed and by learning from the Fed’s capture leading up to the crisis, it is necessary to review how the Fed’s capture exposure plagued its regulatory authority.

A. The Relationship Structure Between the CFPB and the Federal Reserve Board

A comparison of the charge and organization of the Fed and the CFPB helps in understanding how the CFPB can avoid the issues faced by the Fed when it “regulated” the banking industry leading up to crisis. During the early 2000s, in the Fed’s deregulation of the financial industry, top figures of the agency were merely puppets of the industry. The Fed was not looking to police the banks, but to give them what they needed. Said one former Fed official: “[I]t was explicit in those years, if you worked inside the Fed, that you were partners with the banks . . . You were not adversaries.”

In one glaring example, Timothy Geithner, now the head of the Treasury Department, had a five-year run at the New York Federal Reserve Bank during which time the financial sector went spiraling downward. At a time when he should have been curtailing the banking industry’s unscrupulous practices, he was interacting both professionally and privately with people in the industry. Steven M. Davidoff thinks that for “financial reform and regulation [to have meaning, we need to make sure that we have regulators who can truly act independently,” and be able to focus on its mission.

The Fed’s mission is not consumer protection. The Federal Reserve Reform Act of 1977 legislates that the Fed promotes the “goals of maximum employment, stable prices, and moderate long-term interest rates.” Alan Greenspan, in leading the Fed for 18 years until he ended his tenure in 2006, consistently advocated for deregulation and sought ways to control inflation. He stated that “a central bank’s vigilance against inflation is more than a monetary policy cliché, it is, of course, the

106. Dodd-Frank Act, Pub. L. 11-203, §§ 1011(a), 1017(a), 124 Stat. 1376, 1964, 1975 (2010) (Section 1017(a) provides that the Bureau receives its funds from an allocation by the Fed, making this the strong connection to being “under” the Fed. See discussion infra Part IV.B.).
107. MORGENSEN & ROSNER, supra note 9, at 126–28.
108. Id. at 127–128. In particular, Roger Ferguson, a member of the Fed and whose wife was a managing director at Smith Barney, consistently advocated for the banks. Id. In a 1999 speech to the Bond Market Association, he remarked that “[h]eavier supervision and regulation of banks . . . is not the solution. . . Increased oversight can undermine market discipline . . . Less reliance on governments . . . is the key.” Id.
110. Id. (demonstrating that Mr. Geithner’s predecessors ended up as investment bank executives, and William Dudley, who followed Geithner, came from Goldman Sachs).
way we fulfill our ultimate mandate to promote maximum sustainable growth." 113
Under his guidance, the Fed created—or did not control—the bubble that ultimately led to the destabilization of the financial security of millions of Americans. 114

The Fed’s makeup does not position consumers as its priority, despite its self-promotion that this is one of its six strategic goals. 115 Although the Fed champions itself as protecting the interests of consumers, it also believes in balancing that with the industry’s interests. While six of the nine members of the Fed appear “to represent the public,” they also have the responsibility to have “due but not exclusive consideration to the interests of agriculture, commerce, industry, services, labor, and consumers.” 116 Furthermore, one tier (three members) of the board of directors is chosen by the stockholding banks, and the two other tiers come from the joint public interest and industry interests. 117 With such a large tie to not only the banking industry, but also other industries that have influence, the Fed’s responsibility is not directed solely towards consumers. Because its concerns are tied with the industry, it is therefore subject to capture. 118

For instance, the Fed has departments that work to serve its sponsoring unit—that is, banking regulation—whereas the CFPB department “works within an organization whose mission it is to further consumer protection.” 119 Although the Fed was designed within the framework of stability, namely its lengthy commissioners’ terms of office to withstand any adverse political changes, 120 because “[s]tability is related to the goal of preventing capture because it aims to keep an agency free from unwanted political forces even as the enacting coalition fades from power,” 121 its main focus has been directed toward protecting the financial institutions.

