



Americans for Financial Reform
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July 23, 2015

The Honorable John Cornyn, Chairman
The Honorable Dick Durbin, Ranking Member
Subcommittee on the Constitution
Senate Judiciary Committee
US Senate
Washington, DC 20515

Re: Hearing on “The Administrative State v. The Constitution: Dodd-Frank at Five Years”

Chairman Cornyn, Senator Durbin and members of the Committee,

On behalf of Americans for Financial Reform, the leading public interest coalition that supported enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) and its members, including the undersigned, we write both to explain the importance of the Act and to point out that, while numerous opponents of financial reform have challenged the act’s constitutionality, none have prevailed, in any court. In fact, several cases have been firmly rejected.

The bottom line is this: Following two years of investigations and hearings in response to the financial collapse, the Dodd-Frank Act was carefully constructed to reduce the risk of another financial crisis through reforms and new regulatory structures that have built in numerous checks and balances and that pass constitutional muster.

Just this week the act turned 5 and the Consumer Financial Protection Bureau turned 4. The CFPB is a singular achievement of the Congress – perhaps the most important consumer financial reform since deposit insurance over 75 years ago, which was enacted into law the last time that Wall Street predatory practices collapsed the economy. The CFPB is aligning interests of financial firms with those of their customers and making markets work for all Americans. The opponents of Dodd-Frank are expected to also challenge the establishment of the Financial Stability Oversight Council and its powers as well as the act’s establishment of Orderly Liquidation Authority to wind down failing banks.

An important element of all claims regarding the constitutionality of Dodd-Frank is that it is somehow illegitimate or unconstitutional for Congress to grant significant discretionary authority

to financial regulators in determining how to address issues of financial risk or consumer exploitation. Yet there is a long tradition of granting such broad discretion to financial regulators. The authority of prudential banking regulators to examine banks for safety and soundness dates back to the 1860s. The ability of Federal regulators to regulate markets for unfair and deceptive practices dates back to the Federal Trade Commission Act of 1914. The Securities and Exchange Commission has issued many hundreds of rules under broad mandates to protect investors and facilitate capital formation. Dodd-Frank lies squarely within this long tradition.

One of the witnesses today is chief counsel to the plaintiffs in the case *State National Bank of Big Spring v. Lew*. The case has already been rejected due to a lack of standing of some of the plaintiffs (including Big Spring, which is a small bank not fully subject to the CFPB) and a lack of ripeness for review. Further, most experts believe that a decision in its appeal is not even expected to reach any of the constitutional questions presented.¹

***Big Spring* asserted a pastiche or mosaic of constitutional claims against the CFPB.**

Primarily, plaintiffs assert that Title X of Dodd-Frank allegedly violates the Constitution's separation of powers by giving effectively unbounded power and discretion to the Consumer Financial Protection Bureau (CFPB) and its Director and by insulating the CFPB against meaningful checks by the other branches of government.

Allegations that its structure is somehow "rogue" are meritless; the CFPB's structure, funding, and authorities are very similar to those of the Office of the Comptroller of Currency, an agency enacted in 1863 which regulates the safety and soundness of national banks. One difference in their authorities is telling: The OCC's powers extend to shutting banks down; the CFPB's do not. A difference in their funding is also telling: CFPB's independent funding is capped, after which it must come to Congress for additional funds; OCC can simply raise the regulatory fees it imposes on banks to increase its budget. The CFPB's structure, funding and authorities are also similar to those of another much more recently created agency, the Federal Housing Finance Agency, established under the Housing and Economic Recovery Act (HERA) in 2008. Like the CFPB, FHFA has a single director and dedicated funding.

Of course, like these and other agencies, the CFPB's rulemaking process must follow APA procedures, including Congressional review, and is subject to judicial review. In addition, in a variety of ways the CFPB is subject to review and oversight that is more stringent than that of the OCC, FHFA, or other financial regulators. First, it must engage in an additional separate small business consultation process, SBREFA, before it can begin the regular APA rulemaking process

¹ See, e.g., an industry-side analysis in the frequently-cited blog *CFPB Monitor*: "I do not believe they have a good chance of prevailing on appeal in the D.C. Circuit, particularly in view of the number of that court's opinions cited by Judge Huvelle's opinion," Keith Fisher, "The District Court's ruling in *State National Bank of Big Spring v. Lew*", 7 August 2013, available at <http://www.cfpbmonitor.com/2013/08/07/the-district-courts-ruling-in-state-national-bank-of-big-spring-v-lew/>

for most rules. Its rules are also subject to veto by the Financial Stability Oversight Committee.(FSOC) No other financial regulators have these checks or requirements.

A number of other plaintiffs have also challenged various aspects of the CFPB's structure and authorities on constitutional grounds. Courts have rejected them all:

CFPB v. Morgan Drexen, Inc.² The court ruled in favor of the CFPB on all statutory and constitutional grounds. Among the court's holdings:

- the Dodd-Frank Act did not impermissibly restrict the President's executive power;
- the delegation of authority to the CFPB did not violate the Constitution's prohibition on the delegation of legislative power outside of Congress;

CFPB v. ITT Educational Servs., Inc.³ Among the court's holdings in favor of the CFPB:

- the CFPB's restriction on the President's ability to remove the CFPB's Director did not violate the President's constitutional removal powers;
- a provision of the CFPB which stated that the CFPB's determinations were subject to *Chevron* deference did not impermissibly limit judicial oversight;

Illinois v. Alta Colleges⁴ In this case, the court rejected a variety of constitutionality claims by a for-profit college challenging the Illinois Attorney General's enforcement of the Consumer Financial Protection Act (Title X of the Dodd-Frank Act, establishing the CFPB).

Illinois v. CMK Investments, Inc.⁵ Similarly, in this case, the court rejected a variety of constitutionality claims by a lender challenging the Illinois Attorney General's enforcement of the Consumer Financial Protection Act :

“In affirmative defenses 12-14, defendant alleges that Dodd-Frank is unconstitutional because it is vague, violates separation-of-powers principles, and vests excessive power in a single official. These allegations have been thoroughly analyzed and rejected by two other district courts. The Court agrees with the reasoning of these decisions, and thus strikes defenses 12-14 as insufficient as a matter of law. (citations omitted).”

Several other claims against the Dodd-Frank Act's constitutionality are made in *Big Spring* and a case brought by the insurance company Met Life:

The first argument, as made in *Big Spring*, is generally that Title I of Dodd-Frank allegedly violates the Constitution's separation of powers by establishing the Financial Stability Oversight

² 60 F. Supp. 3d 1082 (C.D. Cal. 2014)

³ 2015 WL 1013508 (S.D. Ind., 2015)

⁴ 2014 U.S. Dist. LEXIS 123053 (N.D. Ill. 2014)

⁵ 2015 U.S. Dist. LEXIS 84277 (N.D. Ill. 2015)

Council (FSOC), which, in particular, has the power to designate which nonbank financial companies are “systemically important financial institutions,” and not limiting these powers with any meaningful statutory directives or judicial review. *Big Spring* argues that its lack of designation (it is very small) is a constitutional infirmity; conversely, in *MetLife v. Financial Stability Oversight Council*, MetLife argues it is harmed by its SIFI designation. While witnesses including Professor Levitin and Deepak Gupta will discuss the constitutional implications of the various arguments both plaintiffs make, we would like to point out the importance of the FSOC and the SIFI designation process.

The capacity to designate non-banks critical to the U.S. financial system for appropriate regulatory oversight is a central element of FSOC’s powers. After the Gramm Leach Bliley Act repealed the last vestiges of the Glass-Steagall divisions between banking, insurance, and trading market activities, the financial system became more highly interconnected. This allowed for the rapid transfer of risk between insurance companies, commercial banks, broker-dealers, and large hedge funds. During the 2008 financial crisis the impact of these interrelationships became clear, as the failure of investment banks such as Lehman Brothers and insurance companies such as AIG threatened to bring down the entire financial system. While these non-bank entities were regulated for some specific activities, they faced no effective prudential regulation to ensure their overall solvency at the holding company level.

The question of exactly which non-banks should be designated as systemically significant and how such institutions should be regulated is a complex and institution-specific question. This is precisely why Congress has delegated the designation power to a body made up of experts from the full range of financial regulatory agencies. However, given the central role of non-banks in both the financial crisis and in the modern financial system, the general need for a mechanism to ensure proper oversight of systemically critical institutions is clear.

The other primary constitutional problem alleged by opponents concerns Orderly Liquidation Authority. Title II of Dodd-Frank created an “Orderly Liquidation Authority” (OLA) to enable the Treasury Secretary to unwind failing financial companies by appointing the FDIC as a receiver. Opponents claim this provision allegedly violates the separation of powers and also violates the Due Process Clause and the constitutional requirement that bankruptcy laws must be uniform. *Big Spring* makes these claims but we similarly believe they are doomed to fail. The Dodd-Frank liquidation authority for holding companies and systemically important non-banks is clearly modeled after the FDIC’s receivership authority for banks. Congress has long granted FDIC receivership powers over failed banks. These powers grant the FDIC exclusive executive authority to resolve a failed bank, including through repudiation of contracts. FDIC receivership powers have been well established since the 1930s, and we believe that Dodd-Frank Title II powers will clearly be recognized as a logical extension of these long-standing practices.