Unlike the CFPB’s profound statement to the public in remaining candid and transparent in its policy (and operations”) standard, 122 the Fed conversely has repeatedly censored information from the public. For example, the Fed told American International Group (“AIG”) to suppress evidence that revealed AIG’s payments to

115. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ANNUAL REPORT (2010) (listing under its supervisory and regulatory function that consumer protection is a strategic goal). The goal is to “develop[] regulations, policies, and programs designed to inform and protect consumers, to enforce federal consumer protection laws . . . .” Id.
117. Id.
118. See generally Barkow, supra note 57, at 72–73 (2010) (explaining that the regulators who, despite having responsibilities for consumers, their focus was primarily on the financial institutions).
120. Barkow, supra note 57, at 24.
121. Id.
122. See discussion infra Part IV.C.
banks during the financial crisis. Rather than instituting its standard for evaluating risk, the Fed typically relied on the banks' own assessments, a clear "dereliction of duty."  

As the immediate impact of the financial crisis begins to wane, much information continues to filter through concerning the Fed's secret deliberations. Representative Ron Paul (R-TX) advocated that it is imperative for the public to know what happens inside the Fed's boardroom, considering that Goldman Sachs received essentially free loans and non-bank corporations accepted other loans. The Fed operates under a veil of secrecy, which is diametrically opposed to the transparent openness of the CFPB.

Finally, despite being under the Fed, the CFPB is not subject to much oversight. In fact, so much of the CFPB's autonomy is premised on what the Fed—and its Board of Governors—cannot do. The Fed's Board of Governors, for the most part, is not involved in any sort of control that may have been intuitively and inherently part of this overarching structure. For instance, the Fed may not "intervene in any matter or proceeding before the [CFPB] Director . . . ; appoint, direct, or remove any officer or employee of the [CFPB]; or merge or consolidate the Bureau, or any of the functions or responsibilities of the Bureau, with any [part of the Fed]." Rules promulgated by the CFPB are not subject to Fed intervention, nor is the CFPB Director required to seek approval, comments, or review prior to going to Congress with the CFPB's desired implementation. With this type of autonomy, the CFPB and its Director have quite the influence in the consumer financial services sector.

The Fed's "power" over the Bureau primarily extends to being the automatic—without discretion—revenue source from which the CFPB draws its budget. Despite the Fed being the funding source, the manner in which the CFPB receives its budget limits the opportunity for the finance industry to capture the Bureau.

B. CFPB's Budget Structuring Limits Capture Capability

Unlike the Fed, FDIC, OCC, and OTS, all of which set their budgets, the CFPB's budget comes from the Fed. The CFPB is under the Fed: the Bureau


124. MORGENSON & ROSNER, supra note 9, at 131.


127. Id. § 1012.

receives its funding source from the Fed. The CFPB will have twelve percent of the operating expenses of the Fed after 2012 in funding each year. The statute caps its funding, with inflation, at this amount. If the CFPB wants to request additional funding, then it must go through the congressional appropriations committee; this limitation would permit the type of congressional oversight that would hinder CFPB’s original mission.

However, the connection of the CFPB’s budget to the Fed—a minimum is guaranteed—eliminates the “appropriations gamesmanship” since the Bureau does not have to go through the congressional appropriations process. Elizabeth Warren warned that “[p]oliticizing the funding of bank supervision” creates a dangerous situation. “Supervisors who can independently decide over the sources, size and use of their budget in function of their mission are better equipped to withstand political interference (pressure) through the budget.” Thus the Bureau does not have “to come back to Congress, hat in hand, to be turned away by the influence of the financial industry to restrict their ability to do their job.”

When Senator Richard Shelby (R-AL), commented that “Washington and the regulators are there to serve the banks,” and Senator Max Bacchus (R-AL) argued that Congress needs to be able to control the CFPB through the appropriations process, the CFPB is best served by avoiding such one-sided congressional leaders in its initial budget funding avenue.