The public policy justification for Title II is also clear and pressing. The lack of resolution authority for systemically important non-banks and bank holding companies became a major issue during the financial crisis of 2008, and placed unprecedented strains on our financial regulatory system. Eventually the risk of systemic collapse due to the failure of key non-bank financial entities was addressed through large-scale, ad-hoc taxpayer bailouts. Title II of Dodd-Frank was motivated by the desire of Congress and the public to avoid this outcome in the future.

We also expect opponents to raise the recent mortgage case involving PHH Corporation, a mortgage lender, where CFPB Director Cordray overruled an administrative law judge.⁶ We believe that the Director carefully considered his statutory authorities in making this decision and that there are no extant constitutional issues, although we would not be surprised if they are raised in either the hearing or the PHH appeal.

Thank you for your consideration of our views. We believe that two of the witnesses, Professor Levitin and Deepak Gupta, can answer any questions that the committee may have but we are happy to engage further with you or your staff.

Sincerely,

Alabama Appleseed
Alliance for a Just Society
Americans for Financial Reform
Center for Economic Justice
Consumer Action
Consumer Federation of America
Consumers Union
Empire Justice Center
Mainstreet Alliance
Massachusetts Communities Action Network
NAACP
National Association of Consumer Advocates (on behalf of its low-income clients)
National Community Reinvestment Coalition
National Consumer Law Center
National Fair Housing Alliance
Philadelphia Unemployment Project
Public Citizen
U.S. PIRG
Woodstock Institute

⁶ See “CFPB Director Cordray Issues Decision in PHH Administrative Enforcement Action,” 4 June 2015, available at <http://www.consumerfinance.gov/newsroom/cfpb-director-cordray-issues-decision-in-phh-administrative-enforcement-action/>

Following are the partners of Americans for Financial Reform.

All the organizations support the overall principles of AFR and are working for an accountable, fair and secure financial system. Not all of these organizations work on all of the issues covered by the coalition or have signed on to every statement.

- AARP
- A New Way Forward
- AFL-CIO
- AFSCME
- Alliance For Justice
- American Income Life Insurance
- American Sustainable Business Council
- Americans for Democratic Action, Inc
- Americans United for Change
- Campaign for America's Future
- Campaign Money
- Center for Digital Democracy
- Center for Economic and Policy Research
- Center for Economic Progress
- Center for Media and Democracy
- Center for Responsible Lending
- Center for Justice and Democracy
- Center of Concern
- Center for Effective Government
- Change to Win
- Clean Yield Asset Management
- Coastal Enterprises Inc.
- Color of Change
- Common Cause
- Communications Workers of America
- Community Development Transportation Lending Services
- Consumer Action
- Consumer Association Council
- Consumers for Auto Safety and Reliability
- Consumer Federation of America
- Consumer Watchdog
- Consumers Union
- Corporation for Enterprise Development
- CREDO Mobile
- CTW Investment Group
- Demos

- Economic Policy Institute
- Essential Action
- Green America
- Greenlining Institute
- Good Business International
- Government Accountability Project
- HNMA Funding Company
- Home Actions
- Housing Counseling Services
- Home Defenders League
- Information Press
- Institute for Agriculture and Trade Policy
- Institute for Global Communications
- Institute for Policy Studies: Global Economy Project
- International Brotherhood of Teamsters
- Institute of Women's Policy Research
- Krull & Company
- Laborers' International Union of North America
- Lawyers' Committee for Civil Rights Under Law
- Main Street Alliance
- Move On
- NAACP
- NASCAT
- National Association of Consumer Advocates
- National Association of Neighborhoods
- National Community Reinvestment Coalition
- National Consumer Law Center (on behalf of its low-income clients)
- National Consumers League
- National Council of La Raza
- National Council of Women's Organizations
- National Fair Housing Alliance
- National Federation of Community Development Credit Unions
- National Housing Resource Center
- National Housing Trust
- National Housing Trust Community Development Fund
- National NeighborWorks Association
- National Nurses United
- National People's Action
- National Urban League
- Next Step
- OpenTheGovernment.org
- Opportunity Finance Network
- Partners for the Common Good
- PICO National Network
- Progress Now Action
- Progressive States Network
- Poverty and Race Research Action Council
- Public Citizen

- Sargent Shriver Center on Poverty Law
- SEIU
- State Voices
- Taxpayer's for Common Sense
- The Association for Housing and Neighborhood Development
- The Fuel Savers Club
- The Leadership Conference on Civil and Human Rights
- The Seminal
- TICAS
- U.S. Public Interest Research Group
- UNITE HERE
- United Food and Commercial Workers
- United States Student Association
- USAction
- Veris Wealth Partners
- Western States Center
- We the People Now
- Woodstock Institute
- World Privacy Forum
- UNET
- Union Plus
- Unitarian Universalist for a Just Economic Community