129. Dodd-Frank Act § 1017(a).
130. Id. § 1017. The budget is 11% in 2012, and 12% each year thereafter, with the adjustment of inflation. Id. This total could exceed $500 million per year.
131. Id.
Although the CFPB’s budget is not to “be subject to review by the Committees on Appropriations of the House of Representatives and the Senate,” it is still held accountable. For instance, the Director is required to submit information to other administrative offices. The Director provides operating plans, forecasts, and quarterly financial reports to the Office of Management and Budget. The Director must demonstrate justification of the budget from the previous year and appear before Congress twice a year to report about the CFPB’s activities. In addition, the Comptroller General can audit the CFPB each year and report these findings to Congress, and the CFPB must also provide access to the Government Accountability Office to conduct an audit each year.

The Bureau, with its independent funding, is designed to keep itself free from regulatory capture. By making the CFPB independent in its budgeting process, Congress has created some insulation between it and lobbyists. Despite lobbying efforts throughout the debate of the Dodd-Frank bill, the industry failed to include language that would have tied the funding of CFPB through assessments; regulators do not need to depend on the industry for budgetary survival. “[T]he CFPB’s jurisdiction is not optional, . . . [providing that] the CFPB need not make any effort to attract” ways to generate funding. This provides the CFPB insulation.

The benefit of independent funding allows the Bureau to have long-term planning, and ensure that the complex initiatives to monitor banks are thorough. Thus, one of the Bureau’s protections to maintain its independence does not have to rely on Congress nor be at the mercy of a political dogfight for its funding. Without “depend[ence] on the budgetary grace of a parent agency . . . the [CFPB’s] ability to carry out its mission will depend on the unstable priorities of other regulators who, in the long run, may or may not be sympathetic to its charge.” When funding is permitted from outside sources, a potential breach and influence from industry players is possible.

The CFPB’s funding stream permits it to fully commit to its job and be able to refuse the “overtures from industry.” When the country has moved beyond the

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139. Id. § 1017(a)(2)(C).
140. Id. § 1017(a)(4)(A).
141. Id. § 1016.
142. Id. § 1017(a)(5)(A).
143. Id.
144. Arthur E. Wilmarth, Jr., The Dodd-Frank Act’s Expansion of State Authority to Protect Consumers of Financial Services, 36 J. CORP. L. 893 (2011).
145. Barkow, supra note 57, at 77.
146. Oversight, supra note 128, at 20 (written testimony of Elizabeth Warren Special Advisor to the Sec’y of the Treasury for the Consumer Financial Protection Bureau (CFPB), U.S. Dep’t of the Treasury).
148. Quintyn & Taylor, supra note 134.
discussions to reform the financial services sector (to the extent as it relates to the failures learned from the 2008 financial crisis), the CFPB will still prosper because its budget stream will be a constant, and thus continually protecting American consumers.\textsuperscript{150} In the meantime, the Bureau's attention to govern with transparency will deny industry overtures to invade the agency.

C. The CFPB's Transparency Helps to Avoid the Industry's Tentacles

Proper accountability arrangements reinforce an agency's independence by enhancing its legitimacy and encouraging it to adhere to high standards of governance and performance. In addition, they enhance an agency's integrity and thus reduce the possibility of regulatory capture.\textsuperscript{151}

The CFPB's mandate stipulates that its method of proper accountability will legitimize the institution, reducing its risk of being captured.\textsuperscript{152} The opportunity for systematic abuse is negated when the agency is subject to governance and has transparency.\textsuperscript{153} The CFPB's powers are a consummation of existing financial consumer laws\textsuperscript{154} and their respective administrative agencies.\textsuperscript{155} The CFPB now has the authority for rulemaking, researching, enforcing, and educating many of those respective entities who are involved in the consumer financial product market.\textsuperscript{156} The CFPB "implement[s] and enforce[s] federal consumer financial law consistently for the purpose of ensuring 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."\textsuperscript{157} Having this magnitude of responsibility sets a high standard for governance.
When the core of CFPB’s agenda is built upon providing consumers transparent information and operating itself in the same manner, any dishonest conduct in the CFPB’s operation—like preferential treatment to influential power parties—will be evident. When the CFPB is “sharing with the public not only what [it is] doing but how [it is] doing[,]” special interests will be exposed. By creating an agency that facilitates open communication between the financial industry and its customers, the CFPB is holding the industry accountable for maintaining social capital—tying trust and reciprocity into the process. At the same time, the CFPB’s implementations that make it transparent include creating a cohesive Bureau that is working towards the ultimate mission; not hiding information within the agency’s walls; and establishing an agency that will implement what was envisioned and crafted in legislation.

Considering that the CFPB’s “core functions” are working to make regulations fairly straightforward, and as “clear and streamlined as possible,” consumers will see the effect of regulations. When “the new missions of the regulatory agencies are defined clearly and their operations made transparent, it limits the ability of some future regulator to mess things up.” Some of the CFPB’s goals reveal transparency; on its website, the public is able to 1) view the Director’s monthly schedule to see with whom the Director has had meetings; 2) monitor the financial report for the year or quarters, showing its obligations and requests for transfers; 3) provide feedback to the Bureau; and 4) peruse the interaction between members of Congress and the

158. See generally Consumer Financial Protection Bureau, supra note 156.
161. Paul Wiseman et al., Big Job Looms for New Consumer Protection Agency, USA TODAY, June 24, 2010, at B1 (highlighting that when William Ruckelshaus took over the new EPA in the early 1970s, he immediately went to work, threatening cities with lawsuits only nine days into the start of his tenure).
162. Consumer Financial Protection Bureau, Learn About the Bureau, http://www.consumerfinance.gov/leadership-calendar/ (last visited Sept. 4, 2012). The calendar is updated retrospectively to prevent posting information that may be necessary to withhold in compliance with the Freedom of Information Act. Id.
164. Consumer Financial Protection Bureau, supra note 156 (showing as the focal point of its main website, the CFPB solicits the public’s opinions in many ways: complain about a mortgage or credit card practice, or just submit a good or bad story about a financial product).
Bureau. This engagement with consumers will keep the CFPB grounded in its mission to serve the public.

When the public has access to this information, capture should become more difficult because it can “help level the playing field.” When an agency shares data, it becomes harder to capture, and when the industry cannot capture the agency, the agency “can write better rules and enforce those rules more vigorously.” Senator Richard Shelby (R-AL) agreed, saying that “when [the government is] putting taxpayer resources at risk, we need transparency and accountability,” despite his defiance in approving the CFPB because he, among others, believed it would be unaccountable. With this exposure, “[i]t’s a lot harder to let yourself fail—and a lot easier for the public to hold you accountable—when you’ve transparently declared your mission and shared information the public can use to measure your success in meeting.”

The CFPB’s “central mission . . . is to make markets for consumer financial products and services work for Americans,” including mortgages, student loans, and credit cards. One program, “Know Before You Owe,” will aid consumers in making appropriate financial product selections. Because loan documents in the mortgage business—Truth in Lending Disclosure and the HUD-1 Settlement Statement—often contain legal jargon that consumers do not understand, “Know Before You Owe” is CFPB’s effort to minimize confusion. The Bureau solicits complaints from consumers, and it has adopted individual rulemaking projects that include mandates for international money transfers, consolidated mortgage disclosures, and mortgage origination.

The Bureau provides consumers the necessary information to make appropriate financial decisions; protects consumers from unfair, deceptive, or abusive

169. Id.
171. Warren, supra note 168.
172. CONSUMER FINANCIAL PROTECTION BUREAU, supra note 162.
174. Id. When taking out a loan, consumers are given these forms to provide details on the loan purchased, including the cost for services to settle on the loan, and other conditions that may apply. Id. These forms ensure that applicants are receiving the loans they want. Id.
175. Id.
acts; reduces the regulatory burdens; enforces consumer financial law; and promotes transparent consumer marketing practices. Practically, its important duties will “[t]ake consumer complaints, [p]romote financial education, [r]esearch consumer behavior, [m]onitor financial markets for new risks to consumers, [and] [e]nforce laws that outlaw discrimination and other unfair treatment in consumer finance.”