List of State and Local Partners

- Alaska PIRG
- Arizona PIRG
- Arizona Advocacy Network
- Arizonans For Responsible Lending
- Association for Neighborhood and Housing Development NY
- Audubon Partnership for Economic Development LDC, New York NY
- BAC Funding Consortium Inc., Miami FL
- Beech Capital Venture Corporation, Philadelphia PA
- California PIRG
- California Reinvestment Coalition
- Century Housing Corporation, Culver City CA
- CHANGER NY
- Chautauqua Home Rehabilitation and Improvement Corporation (NY)
- Chicago Community Loan Fund, Chicago IL
- Chicago Community Ventures, Chicago IL
- Chicago Consumer Coalition
- Citizen Potawatomi CDC, Shawnee OK
- Colorado PIRG
- Coalition on Homeless Housing in Ohio
- Community Capital Fund, Bridgeport CT
- Community Capital of Maryland, Baltimore MD
- Community Development Financial Institution of the Tohono O'odham Nation, Sells AZ
- Community Redevelopment Loan and Investment Fund, Atlanta GA

- Community Reinvestment Association of North Carolina
- Community Resource Group, Fayetteville A
- Connecticut PIRG
- Consumer Assistance Council
- Cooper Square Committee (NYC)
- Cooperative Fund of New England, Wilmington NC
- Corporacion de Desarrollo Economico de Ceiba, Ceiba PR
- Delta Foundation, Inc., Greenville MS
- Economic Opportunity Fund (EOF), Philadelphia PA
- Empire Justice Center NY
- Empowering and Strengthening Ohio's People (ESOP), Cleveland OH
- Enterprises, Inc., Berea KY
- Fair Housing Contact Service OH
- Federation of Appalachian Housing
- Fitness and Praise Youth Development, Inc., Baton Rouge LA
- Florida Consumer Action Network
- Florida PIRG
- Funding Partners for Housing Solutions, Ft. Collins CO
- Georgia PIRG
- Grow Iowa Foundation, Greenfield IA
- Homewise, Inc., Santa Fe NM
- Idaho Nevada CDFI, Pocatello ID
- Idaho Chapter, National Association of Social Workers
- Illinois PIRG
- Impact Capital, Seattle WA
- Indiana PIRG
- Iowa PIRG
- Iowa Citizens for Community Improvement
- JobStart Chautauqua, Inc., Mayville NY
- La Casa Federal Credit Union, Newark NJ
- Low Income Investment Fund, San Francisco CA
- Long Island Housing Services NY
- MaineStream Finance, Bangor ME
- Maryland PIRG
- Massachusetts Consumers' Coalition
- MASSPIRG
- Massachusetts Fair Housing Center
- Michigan PIRG
- Midland Community Development Corporation, Midland TX
- Midwest Minnesota Community Development Corporation, Detroit Lakes MN
- Mile High Community Loan Fund, Denver CO
- Missouri PIRG
- Mortgage Recovery Service Center of L.A.
- Montana Community Development Corporation, Missoula MT
- Montana PIRG
- New Economy Project
- New Hampshire PIRG
- New Jersey Community Capital, Trenton NJ

- New Jersey Citizen Action
- New Jersey PIRG
- New Mexico PIRG
- New York PIRG
- New York City Aids Housing Network
- New Yorkers for Responsible Lending
- NOAH Community Development Fund, Inc., Boston MA
- Nonprofit Finance Fund, New York NY
- Nonprofits Assistance Fund, Minneapolis M
- North Carolina PIRG
- Northside Community Development Fund, Pittsburgh PA
- Ohio Capital Corporation for Housing, Columbus OH
- Ohio PIRG
- OligarchyUSA
- Oregon State PIRG
- Our Oregon
- PennPIRG
- Piedmont Housing Alliance, Charlottesville VA
- Michigan PIRG
- Rocky Mountain Peace and Justice Center, CO
- Rhode Island PIRG
- Rural Community Assistance Corporation, West Sacramento CA
- Rural Organizing Project OR
- San Francisco Municipal Transportation Authority
- Seattle Economic Development Fund
- Community Capital Development
- TexPIRG
- The Fair Housing Council of Central New York
- The Loan Fund, Albuquerque NM
- Third Reconstruction Institute NC
- Vermont PIRG
- Village Capital Corporation, Cleveland OH
- Virginia Citizens Consumer Council
- Virginia Poverty Law Center
- War on Poverty - Florida
- WashPIRG
- Westchester Residential Opportunities Inc.
- Wigamig Owners Loan Fund, Inc., Lac du Flambeau WI
- WISPIRG

Small Businesses

- Blu
- Bowden-Gill Environmental
- Community MedPAC
- Diversified Environmental Planning
- Hayden & Craig, PLLC
- Mid City Animal Hospital, Pheonix AZ

- UNET