However, considering that the CFPB has combined so many agencies under one roof, such a major bureaucracy will continue to be monitored. The CFPB is for American consumers, and its regulations will impact many people. Because the American public is paying more attention to the financial sector, and the CFPB is delivering its message openly, transparency will play a decisive role in reducing the chance for agency capture. CFPB can deliver its message without the interference of special interests, and it is the Bureau’s leadership structure that will significantly reduce industry’s influence.

D. The CFPB’s Leadership Structure Promotes Resistance to Capture

The CFPB is headed by a single director, who is appointed by the President and confirmed by the Senate. The Director will serve for a five-year term, and is subject to removal for “inefficiency, neglect of duty, or malfeasance in office.” Because a single director will be able to make more efficient decisions than a board of commissioners, the CFPB’s structure will enable it to promote consumers’ interests. This position does not create the multiple avenues (more members mean more access) to power accessibility like that of a board.

In striking fashion, it is Republicans who remain fearful of the authority given to the Director, and they have been busy creating legislation to minimize the CFPB’s power and promote accountability. Democrats and Republicans fought doggedly at the bill’s inception—and continue now—because Republicans believe that the Bureau wields too much power. For this reason, the Republicans focused their discontent on the director’s position. Regardless, after seven months of full debate in late 2009 through July 2010, Congress passed the CFPB’s leadership structure with a

178. Dodd-Frank Act § 1061(a)(2); see supra note 155 and accompanying text.
179. Dodd-Frank Act § 1011(b).
180. Id. § 1011(c).
181. For instance, a parallel can be drawn when two agencies are fighting for power. See Bradley, supra note 89.
182. Republicans receive large amounts of money from the industry. The party does not want to see its campaign contributions disrupted. See supra note 136, and accompanying text.
183. See Berman, supra note 85 (highlighting that three chief sponsors of bills to change the power of the CFPB and its structure are “returning the favor” to the banking industry because the industry does not want to see changes).
184. Puzzanghera, supra note 52. For example, Republicans expressed dismay in May 2011 when forty-four Republicans vowed to block any person nominated by President Obama unless changes to the Bureau’s structure were made, including vesting authority in a board of directors, rather than a single person. Id.
single director despite Republican opposition. The legislation contains a clear directive on the leadership structure of the CFPB.185

With a single director, the one accountable is the Director. Despite the argument that a multi-member board is a more “collegial body,”186 and that a similar board foundation exists in the Federal Trade Commission, SEC, and FDIC, these regulatory agencies do little to look out solely for the powerless consumer. These agencies function to regulate both competing interests. And another regulator agency, the OCC, despite its single director leadership position, has the responsibility for protecting both consumers and banks. Even here, OCC threw “consumers[s] under the bus,”187 in favor of becoming a haven for the other half of its responsibilities: the banking industry.188 Because the Bureau’s Director represents a single entity—consumers—the Director can eliminate the “cushy arrangement” of banks dominating consumers, counterbalancing the ill-effects of the OCC.189

In 2011, the House Committee on Financial Services proposed a bill to replace the director position with a commission, in spite of the Dodd-Frank Act’s implementation.190 The committee believed that a board structure “offers more stability, ensures continuity in knowledge, provides for the continuous presence of experienced members at all times, and prevents gaps in agency effectiveness.”191 In the House Committee on Financial Services, the minority view—Democrats in support of the single position—opined that:

[c]onsumer protection in financial matters was in the hands of regulators who consistently treated consumer protection as a second class concern. Creating an independent bureau was intended to ensure that consumer interests are fully considered on the merits and not relegated to an afterthought. H.R. 1121 proposes to alter fundamentally the structure of the CFPB, . . . [This proposal] was considered and rejected by House conferees who recognized the need for a strong consumer protection regulator that could act decisively to protect consumers and support a well-informed, efficient market for consumer financial products. One of the primary responsibilities of the CFPB is to regulate the shadow banking system that often harms both consumers and responsible financial institutions. H.R. 1121 would

185. See generally Jenna Greene, Interim Director Defends Consumer Protection Bureau’s Structure, THE BLT: THE BLOG OF LEGALTIMES (Nov. 2, 2011), http://legaltimes.typepad.com/blt/2011/11/interim-director-defends-consumer-protection-bureaus-structure.htm (when attacked by Republican members of the Financial Institutions and Consumer Credit Subcommittee in the U.S. Senate who do not like the leadership structure of the Bureau, interim director Raj Date of the CFPB responded, “Congress deliberated and debated various governance mechanisms . . . and came to a conclusion. My job is to take the structure and make it work.” This structure was having a single director and not a multi-member board.).
188. Legislative Proposals, supra note 84, at 4 (written testimony of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center).
189. Berman, supra note 85.
lead to gridlock, exacerbate the regulatory disparity between banks and credit union and their less-regulated competitors, and leave consumers without crucial protections.192

Elizabeth Warren defended that the single leader was the best method for regulating. In comparing the Bureau to OCC and OTS, both primary prudential regulators193 that operate using a single director, she stated that this method “makes for a more efficient operation” in regulating the banking industry.194 Furthermore, even though some argued that the single director position wields too much power, Warren posited that this power is “unlike any agency anywhere else in government” because the Bureau’s budget is constrained and limited.195

Congress already “got the point” and made the “right decision”:196 a single director would best serve consumers. Essentially, placing more people into positions of power would enable the industry—presumably, the banks—to have more leverage, and less regulation.197 The financial sector will work to capture the agency, effectively enabling the agency to protect this sector, rather than regulate it.198 In putting pressure on Congress, the U.S. Chamber of Commerce has been concerned that the single director “places an enormous amount of unchecked power in the hands of one person” and that the federal banking regulators should have some influence on the Bureau as to mitigate bank failure.199 But then again, it was these very same banking regulators who sat idly by as the industry manufactured the collapse.200 Of course, like the banking industry did in the early 2000s, the industry wants regulators who push its agenda, and it was the “Fed [among other regulators] . . . who were more than willing to put the bankers in the driver’s seat.”201

192. Id. at 51.
194. Oversight, supra note 128, at 27.
195. See discussion supra Part IV.B.
196. Oversight, supra note 128, at 28.
197. Puzzanghera, supra note 52 (Sen. Richard Shelby (R-AL) of the Senate Banking Committee fearing that a single director would have a “staggering amount of control.”).
198. Sovern, supra note 97 (explaining how the banks captured the Fed and OCC).
200. Morgenson & Rosner, supra note 9, at 126, 129 (commenting that federal regulators—i.e., Federal Reserve—supported banks risky practices to achieve maximum profitization”); see generally id. at 124–41 (2011) (summarizing that federal regulators merely paid lip service to the public as they let the bankers set the standards).
201. Id. at 129.
To deflect industry presence, a critical stage in the early years of CFPB’s leadership structuring is during the initial stages when it recruits personnel who will be “aggressive and conscientious in carrying out the mandate and mission of the [CFPB].” Such a balance will develop a culture that will not only protect consumers, but also discover a common ground with the regulated industry. In addition, the Bureau will consult with the Consumer Advisory Board, a consumer-friendly board, for its information. This Board will assist in advising the Director and the Bureau of financial laws, and will “provide information on emerging practices in the consumer financial products or services industry, including regional trends, concerns . . . .” The Director will appoint no fewer than six members who are:

experts in consumer protection, financial services, community development, fair lending and civil rights, and consumer financial products or services and representatives of depository institutions that primarily serve underserved communities, and representatives of communities that have been significantly impacted by higher-priced mortgage loans, and seek representation of the interests of covered persons and consumers, without regard to party affiliation.

By placing consumer-friendly advocates near its upper-echelons, the Bureau will be able to maneuver around potential capture.

The financial crisis of 2008 occurred when the regulations and the regulators failed to protect consumers; the collapse was not that the industry did not have the influence to affect the regulators. A single director will minimize the effect that the lobbying interests will have on the Bureau, and create a fair marketplace. The CFPB’s leadership structure and acute consumer focus provides the tools so as not to compromise the integrity of the system, and will also be able to create an insulated system which will not jeopardize the financial stability of the United States.

203. CONSUMER FINANCIAL PROTECTION BUREAU, supra note 162.
205. Id. at § 1014(b).
206. See also PAUL MUOLU & MATHEW PADILLA, CHAIN OF BLAME: HOW WALL STREET CAUSED THE MORTGAGE AND CREDIT CRISIS 290 (2008) (explaining that the legislation Truth in Lending, which was regulated by the Fed, and described “to protect consumers from unfair or deceptive home mortgage lending and advertising practices” actually provided the Fed flexibility to overlook the necessary protections).
207. See discussion supra Part II.B; Liberto, supra note 199.
V. CONCLUSION

It may be David versus Goliath, but the CFPB is working to keep the industry influence out of the Bureau and avoid being captured. President Obama has weighed in, expressing concern that an “army of lobbyists . . . [are] working to water down the protections.” It is evident that the banking industry, and others in the financial services sector, will continue the fight in opposition of the CFPB. “Business groups—most vociferously the U.S. Chamber of Commerce and the American Bankers Association—have campaigned fiercely” because the Bureau will step on the other agencies’ powers. This stance seems interesting considering that those who failed to protect the economy in 2008 would be put in charge of regulating again.

The CFPB’s creation has been controversial. In an effort to streamline the bureaucratic process for consumers, the CFPB’s intent is to correct the wrongs of the financial crisis of 2008 and prevent any future disasters. Previous regulators allowed the industry to handle its own matters, and in turn, this inevitably led to the near destruction of the American financial structure. Now, with the Bureau in place with a singular purpose of protecting consumers, Americans will have a safeguard monitoring every consumer product, and also have the security that an agency exists to assist them in making informed financial decisions.

Despite many significant players seeking ways to manipulate the CFPB’s authority and market their own respective agenda within the agency, the Bureau’s budget independence and powerful agenda will yield to the special interests of only consumers and create a more equitable playing field in the financial system. Without the need to seek its money stream from outsiders and with this emphasis on consumers, the CFPB will be free from corporate influence. While the problem of regulatory capture exists in any agency and has transpired with the Fed taking a back seat to the industry, this consumer-focused oversight allows for the CFPB to avoid regulatory capture.

Considering that the CFPB’s core function is to be the watchdog for consumers against the mighty financial services industry and while also putting the two on a level bargaining table, a single director is the most efficient and most protective for consumers. The CFPB’s ability to initially steer clear of regulatory capture should lay the foundation for its ability to avoid being captured by the


211. Id.

212. Wiseman et al., supra note 161 (“Financial industry lobbyists have fought the new agency through every step of the legislative process. And they aren’t likely to give up once it is up and running.”).

213. Robert G. Kaiser, The CFPA: How a Crusade To Protect Consumers Lost Its Steam, WASH. POST, Jan. 31, 2010, at G1 (explaining how the Bureau is seen as intrusive in businesses’ eyes, most likely because the sector has not seen riveted consumer protection movement since the 1970s).

214. Id.
industry. This structure, although not unique, combined with its appropriations autonomy, will prevent capture.

The Bureau’s transparent policy is designed to protect consumers and will prevent capture because any adverse industry interest will be quickly exposed. Even though the opposition argues that the Bureau is too powerful, this structure is not to the Bureau’s detriment and it will certainly benefit every single American consumer.

The “new consumer watchdog [has] just one job: looking out for people,” and its transparency, budget structure, and leadership structure will prevent lobbyists and special interest industry groups from seizing the agency, the market, and lastly the trust of the American people.